



**Ngolo & another v Nuclear Power Energy Agency (NuPEA) & 2 others;
County Attorney-Kilifi County Government & 2 others (Interested Parties)
(Petition 3 of 2023) [2024] KEELC 14071 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14071 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 3 OF 2023
EK MAKORI, J
DECEMBER 19, 2024**

**IN THE MATTER OF ARTICLES 2, 3, 10, 21, 22, 23, 27, 28,35, 42, 47,
48,69, 70, 232, 258 & 259 (1) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 54, 56 OF THE ENERGY ACT OF 2019

BETWEEN

MKOBA NGOLO 1ST PETITIONER

ZAWADI KALUME 2ND PETITIONER

AND

NUCLEAR POWER ENERGY AGENCY (NUPEA) 1ST RESPONDENT

THE PERMANENT SECRETARY MINISTRY OF ENERGY . 2ND RESPONDENT

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT**

AND

**THE COUNTY ATTORNEY-KILIFI COUNTY GOVERNMENT .. INTERESTED
PARTY**

OCEANS ALIVE TRUST INTERESTED PARTY

ROTARY CLUB OF KILIFI INTERESTED PARTY



RULING

1. For determination is the application dated 13th July 2023 brought by the Petitioners under Articles 2, 3, 10, 21, 22, 23, 27, 28, 35, 42, 47, 48, 69, 70, 232, 258 & 259 (1) of the Constitution of Kenya, 2010; the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Section 54, 56 of the Energy Act of 2019, Practice and Procedure Rules 2013 seeking the following orders:
 1. Spent
 2. Spent.
 3. That pending the inter-partes hearing and determination of the petition herein, the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the Respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to carry out any action towards establishment of Kenya's first nuclear power plant.
 4. That consequent to the grant of the prayers above, the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders and/or favor the cause of justice.
2. The application was supported by grounds on the face of the application and the supporting affidavit sworn by Mkoba Ngolo on even date; he deposed that the Petitioners have filed this Petition to challenge the decision of the 1st Respondent to establish Kenya's first nuclear plant in Kilifi County. The challenge is based on the assertion that the establishment process is shrouded in secrecy, marred with piecemeal collection and dissemination of information, disguised public participation, limited and/or lack of public awareness, education and participation skewed to lodge necessary legal process. The Petitioner went to great length in stating the mandate of the 1st Respondent under Section 56 of the Energy Act. He also deposed that the 1st Respondent is engaged in an illegal and unprocedural process of establishing a nuclear power plant, disregarding the law. In the absence of a defined policy and transparent legal framework guiding the identification of a proposed site for establishing a nuclear power plant in Kenya, the 1st and 2nd Respondent cannot legally proceed to identify potential sites for establishing a nuclear power plant.
3. He contended that the Strategic to Build & Social Assessment Report (SESA) - 2023 acknowledges contravention of the law by the 1st Respondent as it identifies three fundamental issues lacking in the inception of a nuclear plant in Kenya: the lack of nuclear knowledge management, inadequate nuclear research and development, and the need to build capacity as necessary measures all of which are by law must be complied with before establishment of a nuclear power plant. According to him, the report identified 'site B' in Kilifi County as the most suitable site for setting up a nuclear power plant.
4. It was also his assertion that there is a need to apply caution and a safe approach and implementation of the law in the development of a nuclear power plant borrowing from world-renowned countries with nuclear power plants. Establishing a nuclear safety policy and capacity building for the 3rd Respondent is necessary to oversee environmental impact assessments. He asserted that the lack of awareness in handling nuclear waste and the potential risks it poses not only violates the residents right to information, a clear injustice, but also puts their lives, health, and the environment at risk. Further, the decision of the 1st Respondent to establish the nuclear plant without adequate awareness and



understanding among the residents is arbitrary, unreasonable, and unlawful, contrary to the principles of sustainable development and protection of public welfare.

Responses.

