



**Kimeu & 3285 others v Kenya Pipeline Company & another (Environment & Land Petition 9, 8 & 12 of 2019 (Consolidated)) [2023] KEELC 15945 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15945 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND PETITION 9, 8 & 12 OF 2019 (CONSOLIDATED)  
CA OCHIENG, T W MURIGI & A NYUKURI, JJ  
FEBRUARY 22, 2023**

**BETWEEN**

**MUINDI KIMEU & 3285 OTHERS ..... PETITIONER**

**AND**

**KENYA PIPELINE COMPANY ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. Through a Notice of Motion Application dated the October 15, 2021, the 1<sup>st</sup> Respondent/Applicant moved the court for the following orders:-
  1. Spent.
  2. That pleadings and claims filed by the 2<sup>nd</sup> to the 3,285<sup>th</sup> Petitioner be dismissed with costs.
  3. That in the alternative, some claims filed by the 2<sup>nd</sup> to the 3,285<sup>th</sup> Petitioner be struck out and or dismissed with costs.
  4. That the court does issue necessary directions in the matter
  5. That costs of the Application be provided for.
2. The Application is premised on grounds on the face of it and supported by the Affidavit sworn by one Elizabeth Rop, Senior Legal Officer of the Applicant. She deposes that the 2<sup>nd</sup> to 3,285<sup>th</sup> Petitioners had filed the Petition against the 1<sup>st</sup> Applicant, National Environmental Management Authority (NEMA) seeking various reliefs but that they had not sworn any affidavits in support of their claims as they did not intend to appear. Further, that the Petitioners needed to appear in person to present evidence in respect to prayers e, d, f, g and h of the Petition. She confirms that the Applicant did seek orders of



the court for the Respondents to appear in court on July 21, 2021 but the same was dismissed and the Court directed that the matter would proceed partly by viva voce evidence and partly by affidavit evidence. She contends that the only affidavit sworn by Muindi Kimeu was on record and that some prayers were personal in nature yet the other Petitioners had not sworn any affidavit to support their claims. She opines that proceeding with the claims by the 2<sup>nd</sup>-3285<sup>th</sup> Petitioners would be a waste of time since they would not appear to prove their claims. She claims that not all the Petitioners had signed their authority to plead to the said Muindi Kimeu and that the Affidavit he swore does not state that he did the same on behalf of the other Petitioners. Further, she stated that the other Petitioners had not issued authority to act for the consolidated suit and the affidavit supporting the said consolidated suit does not indicate that he is swearing the same on behalf of the other Petitioners.

3. The 1st Respondent/Petitioner opposed the instant application by filing a replying affidavit where he deposes that there was a list of Petitioners at pages 74 to 121 comprising of 48 pages of people who had brought the claims in their individual capacity independent from him. He explains that all adult Petitioners had filed their authority as Appendix 'A' in pages 1-86, 1-103 and 104-130 in Petition Nos. 8, 9 and 12 respectively. Further, that he had annexed authority to act as next of friend to the minors in the suit vide annexure marked 'B'. He refers the court to annexures 'C' and 'D' which are Letters of Administration Intestate for the deceased Petitioners and Petitioners' individual crop losses. He further made reference to annexure marked 'E' which contained details of Petitioners with livestock losses. He contends that there is a fundamental difference between a claim under common law and a constitutional Petition and that the consolidated Petition is a complete pleading with all the documentation required in support of the Petition as filed. He states that other witnesses who supported the Petition included Simon Waweru Chege, Margaret Waithara Kinyua, Ben Mutuku Mutheu, David Mulili Maingi, Paul Kimathi Kalai, Jared Jasuni, Thomas Musau Kivivo, Stephen Kimondiu and Christine Mueni Muia who have all corroborated his evidence. He avers that he would have expert witnesses testifying on areas that the sampled Petitioners' were tested on. He insists that the issues of competency of the Petition ought to be determined vide a full trial and that the court had pronounced its position on the issue of representation on June 3, 2021 and revisited the same on July 15, 2021 where it directed that the matter would proceed partly by viva voce and partially by affidavit evidence. He points out that the Applicants had filed appeals against the ruling of then court vide Civil Appeal Application Number E355 of 2021 at Nairobi, rendering this court functus officio. He reiterates that this court having made a pronouncement on the number of witnesses as sufficient in support of the Petition cannot on the other hand take away their constitutional right to be heard. He states that as per paragraphs 24 and 27 of their supporting affidavit, the Petition satisfied the form of a Petition as set out under the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules 2013](#).
4. The Application was canvassed by way of written submissions as per the court's directions.

