



**Akuku & another v County Government of Siaya & 3 others (Environment & Land
Petition E001 of 2023) [2024] KEELC 3571 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3571 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND PETITION E001 OF 2023**

AY KOROSS, J

APRIL 11, 2024

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 42 AND 165
(3) (D) OF THE CONSTITUTION OF KENYA AND IN THE MATTER
OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF
THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

BETWEEN

MORRIS AJWANG AKUKU 1ST PETITIONER

MOSES AJIER ODIGO 2ND PETITIONER

AND

COUNTY GOVERNMENT OF SIAYA 1ST RESPONDENT

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 2ND
RESPONDENT**

COUNTY COMMISSIONER OF SIAYA 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

Petitioners' case

1. The constitutional petition dated 22/05/2023 that is the subject of this decision is lodged by persons who described themselves as residents of Omnia Mwalo and Omnia Diere sub locations in Rarieda sub county which is within Siaya County.
2. The petitioners assert they also represent the public interest of the community. The respondents are government bodies with the 4th respondent being the government chief legal advisor.



3. In the petition, the petitioners seek the following reliefs from this court:
 - a. An order that within 60 days, the 2nd respondent conducts an Environmental Impact Assessment and Social Audit in Omnia Mwalo and Diere sublocations.
 - b. Conservatory orders be issued restraining the respondents either by themselves or through their agents, servants, employees, proxies or any other person from licensing, permitting, allowing or in any other way dealing with sand harvesting in Omnia Mwalo and Diere sublocations.
 - c. A declaration that the petitioners' right either individually or in association with others to a clean and healthy environment guaranteed by Article 42 of *the Constitution* have been and will be contravened if sand harvesting continues unabated.
 - d. A declaration the 2nd respondent is in breach of the petitioners' fundamental rights and freedoms under Article 42 of *the Constitution* for failing to discharge its statutory obligations and responsibility under the *Environmental Management and Co-ordination Act* by not safeguarding Omnia Mwalo and Diere sublocations.
 - e. An order of compensation to the residents of Omnia Mwalo and Diere sublocations.
 - f. An order that within 60 days, the respondents do fill up gulleys and plant trees within Omnia Mwalo and Diere sublocations.
 - g. An order that through the respondents' intervention, the roads within Omnia Mwalo and Diere sublocations be repaired and or constructed anew.
 - h. Costs be awarded to the petitioners.
4. The petitioners' case is set out in the petition and on the supporting affidavit deposited on 22/05/2023 by the 1st petitioner.
5. The petitioners' case is also contained in annexures attached to the supporting affidavit which are a bundle of photographs, minutes, letters by the 1st petitioner to the 2nd respondent, a report by Stanke Royal Scorpions Group (investigation report) and a bundle of official searches over several parcels of land.
6. It is the 1st petitioner's position that illegal sand harvesting activities takes place in Omnia Mwalo and Omnia Diere sub locations under the watch of the 1st and 2nd respondents who had failed to stop the harvesters.
7. He asserts he sought from the 2nd respondent an environmental impact assessment (EIA) report concerning sand harvesting activities within the locality to no avail and consequently, the community converged to discuss modalities of mitigating sand harvesting activities.
8. The 1st petitioner contends he was forced to seek the services of an investigator who concluded the sand harvesting activities were illegal since they had not been authorised by the 1st and 2nd respondents.
9. The 1st petitioner asserts the investigation report revealed the illegal sand harvesting activities had affected the arability of land, made roads impassable, mutilated burial sites, disinterred remains of deceased persons, created large open gulleys which were filled with rainwater and had a causal link with high malaria incidence, loose soil, famine and loss of property.