5. The 2nd Respondent, in response to the application, filed Grounds of Opposition dated 23rd November, 2023. Counsel stated that the application had not met the threshold for granting an order for prohibition as sought by the Applicants. That the Petitioners violate the trite legal principle, which dictates that internal mechanisms for appeal must be exhausted before approaching the ELC. This principle is a fundamental aspect of our legal system, ensuring that all primary avenues for resolution are explored before resorting to legal action before the ELC. Counsel also stated that the Petitioners have also neglected to avail themselves of the remedy outlined in Section 129 of the [Environmental Management and Coordination Act](#) (EMCA), which directs recourse to the National Environmental Tribunal (NET) as the preferred mode of dispute resolution.
6. Further, that the decision by the 1st and 2nd Respondents to establish a Nuclear Power Plant is lawful and is taken pursuant to its mandate as provided in Sections 56 of the [Energy Act](#), 2019 and that the [Nuclear Regulatory Act](#), 2019 oversees the establishment, operation, and decommissioning of a nuclear power plant by providing a comprehensive framework for regulating the safe, secure and peaceful utilization of nuclear technology.
7. Counsel also stated that the court lacks jurisdiction to entertain the present Petition on account of Section 36 (4) of the [Energy Act](#) and Section 129 of the [Environment Management and Coordination Act](#) (EMCA), which provisions provide that matters such as this should be referred to the Energy and Petroleum Tribunal (EPT) and/or the National Environmental Tribunal (NET).

Submissions.

Petitioners' Submissions.

8. The Petitioners, through their counsels, filed submissions dated 20th May 2024 and highlighted the same before this court. Counsels underscored that the essence of this matter lies in ensuring a lawful and transparent process in establishing Kenya's first nuclear power plant. This is crucial to ensure that all processes align with the tenets of our constitutional system without circumventing mandatory provisions of the law, a matter of utmost gravity.
9. It was submitted that the Respondents' actions are directed at circumventing unfavorable laws and regulations and have markedly increased avoidance of public participation and legal awareness. In addition, the Respondents aim to thwart laws and regulations protecting the public by not complying with public participation.
10. On whether there is a prima facie case with a likelihood of success on the merits, it was submitted that the impugned process of establishment of a nuclear power plant threatens, infringes and is being carried out in violation of Article 2(4), 3, 10, 27, 28, 35(2), 40, 42, 43, 46, 47, 48, 60, 66, 69, 70, 73, 75, & 232 of the [Constitution](#) of Kenya 2010 and Section 56 of the [Energy Act](#). It was further submitted that failing to materialize the provisions of Section 56 of the [Energy Act](#) violates the principles of sustainable exploitation, utilization, management, and conservation of the environment and natural resources, as outlined in Article 69 of the [Constitution](#) of Kenya, which obligates the government to ensure sustainable exploitation, utilization, management, and conservation of the environment and natural resources to ensure equitable sharing of any accrued benefits.



11. It was submitted that Article 10 of the *Constitution* provides for the national values and principles of governance, which include the rule of law and participation of the people. Without such due participation and adherence to the constitutional and statutory dictates, all actions towards establishing the nuclear power plant bereft of due procedure required by law will be incongruent with the tenets of Article 10 of the *Constitution*. Reliance was placed on the case of *Isaac Mugo & 14 others v Fred Okengo Matiang'i, the Cabinet Secretary, Ministry of Interior and Coordination of National Government & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Parties)* [2022] eKLR, Neutral citation: [2022] KEHC 158 (KLR).
12. On the balance of convenience, the risk of irreparable harm, and the public interest, it was submitted that the 1st Petitioner's affidavits sworn on 13th July 2024 and on 20th May 2024 illustrate the need to issue conservatory orders to prevent further violations of the constitutional and legal provisions by Respondents' application. that the impugned process towards establishment of nuclear power plant is being carried out in a manner that does not comply with the relevant statutes and constitutional provisions. In particular, the failure to conduct public participation and being shrouded with secrecy violates the principles of transparency enshrined in Articles 10 and 232(1)(f) of the *Constitution*. Ultimately, it is submitted that granting interim orders in favor of the Petitioners would serve the interests of justice and the public good. The conservatory orders sought would help to maintain the status quo and prevent the Respondents from making potentially illegal, unlawful, opaque, unprocedural, and hasty processes without legal sanctions.

1st Respondent's Submissions.