### **Submissions by the Applicant**

5. The Applicant in its submissions reiterated the contents of its supporting affidavit and emphasized that the following claims needed to be proved by the individual Petitioners;
  - a. Allegations of loss of income as per paragraph 78 of the supporting affidavit.
  - b. Evidence of commercial activities undertaken by the Petitioners as per paragraph 81 of the supporting affidavit.
  - c. Evidence of resumption of farming after a period of 3 years as per paragraphs 88 and 91 of the supporting affidavit.



- d. Evidence of losses of livestock as per paragraph 93 of the supporting affidavit.
  - e. Evidence of health injuries as per paragraphs 119 to 131 of the supporting affidavit.
  - f. Claims on loss of expectation of life, special and exemplary damages as stated in paragraphs 132-136 of the supporting affidavit.
  - g. Claim for invalidation of discharge vouchers as per paragraph 169 of the supporting affidavit.
6. The Applicant argued that Article 159(2) of the [Constitution](#) offers no excuse for a litigant who failed to comply with the mandatory requirements hence being incompetent in limine for not having proper parties. Further, it disputed that all the Petitioners signed their authority as only 124 Petitioners had signed out of a total of 3,285 who had claimed both livestock, water and crop losses. It further submitted that only 1,305 Petitioners were examined out of the 3,286 Petitioners. It insisted that the instant application was not res judicata or sub judice since the rulings of the court did not take away their right to file an application to strike out some of the reliefs sought by the Petitioners. As to whether there is a difference between a claim under common law on personal claims and a claim under a constitutional environmental Petition, they contended that one Muinde Kimeu lacked the requisite authority to represent the Petitioners since not all the Petitioners signed the authority. To buttress its averments, it relied on the following decisions: [Lucy Ougo & 3 Others Vs County Government of Nairobi & Another](#) [2021] eKLR; [Virginia Edith Otieno Vs Joash Ochieng Ougo & Another](#) CA No.31 of 1987; [Zachariah Waweru Thumbi Vs Samuell Njoroge](#) CA No.445 of 2003; [Lyod Patrick Wafula Wanyonyi t/a Lyods \(1996\) Molasses Supply Agencies Vs Attronely General](#) (2016) eKLR and [Musikari Kombo Nazi Vs Moses Masika Wetangula](#).

#### **Submissions by the respondents/petitioners**

7. In their submissions, the Petitioners contended that the Petition was brought under the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\), Practice and Procedure Rules 2013](#) and that [Civil Procedure Rules](#) was only applicable where there are identified gaps in the Constitution. They further submitted that the authorities cited by the Applicant were irrelevant and inapplicable. They argued that the Petition was brought under the [Constitution \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) and therefore Order 2 Rule 2 of the [Civil Procedure Rules](#) is not applicable to the present Petition. They challenged the submission by the Applicants that the Petitioner had not obtained Letters of Administration by referring to pages 137-156 of the Petition which contained the said Letters of Administration ad litem. On the issue of striking out the Petition, the 1<sup>st</sup> Petitioner submitted that he was acting on behalf of minors who could not represent themselves and the members of Thange River Basin villages, whose fundamental rights had been infringed upon by the Applicants. They contended that the Petitioners had a non-derogable right to a fair hearing and that striking out of pleadings was a draconian remedy that should be exercised cautiously and sparingly. Further, that there were no rules for striking out parties under the rules in which the Petition was brought, and they cited rule 5(b) which stated that a Petition shall not be defeated by reason of misjoinder and non-joinder of parties and that the court may in every proceeding deal with the matter in dispute. He reiterated that the Petition was brought by the Petitioners in their own capacity and on behalf of others who could not act for themselves as provided for under part 11 4(2) (1) of the [Constitution of Kenya Practice Rules, 2013](#). They insisted that there was no provision from the Constitution requiring the 1<sup>st</sup> Petitioner to file authority. On the issue of supporting affidavits by the other Petitioners, they listed other witnesses who had also written statements and expert witnesses who would testify. They further submitted that it was not mandatory under Rule 11 (1) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) to file



further supporting affidavits. On the issue of cross-examining the Petitioners, the 1<sup>st</sup> Petitioner cited part III of the rules which provided that the court shall summon any witness if it is established that the evidence of the said witness will help the court arrive at a just determination of a matter.

