



REPUBLIC OF KENYA



**Olang & 18 others v Lake Victoria South Water Works Development Agency Limited & 7 others
(Constitutional Petition E022 of 2021) [2024] KEELC 1320 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1320 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
CONSTITUTIONAL PETITION E022 OF 2021
SO OKONG'O, J
MARCH 11, 2024

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA
AND
IN THE MATTER OF ARTICLES 3, 10, 20, 21, 22, 23, 70 AND 258
OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF ALLEGED CONTRAVENTION AND VIOLATION
OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF
INDIVIDUALS AS ENSHRINED UNDER ARTICLES 47 AND 50 OF
THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND
COORDINATION ACT, 1999 AND THE ENVIRONMENTAL (IMPACT
ASSESSMENT AND AUDIT) REGULATIONS, 2003
AND
IN THE MATTER OF KORANDO WASTEWATER
FACILITY/SEWERAGE TREATMENT PLANT PROJECT AND THE
RIGHTS OF RESIDENTS AND AFFECTED PERSONS WITHIN AND
ELC CONSTITUTIONAL PETITION E022 OF 2021- RULING PAGE 1
ADJACENT TO KORANDO WASTEWATER FACILITY AT CENTRAL
WARD, KISUMU WEST CONSTITUENCY
BETWEEN



BETWEEN

CALVINS OLUOCH OLANG	1ST PETITIONER
PHILIP OLANG	2ND PETITIONER
JOSHUA OGEMBA MBOOK	3RD PETITIONER
BENARD ASONYA	4TH PETITIONER
EDWARD KOTINGI	5TH PETITIONER
PENINA ONEGE	6TH PETITIONER
VITALIS LEO	7TH PETITIONER
DOREEN AKINYI	8TH PETITIONER
ZEPHANIA OYANGE OGOL	9TH PETITIONER
GEORGE ORINDA	10TH PETITIONER
GEORGE O. OMWA	11TH PETITIONER
KELVIN O. ONOKA	12TH PETITIONER
ALFRED OMULLO	13TH PETITIONER
VICTOR ATHEMBO	14TH PETITIONER
DANIEL OMONDI	15TH PETITIONER
PHILIP OCHIENG	16TH PETITIONER
JOAN OKEYO ABUOM	17TH PETITIONER
JOHN OLANG	18TH PETITIONER
GEORGE ODHIAMBO	19TH PETITIONER

AND

LAKE VICTORIA SOUTH WATER WORKS DEVELOPMENT AGENCY LIMITED	1ST RESPONDENT
COUNTY GOVERNMENT OF KISUMU	2ND RESPONDENT
INTEGRATED SCIENCE AND ENGINEERING PROJECTS LTD	3RD RESPONDENT
NATIONAL LAND COMMISSION	4TH RESPONDENT
NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY	5TH RESPONDENT
MINISTRY OF WATER SANITATION & IRRIGATION	6TH RESPONDENT
WATER RESOURCES AUTHORITY	7TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL	8TH RESPONDENT



RULING

1. The Petitioners brought this petition on 18th October 2021 seeking several reliefs against the Respondents. Together with the petition, the Petitioners brought an application by way of a Notice of Motion dated 4th October 2021 under Articles 22 and 159 (2) of *the Constitution* and Rules 23 and 24 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 seeking the following orders;
 - i. That the application be certified urgent and be heard ex parte in the first instance for the purposes of granting prayer (ii) thereof;
 - ii. That the court be pleased to issue a prohibitory injunction restraining the Respondents, their agents, employees and/or representatives from in any way continuing with the implementation and/or construction and/or operations of the wastewater treatment plant at Korando, Central Ward, Kisumu West Constituency, Kisumu County pending the hearing and determination of this application.
 - iii. That the court be pleased to issue a prohibitory injunction restraining the Respondents, their agents, employees and/or representatives from in any way continuing with the implementation and/or construction and/or operations of the wastewater treatment plant at Korando, Central Ward, Kisumu West Constituency, Kisumu County pending the hearing and determination of this petition.
 - iv. That the Respondents bear the costs of the application.

The Petitioners' case

3. The application was based on the grounds set out on the face thereof and on the affidavit and supplementary affidavit of the 1st Petitioner sworn on 18th October 2021 and 12th May 2023 respectively. The Petitioners averred that despite the *Water Act* 2016 expressly providing for the formulation of a water service strategy following public participation, the Cabinet Secretary had neither invited public participation nor formulated a water service strategy provided for under Section 64 (1) and (2) of the *Water Act*, 2016. The Petitioners averred that the available water service strategy was for 2007 - 2015 which had expired. The Petitioners averred that despite there being no water service strategy in place that would outline the Government's plans and programs as approved by the general public, the Government through the 1st Respondent had sought to construct a wastewater treatment facility at Korando, Kisumu County without public participation to approve the plan.
4. The Petitioners averred that on 5th June 2013 and 26th June 2013, the firm of Otieno Odongo and Partners undertook a public participation exercise on behalf of Lake Victoria South Water Service Board the predecessor of the 1st Respondent and the project proponent, where the Residents of Korando objected to the construction of a wastewater treatment facility/sewage within Korando area and there had been no further engagements between the residents and the project proponents on the subject matter until recently when the project proponent's new consultant, the 3rd Respondent fraudulently and clandestinely tried to implement the project without following the due process in accordance with the World Bank safeguards and the Environmental Management and Coordination Act, 1999. The Petitioners averred that on 21st July 2021, the 1st, 2nd, 3rd, 5th and 6th Respondents and the Deputy County Commissioner, Kisumu West met 4 handpicked residents of Central Ward within Korando at the Deputy Commissioner's office at Ojola where for the first time since the residents of



Korando rejected the construction of a wastewater treatment facility in 2013, the Respondents re-introduced the project to the four residents who were not allowed to respond to any issue or give their opinions on the project. The Petitioners averred that on 27th July 2021, the Respondents through the area Chief called another 25 people alleged to be land owners to the Chief's office where the Respondents' representatives led by the project consultant engineers (the 3rd Respondent), Marvin Agama and Cynthia Shitsukane introduced the project. The Petitioners averred that instead of having an interactive meeting regarding the project and how it would affect the residents and the mitigation factors put in place, the Respondents only addressed the issue of land compensation and threatened those in attendance to either allow the project consultant to work freely on their land or their land would be forcefully acquired because what they were working on was a government project.

5. The Petitioners averred that the residents in attendance were not allowed to ask any question regarding the project but were asked to allow the project proponents on their land on 3rd August 2021 for the purposes of survey and valuation. The Petitioners averred that the residents were shocked at the manner in which such a sensitive meeting was called through phone calls from the area Chief instead of a public notice inviting all the residents to a meeting and giving them sufficient notice. The Petitioners averred that the residents who attended the meeting were neither supplied with the project feasibility study, the project appraisal report nor the Environmental and Social Impact Assessment Study report with particular reference to modern wastewater treatment systems and the effect of the same on the environment and human habitation. The Petitioners averred that the proposed project was likely to trigger environmental and social impacts that would need to be mitigated for the project to be environmentally friendly, socially accepted and economically viable. The Petitioners averred that the manner in which the project proponents were hoarding information from the general public showed that the project was not environmentally friendly neither was it socially acceptable nor economically viable.
6. The Petitioners averred that the residents called for a public meeting on 1st August 2021 to discuss the manner in which the project proponent was forcing the project upon them without availing the scientific analysis on how the flood prone Korando area was selected to be the most viable area to construct the waste water treatment facility. The Petitioners averred that on 2nd August 2021, the Petitioners met the representatives of the 3rd Respondent, Marvin Agama and Cynthia Shitsukane at the Chief's office where they insisted that the project was on course for implementation as the meetings of 21st August 2021 and 27th August 2021(sic) were sufficient public participation meetings and that they were proceeding to the next phase of acquiring the land from the affected land owners. The Petitioners averred that the 3rd Respondent presented a google map of the project area which only covered land where the treatment plant was to be constructed although the project was going to affect over 10,000 homes and/or families to whom the project proponent had not offered a solution for their imminent relocation due to the pollution that will be occasioned to them from the sewage treatment plant. The Petitioners averred that from the said meeting, it was resolved that the project proponent would stop all activities within the project area and avail all the documentation to the residents. The Petitioners averred that they did a follow up on the resolution of the meeting by writing to the Respondents asking them to stop any further implementation of the project until proper public consultation and sensitisation was carried out on the project.
7. The Petitioners averred that despite there being an agreement to stop further activities on the project to allow for proper public consultation as provided for by the law following the meeting held on 2nd August 2021 at the Chief's office and being served with a letter to that effect, the Respondents continued with their activities unabated. The Petitioners averred that as part of the project's activities, the County Executive Member for Environment, Kisumu County had gone on radio to the public to



reinforce the statements made by engineers Marvin Agama and Cynthia Shitsukane by insisting that the project was on course for implementation as the meetings of 21st August 2021 and 27th August 2021 were sufficient public participation meetings and that they were proceeding to the next phase of acquiring the land from the affected land owners. The Petitioners averred that the said County Executive Member for Environment, Kisumu County stated that there would be no more public participation over the project.