13. The 1st Respondent, through counsel, submitted that a prima facie case with a probability of success was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR Civil Appeal No. 39 of 2002 had not been established. It was submitted that the determination of the site's suitability and, indeed, civic education to facilitate public participation require that the scientific process that is currently underway be completed. The current actions of the 1st Respondent can, therefore, not be interpreted as posing any real threat of damage to the Petitioners' rights.
14. It was submitted that the Petitioners' insistence that there is a lack of legal framework governing the activities of the 1st Respondent goes further to prove the Petitioners' misinformation on the work of the 1st Respondent. This notwithstanding, the assessment of sufficiency or suitability of legal framework is a matter that requires a full trial by this Honourable Court and cannot, therefore, be grounds for establishing a prima facie case. It is further submitted that the Petitioners have merely alleged that there are no sufficient laws, which allegation is disputed, that there was no public participation, which complaint is premature, and that a Nuclear Power Plant is being established in the Uyombo area – Kilifi County, which allegation is baseless and misleading.
15. Based on the above sentiments, the Court was urged to find that the Petitioners have not made a prima facie case with a chance of success.
16. Counsel submitted that the substratum of the Petitioners' Application is two-fold: first is that there was a lack of public participation in the Respondents' 'decision' to set up the proposed Power Plant at Uyombo – Kilifi; second is concerns over disaster preparedness capacity which poses a threat to the residents of the area. The process currently undertaken by the 1st Respondent is not the establishment of a Nuclear Power Plant as alleged by the Petitioners. Contrary to the allegations, the 1st Respondent has not decided whether the Preferred Site exists.



17. Reliance was placed on the case of *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) Constitutional Petition E022 of 2021 that the Petitioners would not suffer any prejudice if the application is dismissed and that the Respondent would be encumbered from fulfilling its mandate which would form the basis of and enable the conduct of the processes whose importance has been effortfully emphasized by the Petitioners. The Petitioners have failed to put up sufficient arguments to qualify which of their rights are prejudiced if the orders sought are denied.
18. In determining whether the grant of the orders will enhance the constitutional values and objects of the Petitioner's rights that have been allegedly violated, counsel submitted that this issue relates to the onus placed on the Petitioners to establish violation of its rights, which can only be remedied by the conservatory orders sought and relied on the case of *Center for Rights Education and Awareness (CREAW) & Another v Speaker of the National Assembly & 2 others* (2017) eKLR Petition 397 of 2017.
19. It was submitted that the Petitioners will have an opportunity to participate publicly in establishing a nuclear power plant in Kilifi County at the opportune time. In the circumstances, granting these orders will neither enhance nor expedite the enjoyment of that right, as public participation can only be conducted upon the conclusion of the process sought to be stopped by the Petitioners.
20. In determining whether the grant of the orders sought will enhance the public interest, it submitted that public interest tilts in its favor because the Nuclear Power Plant is a project being undertaken for the public good and towards realizing Kenya's current and increasing energy needs. On this heading, reliance was placed on the cases of *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 Consolidated Petitions 56, 58 and 59 of 2019 and that of *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR Judicial Review 378 of 2017.

2nd Respondent's Submissions.

21. The Attorney General identified a number of issues for determination: whether an order of prohibition can be issued in the circumstances, whether there exists a policy and regulatory framework governing the establishment, operation, and decommissioning of the nuclear plant, and whether public participation was involved in the planned establishment of the nuclear plant.
22. The Petitioner's application for an order of prohibition against the Respondent is based on the legal argument that the 1st Respondent is overstepping their constitutional and statutory mandate. This argument draws from the case of *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 other* [1997] eKLR, where the Court outlined the grounds for such an order. The court held that an order of prohibition is a High Court directive that prevents an inferior tribunal or body from exceeding its jurisdiction or violating the laws of the land.
23. She also submitted that the application had not met the threshold for granting an order of prohibition as the Petitioner failed to demonstrate that the 1st Respondent, exercising their constitutional and statutory mandate under Section 56 of the *Energy Act*, acted ultra vires to warrant the orders sought. She also relied on the decision by Justice Kasule in the Ugandan case of *Pastoli v Kabale District Local Government Canal & others* (2008) 2EA 300 on pages 300-304.
24. In analyzing whether there exists a policy and regulatory framework governing the establishment, operation, and decommissioning of the nuclear plant, counsel submitted and relied on the *Nuclear*



Regulatory Act, 2019 which provides for a comprehensive regulatory framework which provides as follows:

“An Act of Parliament to provide for a comprehensive framework for the regulation of safe, secure and peaceful utilization of atomic energy and nuclear technology; the production and use of radiation sources and the management of radioactive waste; the repeal of the Radiation Protection Act and for connected purposes.”

