



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

PETITION No. 2 OF 2020

(FORMERLY HIGH COURT PETITION No. 8 OF 2018)

DR PETER MBAE.....PETITIONER

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST RESPONDENT

KENYA WATER RESOURCES MANAGEMENT AUTHORITY..2ND RESPONDENT

NATIONAL WATER CONSERVATION

AND PIPELINE CORPORATION.....3RD RESPONDENT

TINDRESS PATEL COFFEE ESTATES LIMITED.....4TH RESPONDENT

SALT MANUFACTURERS COMPANY LTD.....5TH RESPONDENT

AND

LAW SOCIETY OF KENYA.....1ST INTERESTED PARTY

NATIONAL ENVIRONMENTAL

COMPLAINTS COMMITTEE.....2ND INTERESTED PARTY

THE ATTORNEY GENERAL.....3RD INTERESTED PARTY

JUDGMENT

1. The petitioner herein describes himself in Amended Petition dated 5th March 2019 as a Kenyan Citizen and Member of County Assembly of Nakuru representing Kabazi Ward. The petition relates to the tragic events of 9th May 2018 when a dam within Patel Farm in Solai Nakuru known as Milmet Dam breached its embankment with resultant loss of lives and damage to property. He brings the petition against the first respondent which is an authority established under **Section 7** of the **Environmental Management and Co-ordination Act, 1999** (EMCA) with the general mandate to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of the government of Kenya in the implementation of all policies relating to the environment; the second respondent which is a state corporation established under **Section 11** of the **Water Act, 2016** with the general mandate to among others formulate and enforce standards, procedures and regulations for the management and use of water resources and flood mitigation as well as to regulate the management and use of water resources; the third respondent which is a state corporation established under **Section 3** of the **State Corporations Act** through Legal Notice No. 270 of 24th June, 1988 and mandated to carry out construction of dams and water pans, canals, flood control works and drilling of boreholes. Following commencement of the **Water Act, 2016**, the third respondent's functions and liabilities have been transferred to the Water Harvesting and Storage Authority which is a state corporation established under **Section 30** of the **Water Act, 2016**; the fourth and fifth respondents which are described in the petition as companies and business names that own or run the dams at Patel Farm; the first interested party which is a body corporate originally established under **Section 3** of the **Law Society of Kenya Ordinance, 1949** and which continues in existence under **Section 3** of the **Law Society of Kenya Act, 2014**. It is a bar association with the mandate to inter alia assist the government and the courts of Kenya in matters relating to legislation, the administration of justice and the practice of law in Kenya and to uphold the Constitution of Kenya and advance the rule of law and the administration of justice.

2. The second and third interested parties were admitted into the proceedings on their own application. The second interested party is a committee of the first respondent established under **Section 31** of EMCA with the general mandate to investigate any allegations or complaints against any person or against the first respondent in relation to the condition of the environment in Kenya; on its own motion to investigate any suspected case of environmental degradation, and to make a report of its findings together with its recommendations thereon to the Cabinet Secretary responsible for matters relating to environment and natural resources while the third interested party is an office established under **Article 156** of the **Constitution** of Kenya as the principal legal adviser to the Government of Kenya.

3. It is averred in the amended petition that besides Milmet Dam there six other dams within Patel Farm and that all the dams are erected along water ways using wrong construction means and materials. That the tragedy of 9th May 2018 would have been prevented were it not for inactions on the part of the respondents and further that the six remaining dams have not been subjected to Environmental Impact assessment and Social Audit contrary to the right to a clean and healthy environment which is granted by the Constitution to every person in Kenya. Citing *inter alia* **Articles 20, 21, 22 (1), 258, 23 (1), 42, 60 and 70** of the **Constitution**, the petitioner prays for judgment as follows:

a. An order (sic) that Environmental Impact Assessment and Social Audit to be conducted on the Patel Farm dams within sixty (60) days.

b. An order that the 4th and 5th respondents do restore the ecosystem within Patel Farm in Solai, Rongai Sub County as per the Environmental Impact Assessment and Social Audit above.

c. Costs of the Petition be awarded to the Petitioner against the respondents.