8. The Petitioners averred that in 2019, Lake Victoria Environment Management Project Phase 2 carried out an environmental and social impact assessment on the proposed rehabilitation of the Kisumu sewage treatment plant through Aquaclean Services Ltd. which released a report. The Petitioners averred that the report raised pertinent issues and recommended a plan of action which was not being followed by the 3rd Respondent in the implementation of the current project. The Petitioners averred that the sewerage system in Kisumu town serves an extensive network of sewer lines which were laid in 3 phases between 1955-1965, 1965-1975 and 1975-1985 and the current area under the sewerage system was approximately 358 Ha. The Petitioners averred that it was proposed that the sewerage system be increased to cover an area of 5,140Ha. The Petitioners averred that currently, only 26% of the Kisumu town population with 10% of land coverage was connected to the sewerage system although settlement areas including Kibuye, Manyatta and Nyalenda had reached the flow thresholds for connection. The Petitioners averred that the sewerage system had not been expanded for higher reach. The Petitioners averred that Kisumu City was being served with 2 sewage treatment facilities, Nyalenda lagoons and Kisat plant which were operating at 30% capacity due to poor design and lack of proper operation and maintenance.
9. The Petitioners averred that 1st Respondent having failed to optimally operate and maintain the 2 sewage treatment facilities wanted to construct another one within a densely populated and highly agrarian area within Korando on land that was prone to flooding due to rainwater and backflow from Lake Victoria. The Petitioners averred that the proposed site was next to Lake Victoria on the 2nd-row parcel of land and any rise in lake water which causes backflow flooding was a great health threat to the neighbouring community as the raw sewage would mix with the flooded water thereby contaminating the entire village.
10. The Petitioners averred that Korando community largely depended on fishing as their main economic activity and the proximity of the sewage treatment facility to the lake was a great threat to their main economic activity as any overflow of the raw sewage and/or any surface runoff from parts of the sewer line corridors and the sewage treatment plant would contaminate the fish breeding areas, fishing grounds and beaches. The Petitioners averred that the proximity of the lake further raises the risk of contamination of the lake from the disposal of sludge cake and settleable matter from the raw sewage. The Petitioners averred that the residents residing within a radius of 2 Kilometers from the project area will suffer from air pollution due to the strong odour emanating from the clarifiers, digesters, drying beds and ponds. The Petitioners averred that the residents will also suffer from contaminated aerosols emanating from the effluent processing especially those in the windward direction of the sewage. The Petitioners averred that the project site and other points of spillage and/or sewage overflow will potentially encourage vegetation to overgrow including grass and shrubs with the risk of attracting birds, snakes, rodents and other undesirable animals which will put the residents at risk.
11. The Petitioners averred that because of the proximity to the lake, certain animals including crocodiles and hippos may encroach on the sewage treatment plant and the surrounding area as a result of the overgrown vegetation. The Petitioners averred that this would not only be a nuisance to the plant's operations but would also pose a safety threat to the immediate residents and commercial premises. The Petitioners averred that there will be birds' attraction to the sewage treatment plant arising from



the proliferation of insects and aquatic flora suitable for birds' food and certain species and populations of the birds at the treatment plant will become a safety risk to the flight path which is a short distance from the project site. The Petitioners averred that the sewage discharge from the treatment plant was a determinant of the macro and microflora and fauna in the lake and the excessive nutrients would lead to increased eutrophication of the lake water. At the same time, chemical and organic loading would reduce the capacity for the lake water to support life (low oxygen levels and toxicity) with the result that the water around the beaches in Korando would not be able to support fish thereby forcing the Korando fishermen to go deep into the lake to sustain themselves economically. The Petitioners averred that no fishmonger would want to buy fish which had been caught next to a sewage treatment plant and therefore the intended construction would kill the fishing industry around Korando area.

12. The Petitioners averred that the project site which starts from the 2nd -row beach plots was less than 6 meters from the first-row beach plots (as they are separated by a road) where some of the Petitioners and residents of Korando had established multi-million beach homes and marine training schools and who would be forced to relocate to other places because of the atmospheric pollution due to odour nuisance that would travel a distance of over 1 kilometer, especially the odour from the dewatered sludge in the waste storage yard if the wastewater treatment plant was modernised but if the wastewater treatment plant was the same as the current ones in Nyalenda and Kisat which were not modernised then the distance would be more than 5 Kilometers. The Petitioners averred that the commonly used procedure in the planning of the wastewater treatment plant was to avoid odour annoyance by making use of separation distance between emission source and residential areas. In this regard, the Petitioners averred that the 1st Respondent should provide a buffer zone of at least 1kilometers radius between the project site and the residential area. The Petitioners averred that from the website of the 1st Respondent, the project proponent, Lake Victoria South Water Works Development Agency had listed the Korando wastewater treatment plant as an ongoing project which had been financed by French Development Agency, European Investment Bank, European Union and the Government of Kenya at a costs of Kshs. 7.5 billion yet the project had not even been proposed to the residents which could be the reason why the same was being pushed and/or rushed without adhering to the legal frameworks of undertaking such a project.
13. The Petitioners averred that unless conservatory orders sought were granted, the Petition would be rendered otiose and the fundamental rights of the Petitioners/Applicants would further be trampled upon.
14. In their supporting affidavit, the Petitioners averred that the 7th Respondent was a statutory body established under Section 11 of the [Water Act, 2016](#) with the responsibility of formulating and enforcing standards, procedures and regulations for the management and use of water resources and flood mitigations. The Petitioners averred that the 1st Respondent was one of the 9 water works development agencies established under Section 65 of the [Water Act, 2016](#) with the mandatory obligation of providing water and sewerage services within the Western region that covers 8 counties of Kisumu, Kisii, Nyamira, Migori, Homabay, Bomet, Kericho and Siaya. The Petitioners averred that the [Water Act 2016](#) introduced new water management institutions to govern water and sanitation and while water remained vested in the state, the water reforms saw the introduction of the commercialisation of the water services as part of the decentralisation process and the participation of stakeholders in the management of national water resources. The Petitioners averred that the separation of policy and regulatory responsibilities and the devolution of responsibilities for water resources management and water services provision to the local level functions as envisaged by the [Water Act,2016](#) had been the principal mechanism for improving accountability and transparency in the water and sanitation sector.



15. The Petitioners averred that the National Policy on Water Resources Management and Development provided certain main objectives as follows;
- 16.
- a. Preservation, conservation and protection of available water resources and allocation in a sustainable, rational and economical way;
 - b. Supply of good quality water in sufficient quantities to meet various needs and alleviate poverty while ensuring safe disposal of wastewater and environmental protection;
 - c. Establishing an efficient and effective institutional framework to guide development and management of the water sector; and
 - d. Developing a sustainable financing system for effective water resources management, water supply and sanitation development.
17. The Petitioners averred that under Article 42 of *the Constitution*, the Petitioners were entitled to a clean and healthy environment which under Section 3(2) of the Environmental Management and Coordination Act, 1999 (EMCA) includes the right to access the various public elements or segments of the environment for recreational, education, health, spiritual and cultural purposes. The Petitioners averred that the intended sewage treatment plant would violate their rights alongside other residents of Korando as follows;
- a) Dignified life in a clean and healthy environment would cease to be possible upon the conversion of the Petitioners' agrarian habitat into a sewage treatment plant.
 - b) By its very nature, a wastewater treatment plant is an industrial location/site that is a relatively nutrient-rich, heavily contaminated environment that receives waste from a variety of antimicrobial-resistant genes and organisms loaded environments, including hospitals, industrial and agricultural sites and releases both solid and liquid by-products that can disseminate antimicrobial resistant genes and organisms. Influent can also be contaminated with a variety of pollutants, including antimicrobial agents, pharmaceuticals, personal care products, and heavy metals, which can accumulate within a wastewater treatment plant. Many microbial and chemical contaminants in wastewater cannot be degraded by the treatment process or inactivated through disinfection of the effluent. For those contaminants that can be degraded, the resulting metabolites may still have antimicrobial or selective activity. For these reasons, the Petitioners contended that under Article 42 of *the Constitution*, the Respondents were prohibited from compelling them to reside in and eke out their agrarian living in such a contaminated environment and or location.
 - c) At the very minimum, the Government of Kenya, its agencies and its officials are enjoined under Article 42 of *the Constitution* to ensure that no wastewater treatment plant is licensed and permitted to operate within a human habitat under residential or agrarian use. In the premises unless and until the Respondents have acquired by purchase land within a radius of 2 Kilometers as a buffer zone for the sewage treatment plant, the proposed wastewater treatment plant cannot operate in conformity with Article 42 of *the Constitution*.
 - d) Given the size of the wastewater treatment plant and its negative effects on land, lake and the atmosphere, there must be a minimum distance of 2000 meters between the wastewater treatment plant and the residential premises.



18. The Petitioners averred that the Respondents had initiated the project and were seeking to implement it in a manner that grossly violated their human dignity as attested by the following;
- a. In the face of opposition by the affected persons, the Respondents had sought to muzzle their objections by compromising the local political leadership and other purported representatives of the people.
 - b. Where and whenever the local political leadership had failed to muzzle up the cry and agony of "their people", the administrative and security forces had been deployed to intimidate and suppress the objectors.
 - c. Unless and until it had been certified that the people living within Korando area were sub-human species, their right to human dignity would be irreparably violated by turning their homelands into an industrial site for processing waste.
19. The Petitioners averred that the wastewater treatment plant had and would violate their right to protection of property under Article 40 of *the Constitution* in that;
- a. The conversion of land measuring 78 Ha. in Central Ward into a sewage treatment plant site would degrade and devalue the Petitioners' properties and quality of life.
 - b. The implementation and operation of the sewage treatment plant would occasion imminent displacement of the residents within the wastewater treatment plant area and the adjacent areas.
 - c. The implementation and operation of the wastewater treatment plant before the Respondents had acquired the actual area for their industrial needs was a scheme to force the residents to sell their land cheaply.
 - d. Whereas the wastewater treatment plant would affect thousands of land owners, the 1st to 3rd Respondents had not acknowledged the adverse impact on them.
 - e. The 1st to 3rd Respondents were fraudulently forcing and intimidating some land owners to sell them their land within the project area with threats of compulsory acquisition where they will be paid peanuts.
20. The Petitioners averred that they were gravely concerned by the adversarial and pre-judicial role played by the 2nd, 4th, 5th, 6th and 7th Respondents in the administration and enforcement of laws and regulations in the water sector particularly the public support they had accorded to the construction of the wastewater treatment plant at the expense of the Petitioners who only know Korando as their ancestral home. The Petitioners averred that the impugned actions and omissions of the Respondents constituted a serious mockery of the rule of law and scurrilous contempt for the authority and dignity of *the Constitution* and statutory institutions. The Petitioners averred that it was in the best interest of justice and by extension in the public interest that the conservatory orders sought be granted urgently to protect the outcome of the pending Petition.
21. In their supplementary affidavit, the Petitioners averred that it had occurred to them that in disregard of the fact that the dispute over Korando wastewater treatment and sewerage facility project was pending in court, the 1st Respondent was proceeding with the implementation of the project. The Petitioners averred that the said project and its implementation started in 2013. The Petitioners averred that the 1st Respondent in an effort to circumvent the legal and due process had hired mercenaries to pose as land owners in the project area to take part in sham public participation. The Petitioners averred that the 1st Respondent set up a Community Project Committee that included a member of a civil society