25. The Nuclear Regulatory Act 2019 plays a crucial role in overseeing the establishment, operation, and decommissioning of nuclear power plants. It provides a comprehensive framework for regulating the safety, security, and peaceful utilization of nuclear technology, including the production and use of radiation sources and the management of radioactive waste.
26. On whether there was public participation, counsel submitted that public participation is a continuous requirement of law under Article 10 of the Constitution, which provides for National values and principles of governance that are to apply to every State Organ, State Officer, and Public Officer whenever any of them inter alia enacts, applies or interprets any law that one of the values under Article 10(2) of the Constitution is participation of the people.
27. It was her submission that by dint of this primacy and as evidenced in the “Strategic to Build & Social Assessment Report (SESA Report) for Kenya’s Nuclear to Build Program at point 5.7 Stakeholder Engagement Discussions and 5.8 SESA Stakeholder Engagement Programme the Respondents conducted thorough workshops and meetings and recorded the responses of those present not only in Kilifi but also in Kwale, Mombasa, Kisumu, Siaya, Busia, Homa Bay, Migori, Turkana, Uasin Gishu, Nandi, Kericho, Bomet, Nakuru, Muranga, Nyeri, Meru, Embu, Kitui, Garissa, Lamu, Tana River and Nairobi.
28. She further submitted that at Point 5.8, under Table 5-7: Phase 1 Stakeholder Meetings, the extensive exercise was conducted on 19th January 2018, with the invitation letters dispatched by 5th January 2018. The meeting brought on board the representatives from the County Executive, Assembly, County University College, Environment/Water & Marine-related NGOs, Water Basin Authority, and County NEMA. According to her, concerns were raised and noted in the meetings, and the report draft that would give rise to establishing the nuclear plant was informed.
29. Ultimately, she submitted that the Petitioners’ allegation of inadequate public participation is unfounded. Establishing a nuclear plant is a meticulous process requiring comprehensive engagement with the local community. All the decisions to develop the nuclear plant along River Kibe were preceded by a series of public consultation workshops held in various locations, ensuring the informed participation of the public.

Analysis and determination.

30. Having carefully considered the materials and submissions placed before me, the issues I consider germane to frame and decide on at this point are – whether this Court has jurisdiction to hear the current application and the petition itself and whether the orders sought in the form of prohibition directed at the 1st Respondent to desist from establishing a first Nuclear Power Plant in Kenya can be issued at this stage.
31. I want to emphasize from the beginning that this is a public-interest lawsuit that requires urgent attention for its hearing and resolution as the nation prepares to set up Kenya's first Nuclear Power Plant, especially considering the International Atomic Energy Agency (IAEA) Reports highlighting



nuclear accidents and preparedness issues and the attendant impact on the environment. For instance, according to its website, a nuclear and radiation accident is defined as:

“an event that has had significant consequences to people, the environment, or the facility.”

32. The website proceeds to illustrate instances of past nuclear mishaps that resulted in fatal outcomes for people, substantial radioactive emissions into the environment, or a meltdown of the reactor core. A prime illustration of a “significant nuclear disaster” is an event where the reactor core suffers damage and substantial quantities of radioactive isotopes are released, as seen in the Chornobyl catastrophe in 1986 and the Fukushima Daiichi nuclear accident in 2011.
33. According to the IAEA website, public anxiety regarding nuclear facilities has been primarily influenced by the impact of nuclear accidents, which have been a subject of discussion since the first nuclear reactors were built in 1954. Although technological measures have been implemented to lower the risk of accidents or to minimize the amount of radioactivity released into the environment, human error still occurs, and “there have been many accidents with varying impacts as well near misses and incidents.”
34. The website also reveals that as of 2014, there were over 100 significant nuclear power-related accidents and incidents. Since the Chornobyl disaster, there have been fifty-seven accidents or serious incidents, and roughly 60% of all accidents or serious incidents involving nuclear have happened in the USA.
35. The Fukushima nuclear accident (2011), the Chornobyl accident (1986), and the Three Mile Island accident (1979) are examples of major nuclear power plant accidents. These accidents can result in fatalities and high remediation expenses.
36. An issue has been raised whether the first port of call in resolving this dispute would have been either NET or EPT. This question can be answered from the recent guidance from the Supreme Court in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment), where the Supreme Court pronounced itself that parties should not be limited in access to justice whenever they seek to ventilate their legal issues - the only catch is - that the forum in which they seek redress is efficacious and adequate and that the doctrine of abstention/exhaustion is applied by the Courts where there exists such primary forum:

“It is this provision that generously allocates the appellant herein the right to file his constitutional petition before the ELC, and looking at the orders that the appellant had set out in his constitutional petition, it is evident to us without much effort that, the remedies of appealing to NEMA and EPRA, respectively, are not efficacious and adequate. Under *EMCA*, Section 129 provides for matters that may require determination by NET. They are all related to licenses and not constitutional violations, as is the case in the present dispute. The fact that licenses may well be a part of the appellant’s petition does not in any way outlaw the hearing and determination of it by ELC.

