



Mbae v Nairobi City County Government (Environment & Land Petition 4 of 2023) [2024] KEELC 3472 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 4 OF 2023**

AA OMOLLO, J

APRIL 24, 2024

IN THE MATTER OF ARTICLES 1(1), 2(1), 3, 19, 20, 21, 22, 23, 24, 48, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 42, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 4, 5, 6 AND 7 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, 1999 (EMCA)

BETWEEN

ADVIN MUTHONI MBAE PETITIONER

AND

THE NAIROBI CITY COUNTY GOVERNMENT RESPONDENT

JUDGMENT

1. This petition dated the 1st September, 2023 is premised on the various articles of the *constitution inter alia*; article 47 on the right to Fair Administrative Action; article 48 on the right of Access to Justice article 50 on the right to a fair hearing and articles 258 and 259 on the interpretation of the Constitutional Provisions. The petitioner pleads that this court has jurisdiction to determine the dispute by virtue of article 165(3)(b); 22 and 23 of the *constitution*.



2. It is pleaded that the petitioner's right has been affected by the following;
 - i. That on 29th August, 2023 the Petitioner learnt that the 1st Respondent had on 25th July, 2023 awarded a tender No. Ncc/Env/287/A./3882/2022-2023 to Design, Finance, Build, Operate, maintain and Transfer a Waste to Energy Processing Plant at Dandora Dumpsite to M/s China National Electric Engineering Company.
 - ii. That the Petitioner avers that the process of advertising, evaluation and award of the said tender was done in an opaque manner without public participation thus the same contravenes Article 10(2) of the *constitution* of Kenya 2010 on National values and principles of Governance which include public participation. Further to that, the petitioner avers that the general public and the residents of Dandora who will be directly affected by the construction of the said Waste to Energy plant were neither informed nor were they granted an opportunity to air their grievances.
 - iii. That the tender in question is contrary to the mission and the vision of the 1st Respondent to proactively provide efficient and effective water and environmental planning and management services for clean, healthy and safe environment to protect Nairobians from environmental pollution specifically Decommissioning Dandora dumpsite (Respectfully see Nairobi City Integrated Development Plan in Water and Environment Sector).
3. The Petitioner also pleaded that vide a judgment of the Environment and Land Court in Nairobi ELC Constitutional Petition No. 43 of 2019 the Environment and Land Court ordered the Nairobi Metropolitan services, an entity that was perpetually succeeded by the 1st Respondent to take steps to decommission the Dandora dumpsite and relocate it to another site within 6 months from 15th July, 2021. The court further ordered the Nairobi Metropolitan services to shut down the Dandora dumpsite. That the tender in question is contrary to the mission and the vision of the 1st Respondent to proactively provide efficient and effective water and environmental planning and management services for clean, healthy and safe environment to protect Nairobians from environmental pollution specifically Decommissioning Dandora dumpsite (Respectively see Nairobi City Integrated Development Plan in Water and Environment Sector).
4. Consequently, they pray to be granted the following reliefs;
 - a. A declaration be issued that the Respondent has violated the Petitioner's rights under Article 10, 42, 47 and 50 of the *constitution*.
 - b. An order of certiorari to quash and/or nullify the 1st Respondent's decisions dated 25th July, 2023 to award the tender No. Ncc/Env/287/A./3882/2022-2023 To Design, Finance, Build, Operate, Maintain and Transfer a Waste to Energy processing plant at Dandora Dumpsite to M/s China National Electric Engineering Company.
 - c. An order for costs of this Petition.
 - d. Such orders as this Honourable Court may deem fit to grant.
5. The Petition was supported by the affidavit of the Applicant – Advin Muthoni Mbae sworn on 1st September, 2023. Mr. Mbae deposed that the dumpsite is still being operated by the Respondent in clear contravention of the Court Order (In Nbi ELC Constitutional Pet No. 43 of 2019) and without observing the precautionary principle thus posing irreversible health threats. He averred that on 29th August, 2023, he learnt through print media that the Respondent had on 25th July, 2023 awarded a tender No. Ncc/Env/287/A-3882/2022-2023 to the Interested Party.