- organization approved by the community. The Petitioners averred that the civil society organization whose member was part of the said committee was not approved by the community and did not come from the community.
22. The Petitioners averred that on 9th August 2021, the residents of Korando community held a peaceful demonstration complaining that the sewerage project in their area was being implemented without the community being involved. The Petitioners averred that the 1st Respondent in a subtle scheme and bid to keep the Petitioners and the land owners in the dark about the processes of the implementation of the project, only posted its notices on its website that could not be accessed by the Petitioners, the land owners and the locals and purported that the notices were published. The Petitioners averred that the primary and critical recipients of the 1st Respondent's communication were the people directly affected by the project, these were the Petitioners, the land owners and the local residents of the project site. The Petitioners averred that such communication ought to have been made through a medium that was accessible by all and sundry not a website that was limited in access by the public.
23. The Petitioners averred that the majority of the members of the local community around the project area could not access the internet nor the 1st Respondent's website as some were illiterate, others semi illiterate and some not technology savvy to wade through and scavenge the internet for such critical information possessed by the Respondents only. The Petitioners averred that it was the Respondents' obligation to avail to the Petitioners such information in a simple and understandable way and language that assured communication. The Petitioners averred that a public that is ignorant and uninformed on the issues surrounding the project could not effectively take part in the public participation. The Petitioners averred that the 1st Respondent had sidelined the land owners in the project area and despite the illegality in the implementation of the project, the 1st Respondent was still not willing to disclose to the Petitioners and the land owners the critical information on the project. The Petitioners averred that the 1st Respondent had neither furnished nor disclosed to them and the land owners in the project area the information on the implementation of the project. The Petitioners averred that the 1st Respondent was deceptively presenting the project as a Water Treatment Plant when it was actually a Waste Water Treatment Plant. The Petitioners averred that it was the 1st Respondent which could furnish the Petitioners and the community with the information on what the project entailed and it had not done so.
24. The Petitioners averred that their application and petition were well founded and that they should be granted the interim orders sought.

The 1st Respondent's Case

25. The 1st Respondent opposed the application through a replying affidavit sworn by Eng. Paul Agwanda on 16th November 2021. The 1st Respondent averred that it was one of the nine Water Works Development Agencies established under the [Water Act, 2016](#) by the Ministry of Water, Sanitation and Irrigation charged with responsibility of development and construction of major water infrastructure for supply of clean water and sanitation services across the eight counties namely, Kisumu, Siaya, Homa bay, Kericho, Bomet, Kisii, Nyamira and Migori. The 1st Respondent averred that its mandate was to provide the right to access to water and improved sanitation services to the populace within its area of jurisdiction as provided for under Article 43 of [the Constitution](#) of Kenya 2010 and Section 63 of the [Water Act, 2016](#). The 1st Respondent averred that the petition before court was premature, incompetent, frivolous, vexatious, unknown in law and devoid of merits whilst the affidavit in support thereof was full of falsehoods and misrepresentation of facts that were misleading and were only tailored to win sympathy of this court unfairly and unjustly. The 1st Respondent averred that Lake Victoria Water and Sanitation Program (the LVWATSAN Program) was a national government



project co- financed by the French Development Agency (AFD), European Investment Bank (EIB), European Union (AITF) and the Government of Kenya (GoK) at a cost of Kshs. 7.5billion.

26. The 1st Respondent averred that the Government of Kenya through, the 1st Respondent planned to increase access to water and sanitation services under LVWATSAN Program through provision of infrastructure for increased water supply, a new waste water treatment plant, rehabilitation and upgrade existing sanitation facilities in Kisumu City and expansion of water supply and sanitation facilities to satellite towns of Maseno, Kiboswa and Ahero. The 1st Respondent averred that the LVWATSAN Program was in two components; provision of infrastructure for increased water supply and sanitation services which were both at the inception stage hence the reason for ongoing public awareness and education about the project. The 1st Respondent averred that the ultimate objective of the program was to increase access to clean water and improved sanitation within Kisumu City and its environs. The 1st Respondent averred that the project stood to protect the world's second largest fresh water lake from pollution caused by direct discharge of unconnected sources of raw sewage through open drains or partially treated sewage systems, homes, industries, petroleum stations among other polluters. The 1st Respondent averred that that while it was true that the 1st Respondent was desirous of setting up a wastewater sanitation plant within Otongolo area and rehabilitating the existing sewerage facilities at Kisat and Nyalenda, the would be directly project affected persons had not been identified as this would only be possible once the consultant had been allowed to access the project area and members of the public to educate them about the project and undertake designs and feasibility studies in preparation for the Environmental Social Impact Assessment Study.
27. The 1st Respondent averred that while it was also true that the proposed LVWATSAN program would cost approximately Kshs. 7.5 billion, a bigger percentage of the said project amount, approximately. Kshs 5.8 billion will be spent on the expansion of water infrastructure to increase supply of clean and safe drinking water to the residents of Kisumu County and its environs while Kshs. 1.7 billion will be spent on the construction of the sewerage plant to realise the right to clean water and sanitation services under Article 43 of *the Constitution* of Kenya 2010 and the Sustainable Development Goal (SDG) No. 6. The 1st Respondent averred that, the Respondent (formerly Lake Victoria South Water Services Board) which was alleged in the petition to have engaged the firm of Otieno Odongo & Partners Consulting Engineers in 2013 to undertake Environmental Impact Assessment Study in Kisumu for rehabilitation of Kisat and Nyalenda Sewerage Plants under International Development Association (IDA) was a separate State entity from Lake Victoria Environmental Management Project II (LVEMP II) that engaged Otieno Odongo & Partners Consulting Engineers. The 1st Respondent averred that it was a stranger to the project map, survey report and Environmental Social Impact Assessment (ESIA) Report attached to the Supporting Affidavit of Calvins Oluoch Olang and authored by Otieno Odongo & Partners Consulting Engineers and/or Aquaclean Services Limited on the instructions of Lake Victoria Environmental Management Project II (LVEMP II). The 1st Respondent averred that it was not privy to such instructions or the resultant documents. The 1st Respondent averred that the current LVWATSAN Program was an all-inclusive program intended to integrate and take into account all past environmental concerns, design a modern water supply and sanitation facility that would smoothly co-exists with residents of Kisumu while generating sustainable benefits to the populace within the region, creating employment and income and guaranteeing disease-free environment.
28. The 1st Respondent averred that the petitioners were being economical with the truth about the proposed project. The 1st Respondent averred that it was not correct that the 1st Respondent had commenced the implementation or construction of the proposed project. The 1st Respondent averred that the Petition before the court was premature and unknown in law as the subject wastewater



treatment plant was under proposal and as such no feasibility study and project design had been commissioned to give way for public participation and preparation of Environmental and Social Impact Assessment (ESIA) Study Report. The 1st Respondent averred that the Petitioners had denied the Respondents a chance to reach out to the residents of Korando and its environs to educate them about the proposed project and had as a result, misinterpreted facts about the project to mean that the entire proposed project was a wastewater treatment plant, yet the proposed wastewater treatment plant was just but a component of the entire project that will include supply of clean and safe drinking water. The 1st Respondent averred that the petitioners had also misinterpreted the word "Ongoing wastewater treatment plant" appearing on the 1st Respondent's website to mean that the Respondents had commenced construction or implementation of the project when in essence, it only meant that the 1st Respondent had engaged a consultant (3rd Respondent) to undertake public awareness of the proposed project, feasibility study and design of the project. The 1st Respondent averred that when the right time comes for public participation and collection of comments from the members of the public, the Respondents shall publish notices and media reports inviting members of the public to give their views before obtaining the relevant statutory approval. The 1st Respondent averred that the Respondents were obligated under Section 9 of the Environmental Management and Coordination Act (EMCA) 1999 to cooperate with other lead agencies in initiating environmental programmes intended to enhance environmental education, public awareness and promote the integration of environmental considerations into development policies, plans, programmes and projects to ensure proper management and rational utilisation of environmental resources on a sustainable yield basis and for the improvement of the quality of human life in Kenya.

29. The 1st Respondent averred that it was this very statutory obligation that would lead to the preparation of project design or plan and feasibility study that would if the time comes be shared with all stakeholders in an intensive public participation exercise where members of the public will give their views and comments about the project. The 1st Respondent averred that in any event, the Petitioners could not accept or welcome the supply of water services and reject the other component of the project which was sanitation or treatment of used/wastewater.
30. The 1st Respondent averred that the first meeting regarding the LVWATSAN program was held at the Deputy County Commissioner's Office at Ojola on 21st July 2021 between the Respondents, local administration and opinion leaders to educate and make them aware of the proposed water and sanitation project. The 1st Respondent averred that the said first meeting resolved that a subsequent meeting incorporating other State Agencies, Ministries, County Government, Non-Governmental Organizations be held on 28th July 2021 at the area Chief's Office as per the project road map/work plan to educate and make them aware of the proposed project as stipulated under Section 9 of EMCA and formulate a strategy and/ or plan on how to meet, sensitize and educate other members of the public about the project. The 1st Respondent averred that on 23rd September 2021 when the Respondents convened a follow-up meeting at the Chief's Office with opinion leaders and area administration to identify a specific venue, date and time when members of the public and other stakeholders would be engaged and made aware of the proposed project while observing the Ministry of Health measures on Covid- 19, the Petitioners and their Advocates forced their way into the meeting and attempted to disrupt it. The 1st Respondent averred that the Petitioners declared that they would stop further public awareness initiatives on the project until project design, feasibility study and ESIA reports were supplied to them.
31. The 1st Respondent averred that the Agenda of the meeting held on 23rd September 2021 at the Chief's office was to plan and organise for public awareness and education on the proposed project through the area administration. The 1st Respondent averred that the Petitioners and their advocate disrupted



a meeting to which they had not been invited. The 1st Respondent averred that the Environmental Social Impact Assessment (ESIA) and Resettlement Action Plan (RAP) had not been done hence the acquisition of land was not one of the agenda items. The 1st Respondent averred that the said water supply and sanitation project was at a proposal stage and the respondents had just started reaching out to local opinion leaders, local administration and finally all members of the public to make them aware of the proposed project as per the approved project work plan.