4. The petition is supported by a supporting affidavit and a supplementary affidavit, both sworn by the petitioner. He deposed that he brings this petition on his own behalf as Member of County Assembly of Nakuru representing Kabazi Ward and in public interest seeking to have an Environmental Impact Assessment and Social Audit of the dams within Patel Farm to avoid tragedies such as that of 9th May 2018. He added on the said date, Milmet Dam within Patel Farm breached its embankment as a result of which more than 40 lives were lost, property was damaged and hundreds of families lost their homes. That the said dam and six other dams within Patel Farm have existed since the colonial era and have not been subjected to any Environmental Impact Assessment and Social Audit. He further deposed that a Ministry of Interior and Coordination of National Government Multi-Agency report dated 29th May 2018 found that Milmet Dam and the other dams within Patel Farm were erected along water ways using wrong construction means and materials. That the lives, health and properties of the residents of Solai area are in danger and should be protected as guaranteed by the constitution yet nothing has been done about the situation despite there being authorities mandated to deal with such issues.

5. The first respondent filed a replying affidavit sworn by Prof. Geoffrey Wahungu, its Director General. He deposed that the petition is untenable since Environmental Impact Assessments ought to be conducted pre-project and not post-project yet the subject dams have been in existence and operation for a long time. He added that social audits are not within the mandate of the first respondent and that the first respondent has conducted environmental audits by way of a control audit on the subject dams and shared the report with the relevant government institutions and the dam owners. He further deposed that the control audit is currently under implementation and an Environmental Restoration Order dated 19th July 2018 was issued by the first respondent.

6. The second respondent reacted to the petition by filing Notice of Preliminary Objection dated 14th November 2018 seeking its striking out on the grounds that:

1. The purported petition as against the 2nd respondent has been filed contrary to the express provisions of section 137(a) and (c) of the Water Act 43 of 2016 as well as section 103(a) and (c) of the Water Act No. 8 of 2002.

2. The purported petition discloses no actionable cause of action against the 2nd respondent herein.

3. The purported petition as against the 2nd respondent is therefore misconceived, incurably defective, fatally incompetent and does not lie in law.

4. The purported petition as against the 2nd respondent is otherwise an abuse of the process of this Honourable Court and therefore ought to be struck out and / or dismissed with costs.

7. Directions were taken that the Preliminary Objection be determined alongside the petition, in this judgment.

8. The third respondent replied to the petition through an affidavit sworn by Eng. Sammy Mburu, its Acting Managing Director. He deposed that the proprietor of the subject dam is not an affiliate of the third respondent, that he did not act as an agent of the third respondent and that the third respondent did not have any knowledge of the subject matter of the petition. According to him, the claim against the third respondent is unfounded.

9. Despite being given several opportunities to do so, the 4th and 5th respondents as well as the 1st and 3rd interested parties did not file any response to the petition.

10. The 2nd interested party responded to the petition through a replying affidavit sworn by Dr John Kipkorir Chumo, its secretary. He deposed that the second interested party visited the site of the dam to investigate and assess the circumstances leading to and the cause of the collapse and held a meeting with the residents of the area to collect views on the circumstances that led to the collapse. He added that the second interested party carried out an investigation and prepared a report dated 23rd July 2018 which he annexed. Further, that the second interested party also studied a number of environmental impact and social audit reports prepared prior to the collapse by the 4th and 5th

respondents and submitted to the 1st respondent and concluded that the dam collapsed possibly due such reasons as lack of maintenance on the embankments, outdated design, instability caused by high soil moisture saturation, high water volume caused by heavy rains and hydrostatic forces wherein the embankments to control the water within the built dam were weak and conversion of forest land to farm land without carrying out appropriate measure upon change of user. He added that he perused the 4th and 5th respondents' environmental impact audit of 2014, 2015, 2016, 2017 and 2018 and noted that the 4th and 5th respondents failed to disclose the likely environmental impact likely to arise from the dams or even to propose measures to mitigate degradation, environmental monitoring and management plan to enable continual monitoring and management of the likely degradation and the steps taken to protect the environment. According to him, there is a high likelihood that the Environmental impact Assessment and Audit has never been done as required in law and or did not adhere to the set standards that meet the legal requirement of an environmental impact assessment and audit. He further noted that the 2nd respondent classified the dams on the suit property as low risk so that inspections were due only every five years with the last one having been undertaken in 2014 whereas the volume of water and the earthen nature of the dams was high risk that required inspections and audits from time to time. He urged the court to compel the agencies mandated to carry out the environmental impact assessment and audit to do so as regards the remaining dams and the 1st respondent be satisfied on compliance before any activity is undertaken on the suit land. He further urged the court to order the 4th and 5th respondents to restore and redevelop the area that was destroyed at its own cost.