6. That it was within his knowledge that the Respondent and the Interested party had not conducted any feasibility study/EIA before approving the suitability of the earmarked site. The Petitioner added that the project of this nature is governed by the Public Private Partnership Act which Act provides for public participation before tendering process commences. That through the impugned project, the Respondent and the Interested party have violated his fundamental rights and freedoms under articles 10 (2), 26 (3), 29(f); 42, 43, 47, 69 of the constitution.
7. Both the Respondent and the Interested Party opposed the petition through their respective replying affidavits. Mr. Walter Omwenga deposing on behalf of the Respondent gave a background on the subject tender which is the genesis of this dispute. He narrated that the Respondent advertised the tender on 11th January, 2023, shortlisted 18 firms who were invited to participate in the tender on 15th May, 2023. That only 3 bidders submitted the request for proposal and subsequently the Interested Party was the successful bidder.
8. The Respondent avers that the issues raised in paragraphs 2 & 3 of the Petition were already addressed in ELC Pet No. 43 of 2019. In response to paragraph 4 of the supporting affidavit, the Respondent denied issuing the letter dated 25th July, 2023 ref. Ncc/Rm/Vol.358/Item No. 1/287/A.3882/2022-2023 annexed as Adm2 and stated instead that the tender was awarded vide a letter dated 10th August, 2023.
9. Further the Respondent deposed that the EIA study for the project will be undertaken by the Interested Party after it has signed the contract and in this case, a contract is yet to be signed. They contended that public participation will be conducted during the EIA process hence the allegation of violation of the right to public participation is premature.
10. The Respondent contends that the Petitioner has merely claimed that the said fundamental rights and freedoms have been violated without minding to provide details of how and the manner in which they have been violated. The Petitioner has not demonstrated any sufficient grounds or at all to support his claim that NEMA has abdicated its responsibility under Section 3 of Environment Management and Co-ordination Act (hereinafter “EMCA”) adding that NEMA has not been made a party to this suit.
11. The Respondent asserted that the petition is also premature to the extent that an EIA study is yet to take place and that challenging the Public – Private Partnership should be done before a committee set under Section 75(4) of the PPP Act 2021. They urged that the petition be dismissed.
12. Zhang Shang who described himself as the general manager of the Interested Party deposed that the Petition did not meet the required standard of a pleading. He re-stated the tendering process highlighted by the Respondent and annexed copies of the notification of the award dated 10th August, 2023. He added that the tender award was challenged before the Public Procurement Administrative Review Board vide case No. 56 of 2023. That the PPARB heard the request and made its findings and which findings have not been reviewed/appealed.
13. He averred that the alleged environmental degradation by the project is equally premature and made in haste without any basis. He pointed out that Interested Party has not signed any agreement between itself and the respondent in line with the provisions of the Public Private Partnerships Act, 2021. He also deposed that the Interested Party has not commenced an application for any Environmental Impact Assessment license as it can only do that once the contract is signed. Therefore, the allegation that the project is likely to cause environmental degradation is premature as no Environmental Impact Assessment Report has been prepared for the Authority’s consideration. Further, he averred that the Petitioner will have an opportunity to be heard during the public participation that will precede the



grant of the license. The Interested Party urged the court to find that the petition lacks merit and strike it out.

Submissions;

14. The Petitioner filed submissions dated 5th December, 2023 and raised the following 3 issues for determination.
 - a. Whether the Petitioner’s Constitutional right to a clean and healthy environment has been violated and or threatened.
 - b. Whether the respondent followed the due process of the law in advertising and awarding tender for construction of a waste to energy plant at Dandora Dumpsite.
 - c. Whether the Petitioner is entitled to the reliefs sought?
15. He cited article 42 of the [constitution](#) and Section 3 of [EMCA](#) which bestows the right to a clean and healthy environment. The petitioner submitted that the ELC in Nbi ELC Pet No. 43 of 2019 pronounced itself at paragraph 90 thus;