32. The 1st Respondent averred that it was this preliminary public education and awareness exercise that the Petitioners had mistakenly construed to mean intensive Environmental Social Impact Assessment (ESIA) and had desperately put up a fight to choke the proposed project at its inception stage by not allowing the Respondents to meet members of the public and tell them the truth about the project. The 1st Respondent averred that as a result of the Petitioners' threats to disrupt public meetings, the Respondents were unable to discharge their statutory mandate to undertake initial public awareness and/or education of the members about the proposed project to pave the way for preparation of project design and feasibility study which will form the basis for intensive public participation, collection views and application for relevant approvals before commencement of the project.
33. The 1st Respondent averred that the petition was premature as no ESIA had been conducted and submitted to the National Environment Management Authority (NEMA) and other state agencies for consideration, approval and issuance of relevant licenses/permits to commence implementation of the project. The 1st Respondent averred that it was wrong for the Petitioners to mislead members of the public that the proposed project would lead to the eviction of over 10,000 families yet ESIA and RAP had not been done. The 1st Respondent averred that it was not correct that the 1st Respondent had commenced construction of a wastewater treatment facility at Korando, Kisumu County without public participation to approve the plan and feasibility study. The 1st Respondent averred that no evidence of the construction of the wastewater facility had been placed before the court either in the form of photographs or data to support the allegations set out in the petition. The 1st Respondent denied that public participation meetings were held on 21st July 2021 and 28th July 2021 to discuss land acquisition. The 1st Respondent averred that this was not possible since the would be Project Affected Persons (PAPs) were yet to be identified and remained unknown awaiting the commencement of the feasibility study, ESIA Study/Report and Resettlement Action Plan (RAP). The 1st Respondent averred that it was also not correct that the project would automatically trigger the alleged social-economic and environmental impact since no Environmental Social Impact Assessment Study/ Report had been done, public views taken and submitted to NEMA for consideration, approval and issuance of necessary licenses.
34. The 1st Respondent averred that it was not true that the Respondents were hoarding information from the general public about the project. The 1st Respondent averred that the Petitioners' petition was cleverly designed to derail the commencement of the proposed project while at the same time demanding undisclosed individual benefits. The 1st Respondent averred that the fears being nursed by the Petitioners in respect of the proposed project would only be addressed if the Respondents were given ample time to review past ESIA Reports on the project, receive comments from the public, prepare project design and feasibility study. The 1st Respondent averred that the orders sought were premature and would serve no useful purpose as mechanisms for addressing the Petitioners' interest were provided for under the law and in particular EMCA and in any event if the Respondents failed to comply with the law, the petitioners would be at liberty invoke the relevant provisions of the law to challenge the project implementation. The 1st Respondent averred that the Petitioners would suffer no harm by allowing the Respondents to undertake their respective statutory mandates including public awareness/education on the project where as a matter of right, the Petitioners will be at liberty to



- invoke relevant provisions of the law to protect their alleged but undisclosed selfish interests. The 1st Respondent averred that the petitioners had come to the court of equity with soiled hands having admitted that they indeed disrupted a lawful meeting convened at the Chief's Office in Korando Location to prepare for public awareness/education on the project.
35. The 1st Respondent averred that in the absence of relevant data, ESIA Report and expert opinion on the proposed project, it was not possible for the court to issue orders sought against the Respondents as a matter of law. The 1st Respondent reiterated that the petition was premature and urged the court to strike out the same with costs. The 1st Respondent averred that the entire petition was premised on hearsay and inadmissible evidence contrary to express provisions of the *Evidence Act*, Chapter 80 Laws of Kenya. The 1st Respondent averred that Section 57 of the *Water Act*, 2016 did not in any way prohibit a permit holder or the Respondents from accessing the land of another person for purposes of survey at the inception of a project except where the land owner had opposed a proposal to such access or entry to land. The 1st Respondent averred that the Petitioners had not satisfied the principles for the grant of a temporary injunction. The 1st Respondent averred that the Petitioners were on a fishing expedition and could not demonstrate any reason why the intended project should be choked at its inception stage. The 1st Respondent averred that the Petitioners' complaints did not raise any cause of action hence the instant application and petition were without merit.
36. The 1st Respondent filed a further affidavit also sworn by Eng. Paul Agwanda. In the affidavit, the 1st Respondent averred the Petitioners/Applicants filed this petition and attempted to mislead the court that the 1st Respondent had commenced implementation of a wastewater/sewerage plant project within Korando area in Kisumu County without involving, consulting and obtaining views or comments from members of the public. The 1st Respondent averred that the impugned Waste Water Treatment Plant was part of a proposed Western Corridor Water and Sanitation Improvement Project under Lake Victoria Water and Sanitation (LVWATSAN) Program being implemented within the East African Countries of Kenya, Uganda and Tanzania whose main objectives in Kenya included; increasing access to water supply within Kisumu City to at least 90% of the population of about 650,000 people, extension of water supply to the rapidly developing satellite towns of Maseno, Kiboswa and Otonglo areas, extension of water supply pipelines and construction of new wastewater pipeline networks and a wastewater treatment plant for the Western corridor of Kisumu to serve over 120,000 residents, reduction of pollution of the environment and Lake Victoria through rehabilitation of the existing waste water treatment infrastructure at Kisat and Nyalenda stabilisation pond systems, building the capacity of KIWASCO and the County Government of Kisumu on sustainable operation of water and sanitation systems, undertaking of Corporate Social Responsibility among the communities within the settlements along the Western Corridor of the city and establishment of Water Quality and Wastewater pollution monitoring program for rivers, streams and Lake Victoria.
37. The 1st Respondent averred that the LVWATSAN Program was envisaged in the Master Plan for the management of wastewater within Kisumu County. The 1st Respondent averred that the Master plan provided a road map for planning and development of waste water collection, transmission and treatment facilities within the Eastern, Central and Western Corridors of Kisumu City. The 1st Respondent averred that it begun the conceptualisation of this project with development of a masterplan (concepts) in January 2019 and a pre-feasibility study in June 2021 respectively. The 1st Respondent averred that the pre-feasibility study was a mere desktop review of the project that was to inform the development of project methodology, project objectives, scope and budget of the overall project, detailed stakeholders' engagement plan (ESP), project development plan, choice of technology, proposed community project committee, leadership forum, grievance redress mechanism, estimated size of land for wastewater treatment plant, land compensation and corporate social responsibility.



38. The 1st Respondent averred that the pre-feasibility study would be followed by the feasibility study and design. The 1st Respondent averred that the preparation of the feasibility study would require continuous engagement with the stakeholders within the Western Corridor and the surrounding areas. The 1st Respondent averred that the study would establish the suitability of a particular location and influence the designs of the proposed wastewater treatment plant. The 1st Respondent averred that following the conceptualisation of the project and pre-feasibility study, the Respondents organised and held several meetings. The 1st Respondent averred that the objective of the meetings was to sensitise members of the public on the proposed LVWATSAN Program, and in particular, the Master plan. The 1st Respondent averred that the following meetings were held; (a) National Government Administration Officials (NGAO) held on 21st July 2021; (b) 1st Leadership Sensitisation for Kisumu West Corridor held on 28th July 2021; (c) 1st Sensitization of community members held on 01st August 2021; (d) Local Political Leaders held on 23rd September 2021; (e) 1st Leadership Forum held on 13th January 2023; (f) 2nd Leadership Forum for Korando Community held on 29th March 2023; (g) Community Mobilisation Meeting with area Chiefs, Ass. Chief and Village Elders held on 14th April 2023; (h) Current MP Hon. Rosa Buyu meeting on 17th April 2023 and (i) 1st Korando Community Public Meeting on 19 April 2023.
39. The 1st Respondent averred that the 1st and 3rd Respondents thought that it would be prudent and as a matter of protocol to first meet the area leaders and make them understand the proposed project. The 1st Respondent averred that the area leadership would as a point of entry to the community assist in the mobilisation of members of the public for ease of access and dissemination of information about the proposed project by the Respondents. The 1st Respondent averred that the public awareness and sensitisation meetings as opposed to public participation forums were meant to prepare and equip the community and other stakeholders in Kisumu with relevant knowledge and information about the proposed project before undertaking public participation as envisaged under the law and regulation. The 1st Respondent averred that it was these initial or preliminary public awareness meetings on the proposed project that the Petitioners wanted to stop. The 1st Respondent averred that these preliminary engagements with the stakeholders were informed by the extensive nature of the project. The 1st Respondent averred that due to the nature and sensitivity of the proposed project, the 1st Respondent saw it prudent to first sensitise the members of the public and equip them with the relevant background information for meaningful engagements in future public participation forums.
40. The 1st Respondent reiterated that it was a stranger to the project map, survey report and ESIA Report referred to in the Petition. The 1st Respondent averred that the said documents related to a different project initiated in 1993 by an entity called Lake Victoria Environment Project 2 (LVEMP II). The 1st Respondent averred that this was way back before the establishment of the 1 Respondent. The 1st Respondent urged the court to expunge the documents from the record. The 1st Respondent averred that during the first stakeholders' engagement forum held on the 19th April 2023, the 1st and 3rd Respondents demonstrated that they had not undertaken a feasibility study. The 1st Respondent reiterated that the Environmental Social Impact Assessment (ESIA) Study for the project and the said feasibility studies could only be conducted and reports thereof availed after preliminary engagement with all stakeholders. The 1st Respondent averred that the Petitioners had been informed that the reports that they were demanding from the 1st Respondent could only be prepared and shared after the completion of public engagement on and awareness of the proposed project.
41. The 1st Respondent averred that the stakeholders' engagement held on the 19th April 2023 was widely publicised on various Radio Stations and notices of the meeting were also circulated and posted in Korando area, Chief's Office at Rainbow and Kisumu County Government offices. The 1st



Respondent averred that the 1st Korando Community Public meeting held on 19th April 2023 was attended by several people including the petitioners and their advocate as a result of advertisement and wide circulation of notices in the area. The 1st Respondent averred that it was therefore not true that the public awareness meetings organised by the Respondents were a sham and that the 1st Respondent only published the notices on its website. The 1st Respondent averred that the truth of the matter was that the Petitioners had deliberately refused to attend and participate in the public engagement forums organised by the 1st Respondent as acknowledged in their supplementary affidavit. The 1st Respondent reiterated that the impugned project was planned to be implemented in two components namely; to increase access to water supply, and provision a wastewater treatment plant. The 1st Respondent averred that the Petitioners had no issue with an increase in access to water supply in their area but had opposed the wastewater treatment plant meant to treat wastewater and ensure the same was safe before discharge into the environment. The 1st Respondent averred that Article 43 of *the Constitution* not only obligates the 1st Respondent to increase water but also sanitation services. The 1st Respondent averred that the two go hand in hand, and the Petitioners could not therefore elect to have clean water and reject a treatment plant meant to treat used water.

