



Ondiegi & another v Third Engineering Bureau China Group Company Limited & another; National Environmental Management Authority (Interested Party) (Environment & Land Petition E005 of 2022) [2024] KEELC 4000 (KLR) (20 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4000 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND PETITION E005 OF 2022**

GMA ONGONDO, J

MAY 20, 2024

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 22, 27, 28, 29, 35, 39 (3), 40, 42, 47, 60, 69, 70, 162, 165, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA AND

**IN THE MATTER OF SECTIONS 3, 7 & 9 OF THE ENVIRONMENT
MANAGEMENT AND CO-ORDINATION ACT, 1999.**

AND

**IN THE MATTER OF AND THE INTERPRETATION OF THE PRINCIPLE
OF HAZARDOUS ENVIRONMENT ACTIVITY AS CONSTITUTING
THE VIOLENCE OF DEVELOPMENT CONTRARY TO ARTICLE 29 (C).**

AND

**IN THE MATTER OF ALLEGED VIOLATION OF THE RIGHTS ENSHRINED
IN ARTICLES 43(1) (A), (B), (C) & (D); AND 44(2) OF THE CONSTITUTION
OF KENYA, 2010 THROUGH HAZARDOUS ENVIRONMENT ACTIVITY.**

**IN THE MATTER OF ALLEGED VIOLATION OF RIGHTS AND FREEDOMS ENSHRINED
IN ARTICLES 27(1) & (5), 28, 29(C), 32, 39, AND 40 OF THE CONSTITUTION
OF KENYA, 2010 THROUGH HAZARDOUS ENVIRONMENT ACTIVITY.**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND DEROGATION FROM
ARTICLE 10 VALUES AND PRINCIPLES OF GOVERNANCE OF HUMAN
RIGHTS, TRANSPARENCE, ACCOUNTABILITY AND OR SUSTAINABLE
DEVELOPMENT THROUGH HAZARDOUS ENVIRONMENT ACTIVITY.**

BETWEEN

ANTHONY OGUTU ONDIEGI 1ST PETITIONER

FALENTINUS ODERA OMBAI 2ND PETITIONER



AND

**THIRD ENGINEERING BUREAU CHINA GROUP COMPANY
LIMITED 1ST RESPONDENT**

KENYA NATIONAL HIGHWAYS AUTHORITY 2ND RESPONDENT

AND

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .. INTERESTED
PARTY**

RULING

1. On 6th July 2022, the three Petitioners/applicants through Musyoki Mogaka & Company Advocates, filed an application by way of a Notice of motion dated 11th May 2022 seeking the following orders;
 - a. Moot
 - b. Moot
 - c. That pending hearing and determination of the petition, this honourable court be and is hereby pleased to issue an order directed at the 1st and 2nd Respondent to redirect the flow of roadside to issue an Order directed at the 1st and 2nd Respondent to redirect the flow of roadside water flowing from the culvert constructed by the 1st Respondent along Isebania-Kisii-Ahero road around Ringa and specifically preventing it from flowing into the Petitioner's properties known as East Kasipul/kojwach Kamioro/2/93 and EAST Kasipul/kojwach Kamioro/3031 as well as East Kasipul/kojwach Kamioro/3030.
 - d. Any other order that this court may deem fit and appropriate to grant in the circumstances.
 - e. Costs be provided for.
2. The application is founded upon grounds (a) to (f) set out on the face of the same. Also, it is based on the 1st petitioner's supporting affidavit sworn on even date and the accompanying documents marked as "A001" to "A008" and the same include; copies of certificates of title, photographs and a video.
3. Briefly, the petitioners' lamentation is that they seeking enforcement of our individual and collective rights under the constitution of Kenya 2010. That the 1st petitioner and the 2nd Petitioner who are husband and wife respectively, are jointly registered owners of properties of land known as East Kasipul/kojwach Kamioro/2793 and East Kasipul/kojwach Kamioro/3031 while the 3rd Petitioner is the registered proprietor of the neighbouring parcel of land known as East Kasipul/kojwach Kamioro/3030 as per the annexed documents to the supporting affidavit marked "A001 a & b" being copies of the Certificate of Title detailing particulars of the properties in terms of description and their respective owners.
4. The petitioners asserted that in 2017, the 1st Respondent was contracted by the 2nd Respondent vide contract number KENHA/RD/D & C/2118/2017 to conduct a road improvement/expansion project along Ahero-Kisii-Isebania Road. That the three properties; East Kasipul/kojwach Kamioro/2793 and East Kasipul/kojwach Kamioro/3031 owned by the 2nd Petitioner and East Kaipul/kojwach Kamioro/3031 belonging to the 3rd Petitioner herein are situated adjacent to the said road.



5. Further, the petitioners allege that during the construction of the Isebania-Kisii-Ahero road at around Section LOT Kisii Ahero Section and that while doing the construction; out of negligence unprofessional, incompetent, substandard and negligent workmanship the Respondents built a culvert at around Ringa area which channels roadside water to our properties. That the water flowing directly from the culvert has carried with it sand and rocks which it has deposited in some parts of our farms and at the same time washed away all the loamy soil that used to be in our farms together with the fertility of our properties.
6. The 2nd respondent was duly served as discerned in the proceedings of 20th June 2023.
7. On the said date, Mr. W. Omayio learned counsel for the petitioners sought leave of the court to serve the 1st respondent through newspaper of national circulation and leave was granted accordingly
8. In the foregone, is there merit in the application?
9. On 21st September 2022, the court directed, inter alia, that the application be served on the respondents and interested party and that the application be heard by written submissions.
10. On 8th June 2022, learned counsel for the petitioners told the court that there were some lapses and prayed to serve the application and the petition by close of business on that day. The court granted the request.
11. The applicants have failed to demonstrate that the application was served pursuant to the orders of 21st September 2022 and 8th June 2023; see also *Ogada-vs-Mollin* (2009) eKLR.
12. Furthermore, it is a puzzle that the principal order sought in the application is similar to a final order namely number F for mandamus sought in the petition. In *Peter Kasimba & 219 others-vs-Kwetu Savings and Credit Co-operative Society Ltd & 11 others* (2020) eKLR, Odunga J (Now JA) stated;

“.....at an interlocutory stage, the court is not required and indeed forbidden to purport to decide with finality the various relevant “facts “urged by the parties.”
13. In the circumstances, the application is devoid of merit. The applicants do not deserve the orders sought in the application.
14. Thus, the application be and is hereby dismissed.
15. Costs of the application to abide the outcome of the petition.
16. It is so ordered

DATED AND DELIVERED AT HOMA BAY THIS 20TH DAY OF MAY 2024.

G.M.A ONG'ONDO

JUDGE

Present;

Mutiva & Obunga, court assistants