Respondents' case

10. Despite service, the 1st respondent did not participate in these proceedings whilst despite filing a notice of appointment through counsel Mr. Ngararu Maina, the 2nd respondent did not file any documents in opposition to the petition.
11. Through counsel Ms. Grace Essendi, the 4th respondent entered appearance for the 3rd and 4th respondents and filed grounds of opposition dated 13/09/2023 which urges this court to dismiss the petition with costs and raises the following grounds: -
 - a. The petition does not disclose any constitutional violation by the 3rd respondent.
 - b. There is no legal provision that imposed any duty on the 3rd respondent as anticipated by the petitioners.
 - c. The petition does not disclose a reasonable cause of action against the 3rd respondent.
 - d. The petition failed to demonstrate the contribution of the 3rd respondent towards the alleged illegal sand harvesting activities in Omnia Mwalo and Omnia Diere sub locations.
 - e. The joinder of the 3rd respondent to these proceedings will not aid fair and efficient administration of justice.

Parties' written submissions

12. Despite directions from the court, none of the respondents filed written submissions. The petitioners' counsel on record Mr. Kipkoech Ngetich was given 7 days from 5/02/2024 to file his submissions which was to fall on 12/02/2024 but instead, he filed them on 11/03/2024 - close to a month later. Having been filed late without leave, this court will not consider them.

Legal basis of the petition

13. The petition is expressed to have been brought under several provisions of law in particular Articles 22, 42, 60 and 70 of *the Constitution* and Sections 3, 9 and 62 of the Environment Management and Co-ordination Act (EMCA).
14. Article 42 provides that everyone has the right to a clean and healthy environment for the benefit of present and future generations.
15. Article 70 provides for the mode of enforcement of Article 42 through the court process which include such orders as preventing, stopping and discontinuing acts that violate the right to a clean and healthy environment. The provisions in Article 70 of *the Constitution* have been replicated in Section 3 of EMCA.
16. Lastly, Section 9 of EMCA generally sets out the functions of the 2nd respondent which include to supervise and co-ordinate environment management in Kenya and be the government's implementator in all policies touching on the environment.

Issues for determination

17. In consideration of the petitioners' case, it is my considered view that the following issues fall for determination: -
 - a. Whether a cause of action is disclosed against the 3rd and 4th respondents.



- b. Whether there was proof of violation of the petitioners' right to clean and healthy environment.
- c. What orders should be made with regard to the petition including an order on costs?

Analysis and Determination

18. The issues that are identified in the preceding paragraph as arising for determination shall be addressed herein in a sequential manner.
- a. Whether a cause of action is disclosed against the 3rd and 4th respondents.
19. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 defines who a respondent in a constitutional petition is in the following terms: -
- “means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom.”
20. This court has carefully scrutinised the entire petition and I agree with the 4th respondent that apart from merely describing the provisions of law establishing the office of the 3rd respondent, no cause of action has been disclosed against this party.
21. The petitioners have not in any way disclosed whether the 3rd respondent denied, violated or infringed on their rights or if it has threatened to do so and, on that basis, I find that there is no reasonable cause of action disclosed against the 3rd respondent. I also find the 3rd and 4th respondents were wrongly joined to these proceedings.
- b. Whether there was proof of violation of the petitioners' right to clean and healthy environment
22. The petitioners' main argument is that wanton and unabated sand harvesting activities had infringed on their constitutional right to clean and healthy environment as envisaged by Article 42 of *the Constitution*.
23. Being aware of the deleterious effect of activities that are carried out on natural resources, Article 69 (1) of *the Constitution* places obligations on state bodies including the 2nd respondent by stating thus:-
- (1) The State shall—
 - (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
 - (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
 - (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
 - (d) encourage public participation in the management, protection and conservation of the environment;
 - (e) protect genetic resources and biological diversity;
 - (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;



- (g) eliminate processes and activities that are likely to endanger the environment; and
- (h) utilise the environment and natural resources for the benefit of the people of Kenya.”

24. Apart from the state, Article 69 (2) of *the Constitution* places an obligation on every person to cooperate with the state and other persons to ensure the environment is conserved and see to it that ecological sustainable development is carried out.

25. By Article 22 and Section 3(3) of EMCA, the petitioners had the locus standi to institute these proceedings. In the case of *Joseph Leboo & 2 Others v Director Kenya Forest Services & Another* (2013) eKLR the court stated: -

“A reading of Articles 42 and 70 of *the Constitution* above, makes it clear, that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.”