“The court finds that the Respondents have failed to eliminate the processes and activities that cause air pollution in Korogocho and Mukuru Kwa Reuben slums which are attributed to the Dandora dumpsite. The Respondents have also failed to stop the pollution of Nairobi and Athi River and are responsible for violating the Petitioners’ rights to a clean and healthy environment under Article 42 of the [constitution](#). The Respondents have also violated the Petitioners’ rights to the highest attainable standard of health and to clean and safe water enshrined in Article 43 of the [constitution](#).”
16. It is his contention that the mere existence of Dandora dumpsite amounts to a breach of his right to a clean and healthy environment. That the court in Pet. 43 had directed the Respondent to decommission the dumpsite and relocate it within six months. That the court also directed the Respondents to manage the dumpsite in a manner which protects human health and the environment against adverse effects from waste. The petitioner avers that instead of taking steps to decommission and relocate the dumpsite, the Respondent went ahead to advertise and award the tender to “build, design, operate, maintain and transfer a waste to energy processing plant at Dandora Dumpsite to the Interested Party.
17. The Petitioner went further to submit that the Respondent had not followed the due process in advertising and awarding the tender for construction of the waste to energy plant. He made reference to the provisions of Section 32, 65 and 64 of the [PPPA](#) and Section 58 of [EMCA](#). In concluding, he submitted that he is entitled to the reliefs sought and invoked the provisions of article 42 and 70 of the [constitution](#). He urged the court to allow the petition with costs.
18. The Respondent filed submissions dated 13th February, 2024 which raised the following issues for determination;
 - i. Whether the Petitioner has exhausted the available legal channels before approaching this Honourable Court.
 - ii. Whether the court has jurisdiction to determine the petition
 - iii. Whether the petitioner’s constitutional rights to a clean and healthy environment has been violated.



- iv. Whether the Respondent is in contempt of court orders made in ELC Constitutional Petition No. 43 of 2019.
19. The Respondent cited the provisions of Section 75 of the *PPA Act* thus;
- “it is not dispute that the subject tender is a Public Private Partnership Project governed by the Public Private Partnership Act, 2021 (hereinafter “*PPP Act*”). A person aggrieved by the decision of the Committee may, within seven days of the decision, make an application for review to the Committee in the prescribed form. A person aggrieved by the decision of the Petition Committee may appeal to the High Court within fourteen days from the date of the Committee’s decision.”
20. They submit that the complaint in the tendering process is contained in paragraph 26, 27, 28 and 31 of the petition as well as paragraph 5, 6, 8 and 10 of the supporting affidavit. That these issues should have been raised before the petition’s committee for resolution. The Respondent also cited Section 9(2) of the *Fair Administration Action Act* thus;
- “The High Court or a subordinate Court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”
21. The Respondent went further to cite cases which discussed the import of exhausting available internal mechanisms for dispute resolution before approaching court, inter alia Pet. No. 213 of 2022 as consolidated with Pet No. 218 of 2022, *Consumer Federation of Kenya & Another vs Cabinet Secretary, Ministry of Transport Infrastructure, Housing, Urban Development and Public Works* where the High Court held thus;
- “Given the outlined provisions of the *PPP Act*, the Petition Committee was the first port of call for the Petitioners, and by dint of Section 75 (8) of that *Act*, the Petitioners could only move to this court by way of appeal.”
22. On whether this court has jurisdiction to determine the petition, the Respondent submitted that since available Mechanisms have not been exhausted, this court’s jurisdiction is ousted, it relies on the case of *Okiya Omtata Okoiti & Another vs. Kenya Power & Lighting Company Ltd. & 4 Others* (2023) eKLR where it was held thus;
- “From the above, it turns out that, the Petitioners herein ignored a clear statutory provision, by failing to exhaust procedures and process in existence for resolution of disputes. They filed the present petition prematurely and as such this court lacks jurisdiction to hear and determine this petition at this stage.”
23. The Respondent further submitted that the Petitioner has not demonstrated that his rights to a clean and healthy environment have been violated. On the question of violation of orders made in Petition No. 43 of 2019, the Respondent stated they can only be raised in the said suit and which matter had been dealt with in a ruling dated 9th November, 2023. The Respondent urged the court to dismiss/ strike out the petition for being fatally defective, incompetent and want of jurisdiction.
24. The Interested Party’s submissions were dated 14th February, 2024. They also cited the case of *Consumer Federation of Kenya & Another supra* and raised the following issues;



- a. Does the petition meet the standard of pleading or disclose necessary particulars;
 - b. Does the Court have the jurisdiction to entertain the present petition;
 - c. Are the issues in the present petition *res judicata* Nairobi ELC Petition No. 43 of 2019;
 - d. Is the Petition premature and against the ripeness doctrine;
 - e. Is the petitioner entitled to the reliefs sought;
25. The Interested Party also reproduced the provisions of Section 75 of the [Public Private Partnership Act](#) and urged the court to find the Petition offends the doctrine of exhaustion.
26. The Interested Party further submitted that the Petitioner while invoking the decision in ELC Pet No. 43 of 2019, is attempting to reopen and re-litigate issues regarding the dumpsite hence the issues raised in this Petition are *res judicata*.