8. Finally, on the court being *functus officio*, they outlined two instances being June 3, 2021 and July 15, 2021 respectively when the court pronounced its determination on the issue of the 2<sup>nd</sup> - 3285<sup>th</sup> Petitioners and restated that the matter would proceed with only Nine (9) witnesses and the expert witnesses. They explained that the 1<sup>st</sup> Respondent being dissatisfied with the afore-mentioned rulings, filed a Notice of Appeal in Civil Application Nairobi E355 of 2021 and this renders this court *functus officio*. To support their arguments, they relied on the following decisions: *Kitty Njiru Vs nature and Styles Fun Day Events & Anor and Rebecca Muriuki T/A Khaari (Proposed Third Party)* [2020] eKLR; and *Francis Angueyah Ominde & Another Vs Vibiga County Executive Members Finance, Economic Planning And 3 others, Controller of Budget and Ten Others (Interested Parties)* [2021] eKLR.

### **Analysis and Determination**

9. We have considered the instant application, the respective affidavits and the rivaling submissions and the following are the issues for determination; Whether the 1<sup>st</sup> Petitioner has locus standi to represent the interest of other Petitioners. Whether the Petition by the 2<sup>nd</sup>-3285<sup>th</sup> Petitioners ought to be struck out for being incompetent; Whether some of the claims by the 2<sup>nd</sup>-3285<sup>th</sup> Petitioners ought to be struck out for being incompetent; and Who should bear the cost of this Application.

### **Whether the 1<sup>st</sup> petitioner has locus standi to represent the interest of other petitioners.**

10. As to whether the 1<sup>st</sup> Petitioner has *locus standi* to institute the instant Petition, we note that it is not disputed that he is an activist and a friend of the 2<sup>nd</sup> to 5<sup>th</sup> Petitioners. It is further not disputed that the 1<sup>st</sup> Petitioner does not own any of the suit lands. The 1<sup>st</sup> Respondent contend that the 1<sup>st</sup> Petitioner does not have *locus standi* to institute the suit herein. Article 22(2) (a) and (b) of the Constitution provides that;

“In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

- a. A person acting on behalf of another person who cannot act in their own name;
- b. A person acting as a member of, or in the interest of, a group or class of persons.”

11. While Article 258 of the Constitution further provides as follows;

“(1) Every person has the right to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention. (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

- a. A person acting on behalf of another person who cannot act in their own name;
- b. A person acting as a member of, or in the interest of, or a group or class of persons;



c. A person acting in the public interest.”

12. From a reading of the above cited Constitutional provisions, they are quite explicit so as to allow a party to institute a Petition on behalf of another person or represent interests of third parties. In relying on the above Constitutional provisions, and the facts as presented, we find that the 1<sup>st</sup> Petitioner indeed has locus standi to depose an affidavit and present evidence on behalf of the other Petitioners.

**Whether the petition by the 2<sup>nd</sup>-3285<sup>th</sup> Petitioners ought to be Struck Out for being incompetent.**

13. The Applicant is seeking the court’s intervention in striking out the claims as filed by the 2<sup>nd</sup>-3285<sup>th</sup> Petitioners. The gist of their grounds for seeking this prayer is that the 2<sup>nd</sup>-3285<sup>th</sup> Petitioners have not sworn affidavits in support of their claim and that they are unlikely to attend court to testify on the same. They also argued that the 1<sup>st</sup> Petitioner lacked authority to petition on behalf of the other Petitioners. The 1<sup>st</sup> Petitioner on his part submitted that the Petition is properly filed with all relevant documentation. This then raises the questions as to what constitutes a proper constitutional petition in terms of documentation and representation.