26. Section 13 of the *Environment and Land Court Act* donates this court with jurisdiction to hear and determine applications on redress of a denial, violation or infringement of, or threat to, rights or fundamental freedoms relating to the environment and the use and occupation of, and title to, land.

27. Thus, for purposes of ensuring sustainable sand harvesting activities in farms and lakes are carried out properly which is in pursuance of Section 42(4) of EMCA, the 2nd respondent enacted the National Sand Harvesting Guidelines, 2007 (guidelines).

28. Considering these guidelines, the onus is on the petitioners to tender scientific and factual allegations to support their claim. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* stipulates as follows;

- (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

29. In the case of *Leonard Otieno v Airtel Kenya Ltd* (2018) eKLR, Mativo J as he then was expressed himself as follows;

“Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

30. In the Court of Appeal decision of *Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others* [2020] eKLR, the court expressed itself thus on the nature of evidence to be adduced in environmental claims:-

“Pollution is primarily proved by empirical, technical and scientific evidence and not by lay man opinion testimony or depositions.”

31. Now, turning to the petition, the allegations made therein were largely derived from the investigation report. The claims in the petition can adequately be divided into two; firstly, the 1st and 2nd respondents’ breach of statutory provisions and secondly, injuries caused by sand harvesting activities.



32. On the 1st limb of these allegations, the petitioners' contention is that from the investigation report, it emerged that though the 1st respondent never sanctioned the sand harvesters' illegal activities, it still collects cess tax from them.
33. As for the 2nd respondent, the petitioners contend that apart from the investigation report, it arises sand harvesters had never been issued with licenses by the 2nd respondent. According to the petitioners, this illegal sand harvesting activities showed the 1st and 2nd respondents had failed to discharge their legal duty.
34. The petitioners also availed a series of letters from them to the 2nd respondent laying bare concerns from the residents of Omnia Mwalo and Omnia Diere sub locations regarding sand harvesting activities.
35. In addition, these letters also sought to establish if licenses and EIA reports were ever issued to the sand harvesters. According to them, these letters did not elicit any response. Further, the petitioners tendered photographs which showed roads, sand dams and piles.
36. The guidelines provide that the 2nd respondent shall establish a Technical Sand Harvesting Committee (committee) and as many Riparian Resource Management Associations (RRMA) who will ensure sand harvesting is done properly and sustainably.
37. The guidelines hardly impose any legal obligation on the 1st respondent other than requiring it in conjunction with RRMA to rehabilitate sand harvesting sites. It is also allowed to collect cess. See guidelines 4.1 and 12.
38. However, the petitioners did not prove breach of these guidelines by the 1st respondent. This so because in cases concerning the environment, a petitioner is required to avail a credible expert report from a lead agency or a person duly authorized by the 2nd respondent.
39. Based on the provisions of EMCA and the guidelines, it is expected such an expert report would have shown the depth of the sand dams, their distance from each other and whether a separate road had been designated for lorries amongst others.
40. Thus, unquestionably, the photographs and investigator's report from a non-expert did not meet the threshold. This investigation report is bereft of cogent scientific information to substantiate the petitioners' allegations and further, it does not substantiate that cess tax is collected by the 1st respondent from sand harvesters. Consequently, I must conclude and find the claim against the 1st respondent fails.
41. As for the claim against the 2nd respondent, guidelines 4.1 and 5 V (a) and (b) require the committee and RRMA to ensure EIAs and audits are obtained pursuant to Section 58 of EMCA. The petitioners did not lead evidence if these committees and RRMA are in existence within their locality. This Section 58 (1) and (2) places a statutory obligation on a project proponent to secure an EIA license by stating: -
 - (1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.



- (2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:

Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.”