11. An order was made that the petition be canvassed through written submissions. Only the petitioner filed submissions. The petitioner identified the following issues for determination: firstly, whether the 2nd respondent's preliminary objection has any merit, secondly, whether the 4th and 5th respondents' actions have and continue to deny, violate and infringe the petitioners' and Solai residents' right to a clean and healthy environment and lastly, whether the petitioner is entitled to be granted the prayers sought. On the first issue, it is argued that the preliminary objection lacks merit because the 2nd respondent is not a human being as contemplated under **Section 137 (a) and (c) of the Water Act, 2016** and more so since no one working under it has being enjoined in the petition in their individual capacity. Further, that there is a cause of action against the 2nd respondent since some of its functions as outlined at **Section 12 (b), (d) and (h) of the Act** as regards regulation, management and use of water resources are in issue in the petition.

12. On the second issue as to whether the 4th and 5th respondents' actions have and continue to deny, violate and infringe the petitioners' and Solai residents' right to a clean and healthy environment the petitioner cites **Article 42 of the Constitution** and argues that every person has a right to a clean and healthy environment and further points out that under **Article 69** the state has a duty to *inter alia* ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; encourage public participation in the management, protection and conservation of the environment; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; and eliminate processes and activities that are likely to endanger the environment. Citing the case of **Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR**, the petitioner argues that the right to a clean and healthy environment can only be achieved through a collaborative approach. Further, that as owners of Milmet Dam and the six other dams that are located within Patel Farm the 4th and 5th respondents had a duty to ensure that their exploitation and utilization of the environment was sustainable and they were to eliminate any activity that was likely to endanger the environment. That they breached this duty resulting in the tragedy with ensuing damage to the environment, damage to property and loss of lives. It is further argued that none of the respondents have contested the fact that the environment was destroyed by the breach of the embankment of the Milmet Dam and that therefore, the 4th and 5th respondents' actions have and continue to deny, violate and infringe on the petitioners' and Solai residents' right to a clean and healthy environment.

13. Finally, on the third issue as to whether the petitioner is entitled to be granted the prayers sought, it is argued that owing to the central role played by the environment in economic, social and cultural growth of the nation, parliament legislated EMCA **Section 58** of which requires that any person, being a proponent of a project specified in the second schedule before undertaking the said project shall submit a project report to the 1st respondent after which he is required to undertake a full environmental impact assessment study and submit a report of the same prior to being issued with an Environmental Impact Assessment Licence. It is further argued that the 4th and 5th respondents have not shown that any of the dams in the Patel Farm were established and are operated in accordance with EMCA. If anything, the Environmental Restoration Order dated 19th July 2018 issued by the 1st respondent is proof that the 4th and 5th respondents never complied with the provisions of EMCA before constructing the dams. Despite being given an opportunity to do so, they failed to produce any Environmental Impact Assessment Licence in court. Further referring to the Environmental Restoration Order, it is argued that the 1st respondent pointed out therein that the 4th and 5th respondents modified the structures from weirs to earth dams without conducting any fresh Environmental Impact Assessment Study or seeking any fresh licence contrary to **Section 64** of the EMCA. Citing the case of **Moffat Kamau & 9 Others vs Aelous Kenya Limited & 9 Others [2016] eKLR**, it is argued that the modification from weirs to earth dams constituted a substantial change thus necessitating a fresh Environmental Impact Assessment Study and Licence. In the circumstances, the court is invited to make the assumption that the remaining dams in Patel Farm violate the right to clean and healthy environment and therefore apply the precautionary principle as defined at **Section 2** of EMCA. That owing to the uncertainty on the status of the other dams, there is a real risk of damage to the environment and there is therefore no luxury of a wait and see attitude. Citing the case of **Benson Ambuti Adegga & 2 others v Kibos Sugar and Allied Industries Limited & 4 others; Kenya Union of Sugar Plantation and Allied Workers (Interested Party) [2019] eKLR** the court is urged to grant the orders sought.