The 3rd Respondent's case

42. The 3rd Respondent filed grounds of opposition and a replying affidavit in response to the application. In its grounds of opposition dated 9th December 2021, the 3rd Respondent averred that the application offended the doctrines of ripeness and exhaustion and was prematurely before the court. The 3rd Respondent averred that the application was incompetent and did not meet the threshold set out in *Anarita Karimi Njeru v. Republic (1976-1980) KLR 1272*. The 3rd Respondent averred that the petition disclosed no cause of action against the 3rd Respondent and that the orders sought would serve no useful purpose if granted. The 3rd Respondent contended that the application was vexatious and a gross abuse of the court process and should therefore be dismissed with costs.
43. In the replying affidavit sworn by its director, Caleb Opati William, the 3rd Respondent averred that it was a limited liability company incorporated under the *Companies Act*, Chapter 486 Laws of Kenya. The 3rd Respondent averred that it was offering consulting services to public and private entities in Water Resources Engineering, Water and Wastewater Engineering, and Infrastructure projects, among others. The 3rd Respondent averred that sometime in 2018, the 3rd Respondent in consortium with 2 other foreign companies entered into agreements to provide consultancy services to the 1st Respondent under a project named "Consultancy Services for Preparation of Water Resources and Wastewater Master Plan and Water Quality Monitoring under the Lake Victoria Water and Sanitation Program (LVWATSAN)". The 3rd Respondent averred that they were also to undertake consultancy Services for Technical Studies, Detailed Designs, Tender Documentation and Supervision of Works for Works Package 1 and 2 in Kisumu County also under Lake Victoria Water and Sanitation Program (LVWATSAN).
44. The 3rd Respondent averred that the said services to the 1st Respondent were to be provided over 3 years and entailed a series of tasks ranging from (i) development of a water resources and wastewater masterplan, (ii) conduct of technical studies and (iii) design and supervision of various works. The 3rd Respondent averred that in practical terms, the project implementation was phased and designed to be delivered in 3 different stages as follows; (1) Strategic Planning of the Water Resources, Wastewater and Water Quality Monitoring, (2) Preparatory Studies and Priority Interventions including conceptualization, feasibility studies, field investigations, Technical Studies, Environmental and Social Impacts Assessments (ESIA), Resettlement Action Plans (RAP) and (3) Design and Procurement. The 3rd Respondent averred that for proper planning and to facilitate monitoring and



evaluation of the 3rd Respondent's work by the 1st Respondent, an implementation roadmap and work plan were prepared for each key task.

45. The 3rd Respondent averred that upon approval of the work plan by the 1st Respondent, the 3rd Respondent commenced project implementation in strict compliance with the work plan and as such, all milestones that had been achieved had been in accordance with a pre-agreed sequence. The 3rd Respondent averred that far from what the Petitioners believe, in July 2021 when the Petitioners' cause of action was alleged to have arisen, the 3rd Respondent was engaged in the implementation of activities under stage 2 of the project and this primarily entailed field investigations and diagnosis of existing water supply and sanitation systems and review of various studies. The 3rd Respondent averred that as part of that task, the 3rd Respondent was required to initiate a public awareness and sensitisation programme targeting community leaders in Korando area. The 3rd Respondent averred that in fulfilment of that obligation, the 3rd Respondent organised various public awareness and sensitization meetings which meetings were duly attended by a section of the Petitioners.
46. The 3rd Respondent averred that as can be gleaned from the reports and minutes arising out of those meetings, consultations on those material days were general and involved giving brief overviews of various components of the project. The 3rd Respondent averred that the mere fact that certain matters such as potential impacts of the project were touched upon did not transform the meetings into ESIA public participation meetings anticipated under Part VI of EMCA. The 3rd Respondent averred that these broad subjects were highlighted with the sole aim of illustrating some of the issues that would be covered within the broader scope of the project. The 3rd Respondent averred that it was not uncommon for project deliberations of this nature to straddle across various topics without losing sight of its key objectives. The 3rd Respondent averred that it was desirable that participants be encouraged to ventilate on peripheral matters as this provides yet another avenue for obtaining information that supports the overall objectives of a project, even if such information is obtained in forums meant for other purposes.
47. The 3rd Respondent averred that the Petitioners' claim that they were not allowed to air their views during these meetings was not true. The 3rd Respondent averred that the organisers of the said meetings offered those in attendance great latitude to deliberate on a wide array of issues in an attempt to cover all key areas in the project as a whole. The 3rd Respondent averred that as its work plan would demonstrate, during the meeting of July 2021, the agenda on the table was community sensitisation among community leaders. The 3rd Respondent averred that activities touching on, or concerning ESIA and land acquisition were scheduled to take place between August and October in the manner anticipated under the EMCA. The 3rd Respondent averred that it was evident from the foregoing that the Petitioners' entire claim was based on a wrongful assumption as the meetings convened in July were not public participation forums for purposes of ESIA; a fact which would have been easily ascertained by the Petitioners, if only they had exercised a little bit of due diligence. The 3rd Respondent averred that if the Petitioners had been keen to approach the 1st Respondent for clarification and additional information on its activities in the area, they would have been informed that the extension of Water Network Services at Otonglo area was being planned under a different contract whose procurement was already at an advanced stage and would be a forerunner to the sanitation component.
48. The 3rd Respondent averred that *the Constitution* offers reliefs only in situations where there is an actual controversy meriting judicial intervention and that by the same token, it bars the court from entangling itself in a hypothetical and abstract claim by adjudicating a dispute that has been brought simply out of apprehension and which offends the doctrine of ripeness. The 3rd Respondent averred that this court lacked jurisdiction to hear the Petitioners' application as it was bad in law, incompetent, unmerited, misadvised, baseless, frivolous, scandalous, vexatious and outright abuse of court process and hence



- defective. The 3rd Respondent averred that the application could not be remedied by Article 159 (2) (d) of *the Constitution*. The 3rd Respondent averred further that the petition and application went against the doctrine of exhaustion which demands that where there is a clear procedure for redress of any particular grievance prescribed by an Act of Parliament, that procedure should be strictly followed before a litigant approaches a court of law. The 3rd Respondent averred that in satisfaction of the doctrine of exhaustion, the Petitioners should have followed the procedure set out under Part VI of the *Water Act* 2016 to address the claims made concerning the absence of a water strategy before approaching this court. The 3rd Respondent averred that in the alternative, the Petitioners ought to have offered the court a satisfactory explanation for their avoidance of that remedy.
49. The 3rd Respondent averred that the mere absence of a water strategy would not have hindered the commencement of the impugned project as government development plans are incorporated across several policy documents and the project at hand was well entrenched in the 1st Respondent's development plans and thus, its implementation was not reliant solely on the water strategy. The 3rd Respondent averred that the Petitioners had not shown with clarity or precision how the actions of the 3rd Respondent had contravened the law or the basis for any apprehension. The 3rd Respondent averred that the issues in dispute were primarily based on ESIA-related processes which were firmly anchored in EMCA. The 3rd Respondent averred that the Petitioners ought to have approached institutions created under that Act, with the requisite capacity to interrogate ESIA Study Reports and inspect the projects for compliance because a court of law has no such tool or capacity and can only supervise the actions of a statutory agency which in the instant case, it could not be called upon to do, as no action requiring the court's supervision had been taken by any agency.
50. The 3rd Respondent averred that Section 31 of EMCA establishes the National Environmental Complaints Committee (NECC) and mandates it under Section 32 thereof to investigate "any allegations or complaints against any person or against the Authority in relation to the condition of the environment in Kenya" and that NECC resolves a wide array of environmental disputes through Alternative Dispute Resolution methods. The 3rd Respondent averred that *the Constitution* requires that appropriate forms of alternative dispute resolution mechanisms be promoted and that usurpation of their jurisdiction by this court would not be promoting but rather undermining a clear constitutional objective. The 3rd Respondent called upon the court to construe its mandate in a way that accommodates alternative dispute resolution mechanisms and to down its tools in favour of the NECC.
51. Regarding allegations of impropriety on the part of the local administration and the 3rd Respondent's employees, the 3rd Respondent averred that the Petitioners had made grave allegations without offering even an iota of supporting evidence. The 3rd Respondent averred that it was not uncommon that consultants such as the 3rd Respondent would work closely with local administrators when implementing projects of this nature. The 3rd Respondent averred that to imply that such working arrangements were improper was a clear demonstration of the Petitioners attitude towards the local leadership which ultimately led to the chaos that disrupted the meeting of 23rd September 2021 without any valid reason. The 3rd Respondent averred that the right to public participation is to be exercised with due consideration for government administrative processes following the holding in the "Mui Coal Case" that "it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities." The 3rd Respondent averred that



the impugned project and its various components were founded upon contractual agreements which were by their very nature time bound and economically taxing. The 3rd Respondent averred that it had demonstrated that it was unduly being harassed by the Petitioners. The 3rd Respondent averred that it would unjustly suffer great harm if the orders sought were granted.

