



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT

AT NAKURU

PETITION NO 50 OF 2012

**IN THE MATTER OF ARTICLES 22 (1), (2), (3), (4)); 23 (1), 3(a) and (b), 42,
69 (f) and (g) 70, 258 and 162(2)(b) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTION 19 OF THE SIXTH SCHEDULE (TRANSITIONAL
AND CONSEQUENTIAL PROVISIONS) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLE 42 OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT 2011

AND

**IN THE MATTER OF SECTIONS 3 & 111 OF THE ENVIRONMENTAL MANAGEMENT AND
CO-ORDINATION ACT 1999**

BETWEEN

AFRICAN CENTRE FOR RIGHTS AND GOVERNANCE (ACRAG).....1ST PETITIONER

JOHN MUCHINA.....2ND PETITIONER

JOHN MUCHIRI.....3RD PETITIONER

ELIZABETH WANJIKU.....4TH PETITIONER

VERSUS

NAIVASHA MUNICIPAL COUNCIL..... RESPONDENT

RULING

1. By a Petition dated **31st October, 2012** the Petitioners moved the court seeking;

(i) A declaration that the respondent has violated their rights under Article 42 of the Constitution to a clean and healthy environment;

(ii) A mandatory injunction to compel the respondents to relocate the dumpsite on **Naivasha/Maraigushu Block 11/4 (KARAI)** to another place and to restore the dumpsite;

(iii) A prohibitory injunction to restrain the Respondents or their agents and/or servants from dumping on the suit property;

{iv) An environmental restoration order

(v) Any other relief that the court may grant

(vi) Costs of the petition.

2. This petition being a matter of public interest and wishing to bring on board as many people as possible who felt aggrieved by the dumping of refuse at **Naivasha/ Maraigushu Block 11/4 (Karai)** (hereinafter referred to as the suit property) the Petitioners filed this application, on **23rd July, 2013** seeking that notice of institution of this Petition be published in a daily newspaper of wide national circulation so that any interested party could apply to be enjoined in the Petition.

3. The application was opposed vide a replying affidavit dated **2nd October, 2013** sworn by Isaac **Felix Olwero**, the Naivasha Sub-County Administrator. He deponed that the application was incompetent in law and only sought the sympathy of the court and the public, that the Petitioners had already filed their Petition and could not seek the help of other members of the public to punish the Respondents; that it would be a grave miscarriage of justice if the application was allowed.

4. The application was argued before me on **16th July, 2014**. Counsel for the applicant chose to fully rely on his application and supporting affidavit and counsel for the respondent did not attend court on the hearing date.

5. Before the promulgation of the new constitution 2010, Public interest litigation had been a sticky affair in this country. This is evidenced by the rulings in the two infamous cases, **Maathai v Kenya Times Media Trust Ltd** and **Maathai & 2 others v City Council of Nairobi & 2 others** (collectively referred to as the Wangari Maathai cases) where the High Court stated that it was only the Attorney General that could institute cases on behalf of the public.

6. The drafters of the new constitution appear to have contemplated such scenarios when they included **Article 22(1)** in the Constitution of Kenya 2010 by addressing the thorny issue of capacity.

Article 22 (1) provides;

"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

This was further expanded in **Article 22 (2) (c)** which states that anyone may bring a constitutional petition in which allows public interest. It provides;

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

a).....

b).....

(c) a person acting in the public interest; or....."

Statute supports the position stated in the constitution.

7. Statutes for instance the **Environmental Management and Co-ordination Act, 1999** equally addresses who can bring a suit in public interest. **Section III (2)** provides;

"For the avoidance of doubt, it shall not be necessary for a plaintiff under this section to show that he has a right or interest in the property, environment or land alleged to have been or likely to be harmed"

8. **Rule 3 (4)** and **5 (d)** of the Constitution of Kenya (protection of rights and fundamental freedom) practise and procedure Rules 2013 popularly referred as the Mutunga rules grants courts power to make orders so as to achieve the ends of justice.

Rule 3 (4) provides:

"The Court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases."

Rule 5 (d) provides:

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just..."

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added."

9. Although the rules remain silent on the position of notice by public advertising seeking to enjoin intended parties to the Petition, there is ample precedent from civil cases decided by our courts to support such an application, made pursuant to **Order 1 Rule 8 (1) and (3) of the Civil Procedure Rules 2010.**

10. In exercise of its jurisdiction, the courts in considering whether or not to allow an application like when the one before me, should be guided by the following principles stated in the case of **Rose Florence Wanjiru v Standard Chartered Bank of Kenya Limited & 2 others** [2014] eKLR, where **Gikonyo J** held that the advertisement should not be allowed if;

"1) it will afford the Plaintiff unfair advantage;

2) it will become a source of prejudice to the Defendants; and

3) a smack on the administration of justice which may in a way border the wider concept of *subjudice*."

11. Applying the above Principles to the instant case, I do not see what prejudice the respondent will suffer if the instant application is allowed. Further their replying affidavit has not demonstrated any loss that will be occasioned to the defendant.

12. For the above reason, I allow the Petitioners' Notice of Motion dated on **23rd July, 2013**. Costs shall be in the cause.

Dated, signed and delivered in open court at Nakuru this 14th day of November 2014.

L N WAITHAKA

JUDGE

PRESENT

N/A for the petitioners

N/A for the respondents

Emmanuel Maelo: Court Assistant

L NWAITHAKA

JUDGE