14. I have considered the petition, the Preliminary Objection, the affidavits and the submissions. The issues that arise for determination are firstly, whether the 2nd respondent's preliminary objection has any merit and whether the petitioner is entitled to the reliefs sought.

15. The law relating to preliminary objections was succinctly summed up in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, by Law JA as follows:

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

16. Thus, for a preliminary objection to be valid, it must raise a pure point of law which is argued on the assumption that all the facts pleaded

by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

17. Sir Charles New Bold, P. lamented the common practice of raising what really does not amount to a valid preliminary objection in **Mukisa Biscuit Manufacturing Co. Ltd** (supra) as follows:

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.

18. The objection is to the effect that the petition as against the 2nd respondent has been filed contrary to the provisions of **Section 137(a)** and **(c)** of the **Water Act, 2016** and further that it discloses no actionable cause of action against it. The section provides as follows:

137. Protection from liability

No matter or thing done or omitted by —

(a) the Cabinet Secretary, the Authority, the Regulatory Board, or other state organ exercising powers or functions under this Act;

(b) any person acting at the direction of the Cabinet Secretary; or

(c) a person acting at the direction of the Authority, the Regulatory Board, or a state organ

shall, if the matter or thing was done or omitted in good faith for the purpose of executing this Act or any rule, regulation or order made under this Act, subject the person in his or her personal capacity to any action, suit, claim or demand whatsoever.
[Emphasis supplied]

19. No submissions were advanced to justify the objection and that alone would be sufficient ground for the objection to fail. A party who raises a preliminary objection cannot sit back and expect it to cruise through on autopilot. In the same way that a litigant who files a claim in court must prosecute it, the party raising a preliminary objection must advance arguments to justify it and to demonstrate how it interfaces with the law and facts of the case. In any case, whether or not the matter or thing was done or omitted in good faith as contemplated at **Section 137(a)** and **(c)** of the Act is a matter of fact which requires evidence since the petitioner has not averred in the petition that the 2nd respondent's actions or omissions were in good faith. An objection that needs to be propped up by evidence cannot be a valid preliminary objection. Thus, the objection fails both for want of prosecution and for not being a valid preliminary objection and I accordingly dismiss it. That resolves the first issue for determination.

20. Now onto the second issue for determination, as to whether the petitioner is entitled to the reliefs sought. As noted earlier, the 4th and 5th respondents have not opposed the petition. Thus, the petitioner's various contentions remain uncontroverted and I accept them as proven. These are that the petitioner is Member of County Assembly of Nakuru representing Kabazi Ward and that the 4th and 5th respondents own Patel Farm in Solai Nakuru within which existed a dam known as Milmet Dam and six other dams which remain in existence. That on 9th May 2018 Milmet Dam breached its embankment as a result of which more than 40 lives were lost, property was damaged and hundreds of families lost their homes.

21. The petitioner further contends that the dams within Patel Farm were established according to and are not being operated in accordance with EMCA and that therefore his right and Solai residents' right to a clean and healthy environment under **Article 42** of the **Constitution** as well as the state's duty under **Article 69** have been violated and continue to face threats.

22. The importance of a clean and healthy environment cannot be over emphasised. A healthy environment makes the full enjoyment of basic human rights, the right to life, health, food, water and sanitation possible. Consequently, **Article 42** of the **Constitution** provides:

Every person has the right to a clean and healthy environment, which includes the right—

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment fulfilled under Article 70.