52. The 3rd Respondent averred that the prayers sought by the Petitioners were extremely drastic and if granted, the same would have the effect of halting an extremely urgent and much-needed project and this would gravely prejudice Kisumu County's interests and Kenya's international obligations. The 3rd Respondent averred that it would not be in the public interest nor would it be consistent with constitutional principles to issue conservatory orders that would have the effect of staying the 1st Respondent's core functions which are geared towards serving the larger public whose interests far surpasses the private and sectarian interests of the Petitioners. The 3rd Respondent averred that the petition and application did not merit the grant of conservatory orders based on; the inherent merit of the case, that is, the existence of an arguable case; risk of prejudice to the applicants and whether the petition will be rendered nugatory if conservatory order is declined; as well as the consideration of public interest, or balance of public interest and private party causes. The 3rd Respondent urged the court to find that the entire petition and application had been brought in bad faith for the sole purpose of crippling the operations of the 1st Respondent and scandalising the 3rd Respondent and to dismiss it with costs.

The 5th Respondent's case

53. The 5th Respondent responded to the application through a replying affidavit sworn by Tom Togo on 3rd October 2023. The 5th Respondent averred that it is the principal instrument of government established under Section 7 of the Environmental Management and Coordination Act 1999 (EMCA) to exercise general supervision and coordination over all matters relating to the environment. The 5th Respondent averred that it is tasked with issuing Environmental Impact Assessment Licenses as provided under EMCA. The 5th Respondent averred that no formal complaint had been raised by the Petitioners with the 5th Respondent that any alleged or actual construction was ongoing without an Environment Impact Assessment (hereinafter referred to as "EIA") License. The 5th Respondent averred that any actual or implied allegations by the Petitioners imputing blame on the 5th Respondent for inaction or otherwise were unfounded and were aimed at painting the 5th Respondent in a bad light. The 5th Respondent averred that in response to the allegation that the construction of the intended project was already ongoing, their investigations revealed that there was indeed no ongoing construction work as the 1st Respondent was still at the speculative stage of the project. The 5th Respondent averred that in addition; no specific parcel of land for the project had been identified or land ownership documents provided, and no architectural drawings for the project had been presented all of which were required in the EIA licensing process. The 5th Respondent averred that there was neither a current EIA License application filed with the 5th Respondent nor any existing and/or current license issued in respect of the project. The 5th Respondent averred that in light of this, the 5th Respondent could not have acted on a non-existent project site, especially in the absence of any formal complaint or EIA application by the intended project proponent.
54. The 5th Respondent averred that in response to the allegation that it had already issued an EIA license, the 5th Respondent averred that the alleged Environmental and Social Impact Assessment Project Report (ESIA Report) was not signed and there was no evidence either from the Petitioners or in its records that the same was submitted to the 5th Respondent. The 5th Respondent averred that be as it may, the unsigned copy of the ESIA Report attached to the Petitioners' supporting affidavit indicated that the same was carried out in respect of Lake Victoria Environment Management Project Phase 2



(LVEMP II) and that the assignment was "Carrying out Environmental and Social Impact Assessment on the Proposed Rehabilitation of Kisumu Sewage Treat Plant", a different proponent from the 1st Respondent herein and a different project from the one proposed and contested in this case.

55. The 5th Respondent averred further that Section 65(1) of EMCA provides that an environmental impact assessment licence may be transferred by the holder to another person only in respect of the project in relation to which such licence was issued. The 5th Respondent maintained that no application for a license had ever been received and thus EIA license had never been issued to the 1st Respondent in respect of the proposed project. The 5th Respondent averred that section 65 (1) of EMCA would not apply in the instant case even if the alleged ESIA Report was valid as it related to a different project.
56. The 5th Respondent averred that a license could not be issued in a vacuum as no evidence had been tendered before the court of any ongoing project as alleged by the Petitioners. In response to the alleged lack of public participation, the 5th Respondent averred that it only organises and spearheads formal platforms for public participation in consultation with a project proponent once an application for grant of EIA license has been formally lodged by way of submission of an Environmental Impact Assessment project or study report, both of which were missing from the current proposed project. The 5th Respondent averred that Section 58 of EMCA which spells out the role of the 5th Respondent in respect of projects was yet to kick in as far as the project in dispute was concerned as neither an application for EIA license had been received from the 1st Respondent nor any administrative action undertaken by the 5th Respondent relating to this case. The 5th Respondent averred that the petition was premature and not ripe for determination by the court or the National Environment Tribunal as per Section 129 of EMCA. The 5th Respondent averred that considering that the alleged project was still at speculative stages, the orders sought against the 1st Respondent that were meant to bar it from meaningfully engaging the residents of the area in relation to the proposed project should not be granted as this would not be in the interest of the general public and the principles of sustainable development which require the court and the government to continually seek ways of improving the general welfare of the public, especially in light of socio-economic rights such as water and sanitation. The 5th Respondent averred that the court and the Respondents, particularly the 1st, 2nd, 4th, 5th and 7th have differing but complementary statutory and constitutional roles towards addressing the socio-economic and environmental needs of the public in an effort towards the realisation of Sustainable Development Goals. The 5th Respondent urged the court not to halt the project at the stage where it was by issuing the orders sought. The 5th Respondent averred that it was through the process being undertaken by the 1st Respondent and the one to be spearheaded by the 5th Respondent after the EIA process begins that will help in determining whether the project should be allowed or not. The 5th Respondent prayed that the suit be dismissed with costs on grounds of being premature and frivolous.

The 7th Respondent's case

57. The 7th Respondent opposed the application through grounds of opposition dated 16th November 2021. The 7th Respondent averred that the application made no allegation of any infringement or violation of the Petitioners' rights by the 7th Respondent. The 7th Respondent averred further that the application failed to plead any particulars of any infringement of rights by the 7th Respondent as required for a case to meet the constitutional threshold. The 7th Respondent averred that no reasonable cause of action had been disclosed against the 7th Respondent.
58. The 7th Respondent averred that in any event, the Petitioners had filed the Petition prematurely since the implementation of the impugned project was still at the feasibility study stage. The 7th Respondent averred that it had not taken any part in respect to the project in question and as such it should not have



been made a party to these proceedings. The 7th Respondent averred that the Petitioner's application dated 4th October 2021 was bad in law, an abuse of the court process and ought to be dismissed with costs to the 7th Respondent.

The 6th and 8th Respondents' case

59. The 6th and 8th Respondents opposed the Petitioner's application through grounds of opposition dated 2nd November 2021. The 6th and 8th Respondents averred that the application lacked merit and was an abuse of the court process. The 6th and 8th Respondents averred that there were grave misrepresentations of facts in the petition rendering it scandalous, frivolous and vexatious. The 6th and 8th Respondents averred that the petition could embarrass and delay justice for the 6th and 8th Respondents.

Submissions

The Petitioners' submissions

60. The Petitioners cited the following cases on the principles that guide the courts on applications for conservatory orders or interim protection; *Judicial Service Commission v. Speaker of the National Assembly & another* [2013] eKLR, *Centre for Human Rights and Democracy & Others v. The Judges and Magistrates Vetting Board & Others*, Eldoret High Court Constitutional Petition No. 11 of 2012, *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others* [2014] eKLR, *Centre for Rights Education And Awareness (CREAW) & 7 Others v. Attorney General* [2011], *Augustin Michael Murandi & 2 others v. Nolturesh Loitoktok Water and Sanitation Co. Ltd (Successor in title of National Water Conservation and Pipeline Conservation)* [2017] eKLR, *Wilson Kaberia Nkunja v. Magistrates and Judges Vetting Board & another* [2016] eKLR, *Adrian Kamotho Njenga v. Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission & 2 Others and Independent Electoral and Boundaries Commission* [2021] eKLR and *Invesco Assurance Co v. MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR.
61. The Petitioners submitted that the impugned project had to be halted to ensure that all the constitutional, statutory and policy frameworks were complied with to avoid or minimise adverse impact on the environment. The Petitioners submitted that it was pertinent that the status quo was maintained. The Petitioners submitted that the lesser inconvenience that would ensure proper use of the billions of shillings was to grant the conservatory orders. The Petitioners submitted that in any event, there was no sewage disposal crisis needing the project urgently and immediately. On the issue of whether the Petitioners had established a prima case, the Petitioners cited *Kevin K. Mwiti Others v. Kenya School of Law & Others* [2015] eKLR where the court stated that:
- “...a prima facie case it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous...the Petitioner has to show that he has a case which discloses arguable issues and arguable constitutional issues, in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success.”
62. The Petitioners submitted that the 1st Respondent commenced processes to actualise the impugned project in contravention of Section 58 of EMCA. The Petitioners submitted that the 1st Respondent claimed that it had not started implementing the project and yet it had already sought and obtained



financing for the same and had even undertaken a sham public participation whose basis was not known. The Petitioners submitted that nothing signified the commencement of the implementation of the project more than those two activities. The Petitioners submitted that under the Second Schedule to EMCA, the project in dispute required an Environmental Impact Assessment Study Report (EIA Study Report) to be prepared in accordance with the Environmental (Impact Assessment and Audit) Regulations, 2003 (EIA Regulations). The Petitioners submitted that the 5th Respondent which was charged with the responsibility of receiving the EIA Study Report had not filed any document in court (sic) and as such could not confirm or deny that an EIA Study was conducted on the project before the commencement of its implementation. The Petitioners submitted that the 7th Respondent was charged under Section 2 of the Water Act to regulate the project and yet it was feigning ignorance of the existence of the project although on the other hand, it was claiming that the project was in its feasibility study stage. The Petitioners submitted that the Water Act 2016 provides for the formulation of a water service strategy that outlines the government's plans and programs as approved by the general public. The Petitioners submitted that there was no water service strategy in place since the last one for 2007 to 2015 had expired and yet the government through the 1st Respondent had sought to implement the project in the disputed area. The Petitioners submitted that the Project was being implemented without following the due process provided by the World Bank safeguards and EMCA. The Petitioners submitted that they had raised valid constitutional and statutory questions which amounted to establishing a prima facie case. The Petitioners cited several cases in support of this submission.