42. The legal obligation of a project proponent vis a vis the 2nd respondent is explicated in the case of Venerable Professor Ndungu Ikenye (Suing for and on behalf of aggrieved residents of Maki and Jogoo Estates within Thika) v Kenya Towers Limited & another [2020] eKLR as follows: -

“It is clear that a proponent will first prepare a project report as envisaged under section 58(1) of EMCA that the report would then go through the Authority and if the Authority is satisfied that the project report discloses sufficient mitigation measures, then the Authority will issue a license. Under Regulation 10(3), it is further required that if the Authority finds that the project will have a significant impact on the environment, it is then that that the Authority will require the proponent to undertake an Environment Impact Assessment Study as envisaged in Section 58(2) of Environment Management & Coordination Act.”

43. Unfortunately, the petitioners in their own wisdom did not deem it fit to join the sand harvesters to these proceedings yet it is they who had allegedly flouted the constitutional and statutory provisions.

44. On the 2nd limb of their allegations which is on injuries that they had ostensibly suffered as a result of sand harvesting activities, I must mention, these assertions were anchored on an unreliable investigation report. Therefore, I must find and hold that the claim against the 2nd respondent fails.

c. What orders should be made with regard to the Petition?

45. By the provisions of Articles 22 and 258 of *the Constitution*, this court has the inherent power to make any orders which will serve the wider interests of justice. This residual power has been the subject of court decisions including the Court of Appeal decision of Nguruman Limited v Shompole Group Ranch & Another [2014] eKLR where the court stated:-

“It is now trite that the inherent power of the Court exists in the Court’s Jurisdiction as a safety valve to enable the Court to make such orders as may be necessary for the ends of Justice or to prevent the abuse of the power of the Court.”

45. In a most recent Court of Appeal decision of Migori County Government & another v Migori County Transport Sacco (Civil Appeal 110 of 2017) [2021] KECA 7 (KLR) (23 September 2021) (Judgment) the court was of a similar position as the decision of Nguruman Limited v Shompole Group Ranch (Ibid) when it stated as follows: -

“The court was always possessed of residual inherent powers which allowed it to make any orders in the wider interest of justice. It was for the court to fashion out an appropriate remedy even in instances where *the Constitution* and the law were silent.”

45. The petitioners’ allegation that sand harvesters carried out activities without adhering to applicable laws and regulations is uncontroverted. Further, minutes of a public meeting that took place on 6/12/2023 illustrate the community of Omnia Mwalo and Omnia Diere sub locations are frustrated by the activities of sand harvesters.



45. This court is called upon to issue appropriate reliefs to ensure the ends of justice are achieved. It is trite law costs follow the event and each party shall bear their respective costs. Ultimately for the reasons and findings herein earlier stated, I hereby issue the following final disposal orders;
- a. That it is hereby declared that the carrying out of sand harvesting activities within Omnia Mwalo and Omnia Diere sub locations in Rarieda sub county without complying with provisions of the Environmental Management and Coordination Act and National Sand Harvesting Guidelines is unconstitutional and contrary to provisions of the applicable laws, regulations and guidelines.
 - b. That sand harvesting activities within Omnia Mwalo and Omnia Diere sub locations in Rarieda sub county shall be closed within 15 days from the date of service of the orders of this court to all parties.
 - c. The sand harvesters within Omnia Mwalo and Omnia Diere sub locations in Rarieda sub county shall thereafter apply for approvals and certification of the sand harvesting projects from all the relevant regulatory authorities within the applicable laws and regulations.
 - d. That the 2nd respondent is hereby directed to monitor and ensure sand harvesting activities within Omnia Mwalo and Omnia Diere sub locations in Rarieda sub county is undertaken in compliance with all the applicable laws, regulations and guidelines.
 - e. The 2nd respondent shall ensure the orders of this court are complied with.
 - f. Each party shall bear their respective costs of this petition.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 11TH DAY OF APRIL 2024.

HON. A. Y. KOROSS

JUDGE

11/04/2024

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Kipkoech for the petitioners

N/A for 1st respondent

Mr. Kakimu h/b for Mr. Ngararu Maina for 2nd respondent

N/A for the 3rd and 4th respondents

Court assistant: Ishmael Orwa

