



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT IN NAIROBI

E.L.C. PETITION NO. 5 OF 2017

**IN THE MATTER OF ARTICLES 2, 10, 42, 70 AND 249 OF THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ENVIRONMENTAL RIGHTS
UNDER ARTICLES 42 AND 69**

AND

**IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION
ACT, 1999**

AND

IN THE MATTER OF NAIROBI CITY COUNTY PLANNING LAWS

BETWEEN

KENNETH KIRIMI.....1ST PETITIONER

KIPTOO JOHN.....2ND PETITIONER

AND

KENAFRIC INDUSTRIES LIMITED.....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY.....3RD RESPONDENT

RULING

The 1st Respondent brought the application dated 7th April 2017 seeking to have its name removed from this petition on the grounds that the description of the property is not given and that it is groping in the dark and is unable to respond to the petition since it does not own L.R. No. 336/356. The 1st Respondent therefore argues that it has been improperly joined in this petition. The 1st Petitioner swore the Replying

Affidavit in opposition to the application in which he reiterates the contents of the petition and supporting affidavit. He contends that from the photographs attached to the supporting affidavit it is clear that the suit property belong to or is occupied by the 1st Respondent and that it is therefore a necessary party to the petition.

The Petitioners claim in the petition that the 1st Respondent, being a private developer, has blocked access to the river bank by building a fence and gate and dumping soil over the sewer line.

The Petitioners contend that Article 22 of the Constitution gives them the mandate to bring the petition in which they allege that the 1st Respondent through its actions is contravening the right to a clean and healthy environment protected in the Constitution.

The Petitioners seek a declaration that the 1st Respondent contravened the rights of residents and violated Articles 42 and 249 of the Constitution; an order restraining the 1st Respondent from continuing any act or omission that is harmful to the environment; an order for the court to visit the site; an order to stop the 1st Respondent from carrying out work in the factory; an order compelling the 1st Respondent to demolish any structures that are on the sewer line and remove the dumped soil on the sewer line; an order to compel the 1st Respondent to remove the illegal gate blocking the public access road to Ruaka River and an order compelling the 1st Respondent to bring down the perimeter wall on the river bank.

The Petitioners attached a letter from the Kenya Environmental Justice Alliance to the 1st Respondent dated 16/2/2017 in which they drew the attention of the 1st Respondent to the fact that they had fenced off the river bank and blocked public access to it and that they had dumped materials on the sewer line. The Petitioners annexed photographs showing the 1st Respondent's gate and a fence near what is stated to be the blocked river bank.

An employee of the 3rd Respondent swore an affidavit in which she states that officers of the 3rd Respondent who went to investigate the allegations herein were denied access and turned away by the 1st Respondent. The 3rd Respondent, which is the principal entity in the implementation of policies relating to the environment, is not in a position to respond to the environmental issues raised in this petition due to the lack of cooperation by the 1st Respondent.

In its Replying Affidavit, the 1st Respondent's director depones that he sought particulars from the Petitioners as to who was complaining about its activities but did not receive a response and therefore believes that no resident of Ruaka has complained against the 1st Respondent. The 1st Respondent avers that it neither constructed on a sewer line nor has it dumped any soil on the sewer line. It also denies conducting any activities that may be harmful to the environment.

The 1st Respondent has not denied being in occupation of the suit premises shown in the photographs produced by the Petitioners. It also avers that the fence has not hampered the community from undertaking conservation and that the community can utilise the wayleave between the fence and the riverbank to undertake conservation activities.

The 1st Respondent's argument seems to be that since no resident from Ruaka has complained against it then the issues raised by the Petitioners against it ought not to be determined by the court. The 1st Respondent argues that the Petitioners must establish a connection between the alleged contravention of the Constitution and the Respondent, and demonstrate how the Respondents are accountable for the alleged violations of the Constitution.

The 1st Respondent relied on the Indian decisions in **Kumar v State of Bihar and Others** 1991 AIR in which the court observed that proceedings should be taken by a person genuinely interested in the protection of society and that public interest litigation cannot be invoked by a person to satisfy a personal grudge. The court stated that such petitions should not be entertained as they would amount to an abuse of

the court process.

The other decision it relied on was **Janata Dal v Chowdhary and Others** made on 28/8/1992 in which the court sounded an alert that a court should not allow its process to be abused by a mere busybody or meddlesome interloper or wayfarer or officious intervener purporting to be pursuing public interest litigation.

Article 32 of the Indian Constitution differs from the Kenyan Constitution which provides at Article 22 that every person has the right to institute proceedings claiming that a right or fundamental freedom in the constitution has been denied, violated, infringed or is threatened. The Constitution protects the right to a clean and healthy environment at Article 42 of the Constitution.

The Petitioner relied on the case of **Kiluwa Limited & Another v Commissioner of Lands & 3 Others** [2015] eKLR in which Anyara Emukule J. discussed at length the fact that Article 22 of the Constitution grants standing to everyone to commence proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated, infringed or is threatened. The Judge observed at paragraph 137 that the right to a clean and healthy environment guaranteed under Article 42 of the Constitution includes the right to have the environment protected for the benefit of future generations through legislative measures contemplated in Article 69 to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources; and also ensure equitable sharing of the accruing benefits.

The Petitioners here allege that the right to clean and healthy environment has been infringed by the activities of the 1st Respondent. This is what they will have to establish and demonstrate how the 1st Respondent is accountable for the court to grant the reliefs they seek in the Petition.

The court finds that the 1st Respondent's application lacks merit. It is dismissed with costs to the Petitioner. Parties are directed to set down the petition for hearing.

Dated and delivered at Nairobi this 29th day of November 2017.

K. BOR

JUDGE

In the absence of the Petitioner and the Respondents

Mr. V. Owuor- Court Assistant