63. On the issue of whether the public interest lies in granting the orders sought by the Petitioners, the Petitioners submitted that the project would affect over 10,000 homes occupied by tens of thousands of families. The Petitioner submitted that the project would affect many other people and generations. The Petitioners submitted that it was in the public interest that the orders sought were granted. The Petitioners submitted that application and the petition promoted Articles 3 and 10 of the Constitution of Kenya, 2010 on upholding and defending the Constitution and the national values and principles of governance and specifically Article 10 sub-article (2)(a), (b),(c) and (d) thereof.
64. The Petitioners submitted that the Respondents had not complied with the environmental laws and regulations in the execution of critical steps and that posed a threat to the environment. The Petitioners submitted that the gist of their petition was that there was noncompliance with environmental laws in the execution of the project that the Petitioners sought to be remedied. The Petitioners submitted that if the execution of the project was allowed to proceed what they were seeking in the petition would be defeated thereby rendering the petition nugatory. The Petitioners submitted that if the petition was allowed to die, a noble cause that house the hopes of tens of thousands of people would have been lost at the inception and remain a mere folk tale. The Petitioners submitted that if the petition was rendered nugatory, the Petitioners would be forced to file another petition for remedial, reparation, reversal and fire extinguishing which would be very expensive and a waste of time as some things cannot be undone.
65. The Petitioners submitted that the application presented the court with an opportunity to facilitate ordered functioning in the execution and implementation of the project. The Petitioners submitted that granting the application would ensure compliance with all the constitutional, statutory and regulatory prescriptions on the project. The Petitioners submitted that granting the orders sought would also serve and protect the public interest.

The 1st Respondent's submissions

66. The 1st Respondent submitted on two issues namely; whether the fact that EIA study was not done before the concessioning of the impugned project rendered LVWATSAN Program legally infirm, and



whether it was justifiable to engage and educate members of the public about the proposed project before the actual implementation. The 1st Respondent submitted that the contractual commitments by the Government of Kenya, donor organisations and financial sponsors of the project were made to ensure that the entire project succeeded. The 1st Respondent submitted that the Petitioners' argument that the concessioning of the project before the EIA study was undertaken contravened Section 58 of EMCA was absurd and demonstrated a clear misinterpretation and application of the law. In support of this submission, the 1st Respondent relied on *Mui Coal Basin Local Community & 15 others v. Permanent Secretary Ministry of Energy & 17 others* [2015]eKLR.

67. The 1st Respondent submitted further that the 1st and 3rd Respondents thought that it would be prudent and as a matter of protocol to first meet the area leadership and make them understand the proposed project. The 1st Respondent submitted that this was planned to be done through a Stakeholders' Engagement Plan developed by the 1st Respondent to ensure that all stakeholders were on board before the actual project implementation. The 1st Respondent submitted that as per the plan, engagement meetings were, to begin with area leadership who would act as a point of entry to the community and would assist in the mobilisation of members of the public for ease of access and dissemination of information regarding the proposed project by the Respondents. The 1st Respondent submitted that these as opposed to public participation, were forums meant to prepare and equip the community and other stakeholders with relevant knowledge and information about the proposed project before public participation forums envisaged under the law and regulations.
68. The 1st Respondent submitted that public participation was a continuous process and had to run throughout the project implementation cycle and in any case, public engagement and project awareness that was being undertaken by the 1st Respondent were planned in good faith to aid in the preparation of a feasibility study report, EIA report and project design. The 1st Respondent submitted that these three documents were key in public participation and EIA license application. The 1st Respondent submitted that it was necessary to involve the public during the feasibility study. In support of this submission, the 1st Respondent cited, *Simon Otworu & 7 v. Lake Victoria South Weather Service Board & 6 others* [2018] eKLR.
69. The 1st Respondent submitted that the Petitioners had not satisfied the principles for the grant of the orders sought in their application. The 1st Respondent submitted that the actual implementation of the project had not commenced. The 1st Respondent submitted that the land owners who will be affected by the project were still unknown and the EIA license was yet to be obtained. The 1st Respondent submitted that it was not in the public interest that the public awareness exercise be stopped. The 1st Respondent reiterated that the petition was filed prematurely. The 1st Respondent urged the petitioners to cooperate and participate in the planned public awareness meetings to allow the 1st and 3rd Respondents to conduct a feasibility study, project design and EIA study. The 1st Respondent prayed that the application be disallowed.

The 3rd Respondent's submissions

70. The 3rd Respondent submitted that the Petitioners' case was that the 1st Respondent had initiated the development of a wastewater treatment plant in Korando area, Kisumu County without following due process. The 3rd Respondent submitted that the 3rd Respondent which was the 1st Respondent's project consultant had been accused together with the 1st Respondent for carrying out public participation in the area without involving the Petitioners. The 3rd Respondent submitted that the application did not meet the threshold for granting the orders sought. The 3rd Respondent submitted that the principles for the grant of conservatory orders had been laid down by the courts severally and were now fairly



settled. The 3rd Respondent cited Board of Management of Uhuru Secondary School v. City County Director of Education & 2 others [2015] eKLR.

71. The 3rd Respondent submitted that in determining whether a matter discloses a prima facie case, the court is required to look at the case as a whole. The 3rd Respondent submitted that the Respondents had placed evidence before the court showing that the Petitioners' case was based on misapprehension of facts. The 3rd Respondent submitted that the project work plan showed that at the time the petition was filed, the project proponent was merely undertaking public sensitisation as a pre-requisite to the development of a feasibility study. The 3rd Respondent submitted that the allegation that the 3rd Respondent had; (a) embarked on public participation for purposes of obtaining an EIA licence and (b) denied landowners an opportunity to participate in its meetings were false because at the pre-feasibility study stage, no public participation meetings had been held and no land had been identified as the potential project location. The 3rd Respondent submitted that having rebutted the Petitioners' allegations, their application had to fail as no prima facie case with a high likelihood of success was disclosed. In support of this submission, reliance was placed in Mrao Ltd v. First American Bank of Kenya Ltd & 2 others [2003] eKLR and Stek Cosmetics Limited v. Family Bank Limited & another [2020] eKLR.
72. On the issue of whether the petition or its substratum would be rendered nugatory unless the orders sought were granted, the 3rd Respondent cited Isaiah Luyara Odando & another v. Kenya Revenue Authority & 6 others; Nairobi Branch Law Society of Kenya (Interested party) [2022] eKLR and submitted that the law sets out clear procedures and provides appropriate safeguards for redress. The 3rd Respondent submitted that at the preliminary stage of the project, there was no action or decision that the 1st Respondent could make that was contrary to the public interest which the court could not reverse. In other words, the 3rd Respondent submitted that there was no real danger that the substratum of the petition would be rendered nugatory without the intervention of the court. The 3rd Respondent submitted that while considering whether to grant conservatory orders, the court has to consider the public interest. The 3rd Respondent submitted that in this case, it was not in the public interest that the order be granted. In support of the submission, reliance was placed in Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others [2014]eKLR .
73. On the Petitioners' claim that the project was being implemented in the absence of a Water Resource Strategy prepared by the Cabinet Secretary under Section 10 of the Water Act, the 3rd Respondent submitted that the Water Act provides a remedy for non-compliance with its provisions. The 3rd Respondent submitted that Part VI of the Act establishes the Water Tribunal. The 3rd Respondent submitted that under Section 121(i) of the Act, the jurisdiction of the Tribunal is set out as follows; "The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board." The 3rd Respondent submitted that if the Petitioners were aggrieved by the Cabinet Secretary's failure to prepare a Water Resource Strategy, they should have exhausted the remedies available under the Water Act by appealing to the Water Tribunal before approaching this court. In support of this submission, the 3rd Respondent cited Speaker of the National Assembly v. James Njenga Karume [1992] eKLR and Martin Kabubii Mwangi v. County Government of Laikipia [2019]eKLR.
74. On whether the petition and application offended the doctrine of ripeness, the 3rd Respondent submitted that the doctrine of ripeness focuses on the time when a dispute is presented for adjudication. The 3rd Respondent submitted that the doctrine calls upon courts to desist from deciding



disputes that are hypothetical, premature or academic. That is to say, disputes which have not fully matured into justiciable controversies must be struck out. In support of the submission, the 3rd Respondent cited Black's Law Dictionary 10th Edition, where ripeness is defined as: "The state of a dispute that has reached but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made". In support of this submission on ripeness, the 3rd Respondent also relied on *Wanjiru Gikonyo & 2 others v. National Assembly of Kenya & 4 others Nairobi, Constitutional Petition No. 453 of 2015 [2016] eKLR* and *National Assembly of Kenya & Another v. The Institute for Social Accountability & 6 others* where the Court of Appeal stated that: "Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDEFA."

The 7th Respondent's submissions

75. The 7th Respondent filed its submissions on 26th November 2021. The 7th Respondent submitted that the application did not disclose any reasonable cause of action against it. The 7th Respondent submitted that the project in question was at a feasibility study stage and several stakeholder engagement meetings were already scheduled to take place within which the Petitioners could raise their concerns. The 7th Respondent submitted that it had not yet undertaken any action in respect to the project in question and as such it ought not to have been made a party to the petition.

Analysis and determination

76. I have considered the Notice of Motion Application dated 4th October 2021 together with the affidavits filed in support thereof. I have also considered the replying affidavits and grounds of opposition filed by the 1st, 3rd, 5th, 6th, 7th and 8th in opposition to the application. Finally, I have considered the submissions filed in support of the parties' respective cases and the many authorities cited in support thereof. The Petitioners have sought a conservatory order in the nature of a prohibitory injunction restraining the Respondents from continuing with the implementation and/or construction and/or operations of the wastewater treatment plant at Korando, Central Ward, Kisumu West Constituency, Kisumu County pending the hearing and determination of this Petition. The parties have raised several issues in their lengthy affidavits and submissions. In my view, most of those issues fall for determination at the hearing of the petition. I believe that the parties may not need to file more affidavits and submissions during the hearing of the petition. The material before the court is sufficient to dispose of the petition.
77. The only issue arising for determination at this stage of the proceedings is whether the Petitioners' application has met the threshold for granting a conservatory order. In *Centre for Rights Education and Awareness (CREAW) & another v. Speaker of the National Assembly & 2 others [2017] eKLR* the Court stated that:

"A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition."