119. Similarly, in respect of the *Energy Act*, section 106 of the *Act* provides that appeals to the EPT from decisions by EPRA shall be in relation to issues relating to licensing, while Section 25 generally grants jurisdiction to the EPT to hear and determine disputes and appeals in accordance with the Act or any other written law. Determination of allegations of constitutional violations cannot be such issues as to attract the Tribunal’s attention.



120. In addition to the above findings, since the appellant's claim is multifaceted, by his own choice, the most appropriate forum for the determination of his petition was the ELC, which would then interrogate and determine them based on such facts and law as shall be placed before it. The superior courts, therefore, clearly fell into an error by finding that the appellant had not demonstrated that he would not have received efficacious relief if he had followed the dispute resolution process outlined in the *Energy Act*. We say so because though the claims against the 2nd and 3rd respondents are intertwined and arise from the same series of events, it would have been impractical to expect the appellant to appeal the decisions of both NEMA and KPLC before two different tribunals.”
37. Several constitutional issues have been raised regarding how the 1st Respondent is progressing in establishing the first nuclear plant in Kenya. NET or EPT cannot address those issues; the two adjudicative organs cannot address the constitutional concerns raised here. It is the province of the ELC. The answer to the jurisdiction question is that this Court has jurisdiction to determine this petition.
38. For the Petitioners, Ms. Ndeti and Mr. Sang seek prohibitory orders to stop ‘any action’ geared towards establishing the first nuclear power plant in Kenya. In their submissions, they adopted a tangent that depicted nuclear power as dangerous for this country’s power needs, given the highlighted disasters. And that it should be a no-go zone for Kenya. The depicted picture is reminiscent of the Chornobyl disaster in Russia and the Fukushima Daiichi in Japan waiting to happen. Issues were raised around the capacity, capability, and mandate of the 1st Respondent to undertake this activity under Section 58 of the *Energy Act* and whether there is a defined policy framework for a nuclear power plant in Kenya, which is a transparent legal framework guiding the appointed site in locating the plant. They aver that the SESA Report raises three fundamental issues on setting up a Nuclear Power Plant in Kenya – do we as a Country have the necessary knowledge in nuclear power, or are we to lease the Country to another nuclear-oriented Country with the capability that will end up enslaving us? Do we have adequate nuclear research and development, and do we need to build capacity around that area before undertaking the process? Are there necessary measures in place for safety and nuclear waste disposal? Should we apply the cautionary principle and desist from undertaking this venture? Has there been adequate Impact Assessment? What about public awareness and participation? Has a site been identified as Uyombo in Kilifi County? If so, how? Were the people of Kilifi and the Kenyan populace adequately and meaningfully involved? Is the action by the 1st Respondent unreasonable, arbitrary, and unlawful? Is it contrary to sustainable development and public welfare or good? et al. The Respondents answered that these processes are ongoing.
39. The Petitioners’ concerns cannot be dismissed as trivial or apathetic. They must be resolved before we develop our first nuclear facility in Kenya.
40. A clear road map has not been provided regarding when the plant will start and when we expect the first nuclear energy to be on the national grid. The plans are at a nascent stage. It is what the main petition will decide because, as I look at it, granting any orders at this stage will mean stopping all operations undertaken by NuPEA - 1st Respondent. Let’s reserve that energy for the main petition.
41. Having said so, I reckon that the current petition raises substantial constitutional and novel issues around the operationalization of the first nuclear power plant in this Country, its impact on a clean and healthy environment under Article 42 of the *Constitution*, and the participation of the people of Kenya in making that decision. The establishment of the first nuclear plant in Kenya is being tested to



determine whether, as a Country, we have the wherewithal, human capacity, and stamina to sustain the same given the disasters highlighted herein. Nuclear power is, of course, green energy, but is it safe? How do we as a Country compare its safety and investment with other green energy sources like geothermal, solar, or wind? What are the world's trends on nuclear power? Is it sustainable?

42. To my mind, these questions will require that the Honourable the Chief Justice of the Republic of Kenya, under Article 165(4) of the Constitution and Section 21(2) of the ELC Act, appoint an uneven number of ELC judges to address the same.
43. Having said so, the application dated 23rd July 2023 is hereby dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Ndeti and Mr. Sang for the Petitioner

Ms. Cherop H/B for Mosota for 1st Respondent.

Ms. Lutta for the 3rd Respondent.

Happy. Court Assistant