23. So as to attain that goal, **Article 69 (1)** imposes a duty on the state to have the environment protected for the benefit of present and future generations. It specifically requires the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, equitable sharing of the accruing benefits; to establish systems of environmental impact assessment, environmental audit and monitoring of the environment and to eliminate processes and activities that are likely to endanger the environment. These duties do not rest only on the state since under **Article 69 (2)** every person has a duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

24. To further ensure that these do not just remain lofty ideals, **Article 70** of the constitution provides that if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to court for redress in addition to any other legal remedies that are available in respect to the same matter and that he does not have to demonstrate that any person has incurred loss or suffered injury. Further enabling provisions are found at **Section 3** of EMCA. Additionally, **Article 162(2) (b)** of the **Constitution** and **Sections 4 and 13** of the **Environment and Land Court Act, 2011** establish this court and cloth it with specialised jurisdiction to hear and determine disputes relating *inter alia* to environmental planning and protection, climate issues and land use planning.

25. The petitioner contends that that as owners of Milmet Dam and the six other dams that are located within Patel Farm the 4th and 5th respondents breached their duties to ensure that their exploitation and utilization of the environment is sustainable and to eliminate any activity that is likely to endanger the environment. According to the petitioner, proof of the breach is evident from the destruction that was caused to the environment by the collapse of Milmet Dam. Among the averments in the amended petition was that the six remaining dams have not been subjected to Environmental Impact Assessment and Social Audit. Although the 4th and 5th respondents did not respond to the petition, it is notable that the petitioner himself stated in the supporting affidavit that the dams have existed since the colonial era. That being the case, the requirements of **Section 58** of EMCA as to application for an Environmental Impact Assessment Licence would not apply to the dams since the said section deals with processes that take place prior to execution of projects. I further note that 2nd interested party in its replying affidavit referred to environmental impact and social audit reports for the years 2014 to 2018 prepared by the 4th and 5th respondents prior to the collapse and submitted to the 1st respondent. The first respondent in its replying affidavit sworn by its Director General also confirmed the existence of those reports by specifically mentioning them in the Environmental Restoration Order dated 19th July 2018 which it issued to the 4th and 5th respondents. The reports were submitted to the 1st respondent pursuant to its environmental audit and monitoring mandate under **Sections 68 and 69** of EMCA. Whether or not the reports are adequate and what follow up actions are necessary are matters within the mandate of the 1st respondent and its organs such as the 2nd interested party. The mere fact that Milmet Dam breached its embankment on 9th May 2018 with resultant loss of lives and damage both to the environment and property does not *per se* amount to proof that the 4th and 5th respondents' actions or omissions pose a threat to the right to a clean and healthy environment. One must not confuse issues of liability whether in tort or under statute with constitutional questions which require the attention of the constitutional court. As the Supreme Court stated in the case of **Benard Murage - v - Fine serve Africa Limited & 3 others [2015] eKLR:**

Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.

26. Thus, on the basis of the material before the court, the issue of whether the 4th and 5th respondents' actions have or are likely to violate, infringe or threaten the petitioners' and Solai residents' right to a clean and healthy environment is one that is prematurely raised before this court in view of the processes already in place.

27. The reliefs the petitioner is seeking are an order that Environmental Impact Assessment and Social Audit to be conducted on the Patel Farm dams within sixty (60) days and an order that the 4th and 5th respondents do restore the ecosystem within Patel Farm in Solai, Rongai Sub County as per the said Environmental Impact Assessment and Social Audit. As previously noted, there exist environmental impact and social audit reports for the years 2014 to 2018 in respect of the Patel Farm and the dams therein. As a follow up to the reports, the 1st respondent issued the Environmental Restoration Order dated 19th July 2018. Further, the second interested party also carried out an investigation and prepared a report dated 23rd July 2018 with detailed recommendations on the way forward. All these steps have been taken by the 1st respondent and the second interested party within their mandates under EMCA. As the issues evolve, some of the matters may find their way into the National Environment Tribunal and ultimately to this court as appeals under **Section 130** of EMCA. In the circumstances, I see no basis upon which to issue the reliefs sought.

28. In the result, this petition is dismissed. Each party shall bear own costs.

29. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 4th day of June 2020.

D. O. OHUNGO

JUDGE