78. In *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*, Supreme Court Application NO. 5 of 2014 (2014) eKLR, the Supreme Court stated that:

“(85) These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.” (Emphasis added).

79. In *Nubian Rights Forum & 2 others v. Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae)* Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR, the Court restated the principles regarding the grant of conservatory Orders as follows:

“(91) This Court is granted powers to issue conservatory orders in constitutional petitions under Article 23(3) (c) of *the Constitution* and Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

(92) The applicable principles for the grant of conservatory orders were detailed by Onguto J. in *Board of Management of Uhuru Secondary School v. City County Director of Education & 2 Others* [2015] eKLR. In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.

(93) We are also guided by the principle that in determining whether or not to grant conservatory orders, the Court must bear in mind that it is not required to enter into a detailed analysis of the facts and the law. As Musinga, J (as he then was) observed in High Court Petition No.16 of 2011, Nairobi – Centre for



Rights Education and Awareness (CREAW) & 7 others, “...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory order is only required to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.”

[105] We have already found that the Petitioners have established, and the Respondent have conceded that there is a risk of prejudice being caused to members of the public and their right to privacy by the disclosure of certain types of personal information in the absence of proposals on how that data will be protected. As regards where the public interest falls in light of the respective prejudices that will be caused if the implementation of NIIMS is stayed, we are persuaded by the definition of public interest by the Indian Supreme Court in the case of *Datraj Nathuji Thaware v State of Maharashtra, Indian & Others* [2004] INSC 755 S.C 755 of 2004 which adopted the meaning of public interest as set out in *Stround’s Judicial Dictionary Vol. 4 (v Ed)* as: “A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.”

[106] We take the view that it is in the public interest to have an efficient and organized system of registration of persons, and the responsible use of resources in the process, in light of the socio-economic gains of the system that have been illustrated by the Respondents. There is, however, also a public interest in ensuring that the said system does not infringe on fundamental rights and freedoms. There is thus a need for a balancing of the competing public interest rights while the consolidated Petitions are heard, so as to safeguard rights and resources, and ensure that the Petitions are not rendered nugatory.”

80. The burden was on the Petitioners to establish on a prima facie basis that their constitutional rights were under threat of violation, were being violated or will be violated by the Respondents and that such violation or threatened violation was likely to continue unless a conservatory order was granted. Despite the passionate appeal by the Petitioners for the grant of the orders sought, I am not satisfied that the Petitioners have discharged the burden of establishing a prima facie case against the Respondents. As mentioned earlier, the Petitioners averred that under Article 42 of *the Constitution*, they were entitled to a clean and healthy Environment. The Petitioners averred that under Section 3(2) of the Environmental Management and Coordination Act 1999 (EMCA), a right to a clean and healthy environment included a right to access the various public elements or segments of the environment for recreational, education, health, spiritual and cultural purposes. The Petitioners contended that the 1st Respondent intended to set up a sewage treatment plant at Korando, Kisumu West Constituency which would violate their rights to a clean and healthy environment. The Petitioners averred that; they would be denied dignified life in a clean and healthy environment by conversion of their agrarian habitat into a sewage treatment plant; since by its very nature a wastewater treatment plant is an industrial location/site that is relatively nutrient-rich and heavily contaminated environment that



receive waste from a variety of antimicrobial resistant genes and organisms loaded environments, the wastewater treatment plant was likely to contaminate the environment and/ or location where the Petitioners were living; a wastewater treatment plant is not supposed to be licensed to operate within human habitat under residential or agrarian use, and given the size of the wastewater treatment plant and its negative effects on land, lake and the atmosphere, there must be a minimum distance of 2000 meters between the wastewater treatment plant and the residential premises.

81. The Petitioners averred that the Respondents intended to implement the wastewater treatment project in a manner that deprived them of human dignity in that; in the face of opposition by the affected persons, the Respondents had sought to muzzle their objections by compromising the local political leadership and other purported representatives of the people; whenever the local political leadership had failed to muzzle up the cry and agony of the people, the administrative and security forces had been deployed to intimidate and suppress the objectors; and unless and until it had been certified that the Petitioners were sub-human species, their right to human dignity would be irreparably violated by turning their homelands into an industrial site for processing waste.
82. The Petitioners averred that the wastewater treatment plant had and would violate their right to protection of property under Article 40 of *the Constitution* in that; the conversion of land measuring 78 Ha. in Central Ward into a sewage treatment plant site would degrade and devalue the Petitioners' properties and quality of life, the implementation and operation of the sewage treatment plant would occasion imminent displacement of the residents within the wastewater treatment plant area and the adjacent areas, the implementation and operation of the wastewater treatment plant before the Respondents had acquired the actual area for their industrial needs was a scheme to force the residents to sell to them their land cheaply; whereas the wastewater treatment plant would actually affect thousands of land owners, the 1st to 3rd Respondents had not acknowledged the adverse impact on them; the 1st to 3rd Respondents were fraudulently forcing and intimidating some land owners to sell them their land within the project area with threats of compulsory acquisition where they will be paid peanuts.
83. The Petitioners also averred that the project was being undertaken without the Water Service Strategy formulated by the Cabinet Secretary under Section 64 (1) and (2) of the *Water Act* 2016. The Petitioners averred that the 1st Respondent intended to construct a wastewater treatment plant at Korando without public participation.
84. The 1st and 3rd Respondents on the other hand contended that the 1st Respondent was implementing a project known as Lake Victoria Water and Sanitation (LVWATSAN) Program. They contended that the project was being implemented within the East African Countries and that its objective was to reduce pollution of Lake Victoria through discharges of untreated wastewater and to provide clean potable water to the urban population around the lake. The 1st and 3rd Respondents averred that the implementation of the project in Korando- Kisumu West had not commenced and that the same was under proposal. The 1st and 3rd Respondents contended that no feasibility study and project design had been undertaken and no Environmental Social Impact Assessment(ESIA) had been done. The 1st and 3rd Respondents averred that the project had not reached the public participation stage and that what they were doing was to sensitise the public residing around the project site about the project. The 1st and 3rd Respondents averred that it was the public awareness and sensitisation that they were undertaking at that stage of the project that the Petitioners mistook for public participation. The 1st and 3rd Respondents averred that they had not even identified the land that the 1st Respondent would require for the project. The 1st and 3rd Respondents averred that the issue of discussing land compensation in the public awareness and sensitisation meetings that they were holding could not therefore arise. The 1st and 3rd Respondents averred that at the stage where the project was, there was



no way the Petitioners' rights to a clean and healthy environment and a right to property could be said to have been violated.

85. The 5th Respondent averred that there was no evidence that the 1st Respondent had commenced the construction of the intended wastewater treatment plant. The 5th Respondent averred that; since the 1st Respondent had not started the development of the said wastewater treatment plant, had not applied for an EIA license, and there was no formal complaint lodged with it by the Petitioners, there was no legal basis on which it could get involved in the project. The 1st, 3rd, 5th, 6th, 7th and 8th Respondents contended that the Petitioners' petition was brought prematurely.
86. The Petitioners have not persuaded me at this stage that the Respondents violated or threatened to violate their constitutional rights in the manner they intended to implement the Lake Victoria Water and Sanitation (LVWATSAN) Program which had two main components namely; increasing access to water supply within Kisumu City and its environs, and construction of wastewater treatment plant. There is no evidence placed before the court showing that the 1st Respondent had commenced the construction of a wastewater treatment plant at Korando without following due process. There is no evidence that the 1st Respondent had even acquired land for the project. The Petitioners did not rebut the 1st and 3rd Respondents' contention that they had neither carried out a feasibility study on the project nor prepared a project design. The 1st Respondent admitted that it had not applied to the 5th Respondent for an EIA license. The 1st Respondent averred that it had not reached that stage of the project. The 1st Respondent averred that it would make the EIA license application to the 5th Respondent when it reached that stage of the project implementation and the Petitioners and other residents of Korando would be involved. The Petitioners did not rebut the evidence placed before the court by the 1st and 3rd Respondents which showed that what the 1st and 3rd Respondents were involved in were public awareness and sensitisation meetings. The Petitioners have not persuaded me that their right to a clean and healthy environment and property had been violated or threatened with violation by the Respondents. Without information on the land that would be taken up by the wastewater treatment plant, the type of the wastewater treatment plant the 1st Respondent intends to put up, and an environmental and social impact assessment study report on the project, the social and environmental impacts of the project alluded by the Petitioners are mere speculation. The project had not been approved by the 5th Respondent and the construction of the wastewater treatment plant had not commenced at the time the Petitioners came to court. There are procedures for challenging development approvals if not carried out in accordance with the law. I am not persuaded that the Respondents had breached any constitutional, statutory or regulatory requirements concerning the impugned project at the time the present petition was filed. I am not persuaded that any provisions of *the Constitution*, EMCA or the *Water Act* were breached by the Respondents. On the Petitioners' claim that they were not allowed to attend the public awareness and sensitisation meetings that were being undertaken by the 1st and 3rd Respondents, I am satisfied with the explanation given by the 1st Respondent that they had planned different meetings for different groups as per their project action plan and as such, the Petitioners could not be allowed into meetings that were not meant for them. Since the Petitioners have failed to demonstrate that their constitutional rights were violated or threatened with violation, there is no basis for granting the orders sought.

Conclusion

87. In conclusion, I find no merit in the Notice of Motion application dated 4th October 2021. The application is dismissed with costs to be in the cause.

DELIVERED AND DATED AT KISUMU ON THIS 11TH DAY OF MARCH 2024



S. OKONG'O

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Ms. Ogola h/b for Mr. Olendo for the Petitioners

Mr. Oundo for the 1st Respondent

Ms. Oduk for the 3rd Respondent

Mr. Oundo for Mr. Ngararu for the 5th Respondent

Ms. Makori for the 7th Respondent

Ms. J. Omondi-Court Assistant