Lastly, the Interested Party submitted that the Petition was premature. in support, they cited the case of [Anthony Mumio & others vs. Attorney General and Others](#) (2021) eKLR where the Supreme Court expounded on the ripeness doctrine as follows;

“ 32. While speaking to *Ripeness doctrine* the Learned Judges stated as follows;-

107. The doctrine focus on the time when a dispute is presented for adjudication. The [Black's Law Dictionary](#) 10th Edition, (*supra*) at page 1524 defines ripeness as;

The state of a dispute that the reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.

108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.”

Determination;

27. Having considered the pleadings filed and the submissions rendered, I raised the following questions for determination.
- a. Whether or not this petition is premature.
 - b. Whether or not this court has jurisdiction to determine the petition;
 - c. Whether or not the petitioner's right to clean & healthy environment is threatened?
 - d. What orders ought to be made.
28. The first prayer sought in the petition is for a declaration that the petitioner's right have been violated. From analyzing the pleadings filed by the parties, there is no dispute that no activity has commenced on the Dandora dumpsite save for the awarding of the tender. The respondent pleaded that it is only the tender which was awarded and they were yet to sign a contract. 287/A/3882/2022-2023 and how it was going to affect the environment around the dumpsite.



Secondly, there being no contract signed between the Respondent and the Interested Party, this court cannot infer that the scope of works to be would violate the rights of the petitioner. To this extent, I find that the petition was filed prematurely.

29. Article 70(1) of the constitution provides that any person who alleges that their right under article 42 has been breached, is being or is likely to be denied, violated or infringed or threatened, apply to the court for redress. This petition proceeded by way of affidavit evidence and written submissions. Thus the court did not have the opportunity of interrogating the contents of the tender No. Ncc/Env.
30. The Respondent and the Interested Party submitted that this court lacks jurisdiction under the doctrine of exhaustion. However, this type of objection no longer holds water where a Petition alleges violation of Constitutional rights. This was the holding by the Supreme Court of Kenya in the case of Abidha Nicholas vs Attorney General & 5 Others (2022) eKLR. However, I confirm I will proceed to determine whether I have jurisdiction to quash the award as sought in prayer 2 of the Petition.
31. The Petitioner pleaded thus under paragraph 26 of the petition;

“That the petitioner avers that the process of advertisement, evaluation and award of the said tender was done in an opaque manner without public participation thus the same contravenes Article 10(2) (a) of the constitution of Kenya 2010 on national values and principles of Governance which include public participation. Further to that, the petitioner avers that the general public and the residents of Dandora who will be directly affected by the construction of the said Waste to Energy plant were neither informed nor were they granted an opportunity to air their grievances.”
32. The Public Private Partnership Act provides a channel for anyone not satisfied with the tendering process to lodge an appeal with the Committee. Section 75 (8) provides that anyone aggrieved with the decision of the Petition Committee may appeal to the High Court within fourteen days of such decision. the constitution under article 162(2) (b) gives this court jurisdiction to deal with disputes concerning use and occupation of land. The process of advertising, evaluating and or awarding of tender does not touch on use and occupation of land. Consequently, this court has no power to declare any such award illegal or otherwise.
33. The Petitioner tried to join the awarding of the tender to be in violation of the orders issued in ELC Pet No. 43 of 2019. As rightly pointed out by the Interested Party and the Respondent, that is an issue which can be dealt with in the former suit and cannot form a basis for filing a fresh suit. Indeed, the issues of breach of the said decree was already raised and determined in ELC 43 of 2019 vide a ruling rendered on 9th November, 2023. Raising it again is res judicata.
34. The last issue for consideration is whether the petitioner as proved violation or threatened violations of his rights. As stated by this court in the preceding paragraphs that no activity is ongoing on the site hence is no right that is threatened to be violated. The alleged contravention of Section 58 of EMCA pleaded has been answered by both the Respondent and the Interested Party that once a contract is signed, an Environmental Impact Study (EIA) will be conducted. Therefore, this court finds that there is no proof as of now any violation of the right to clean and healthy environment thus no declaratory orders to that effect can issue. Doing so will be anticipatory.
35. In light of the foregoing analysis, this court concludes that the petition is premature and without merit. It is struck out. however, on an account that it was intended to preserve the environment and the public good, I make an order that each party bears their cost.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL, 2024



A. OMOLLO
JUDGE