14. The Applicant had pegged their application on Order 2 Rule 15 of the Civil Procedure Rules which stipulates that;

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that— (a) it discloses no reasonable cause of action or defence in law; (b) it is scandalous, frivolous or vexatious; (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

15. Further, the Applicant in paragraph D of its submissions states that the 1<sup>st</sup> Petitioner was in breach of Order 4 Rule 2 of the Civil Procedure Rules and Order 2 Rule 16 of the Civil Procedure Rules for not obtaining the requisite authority from the other Petitioners. The said Rule provides as follows;

“16. Every pleading shall be signed by an advocate, or recognized agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person.”

16. In this instance, we note that the fulcrum of the Petition herein revolves around the infringement of constitutionally protected rights. It is trite that this Court sitting as a Constitutional one, is expected to deal with real issues and establish if indeed the allegations raised therein are factual and recommend appropriate measures which would stop any further infringement as well as restore a healthy environment to the residents of the subject area, being keen to balance this with the promotion of sustainable development including environmental management activities of the Respondents herein. Further, should the overriding objective not suffice, this court is persuaded by the holding of the court in *Kitty Njiru Vs Nature and Styles Fun Day Events & Anor and Rebecca Muriuki T/A Khaari (Proposed Third Party)* [2020] eKLR (JA Makau J) where the guiding rules for constitutional petitions are indicated as the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (otherwise commonly referred to as “the Mutunga Rules”). Particularly, Rule 5(a) of Mutunga Rules is clear that for the purposes of furthering the overriding objective under Rule 3 of the Mutunga Rules, the Court is required to handle all matters presented before it to achieve just determination of the proceedings and that Rule 3(8) of the Mutunga Rules crowns it all by stating that nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.



17. Notably, the court had already conclusively issued directions on how the matter would progress on 21<sup>st</sup> July, 2021. This being the case, we find that the instant application is an abuse of the court process aimed at directions that are preferable to the Applicant. In the case of Francis Angueyah Ominde & Another Vs Vihiga County Executive Committee Member Finance and Economic Planning & 3 Others; Controller of Budget & 11 Others (Interested Parties) [2021] eKLR, the Learned Judge observed that:

“The court manages the case. It directs how the same is to be handled by the parties, the direction that it has to take. Once directions are given, the parties are bound to follow them, even where they do not agree with them. The parties ought not to decide on their own course of action despite the directions of the court.”

18. In associating ourselves with these decisions, we can only reiterate that the instant Petition will proceed by both viva voce and affidavit evidence where the Petition, including testimonies/exhibits on the claims, by the 2<sup>nd</sup>-3285<sup>th</sup> Petitioners will be proved or disproved.

**Whether some of the claims by the 2<sup>nd</sup>-3285<sup>th</sup> Respondents ought to be Struck Out for being incompetent**

19. The Applicant contested the following particular claims as listed below need to be proved in person;

- a. Allegations of loss of income as per paragraph 78 of the supporting affidavit.
- b. Evidence of commercial activities undertaken by the Petitioners as per paragraph 81 of the supporting affidavit.
- c. Evidence of resumption of farming after a period of 3 years as per paragraphs 88 and 91 of the supporting affidavit.
- d. Evidence of losses of livestock as per paragraph 93 of the supporting affidavit.
- e. Evidence of health injuries as per paragraphs 119 to 131 of the supporting affidavit.
- f. Claims on loss of expectation of life, special and exemplary damages as under paragraphs 132-136 of the supporting affidavit.
- g. Claim for invalidation of discharge vouchers as per paragraph 169 of the supporting affidavit.

20. As part of the court’s main mandate, judicial officers are well guided as to what amounts to ‘sufficiently proving a case’. This being an adversarial system, this court is alive to the fact that both parties have to be granted an opportunity to present their respective claims including available evidence, before the Court makes a proper determination of the dispute before it. It would be premature at this stage for the court to rule that the Petitioners are not likely to prove particular claims sufficiently. It seems the Applicant is of the belief that the Petitioners will be unable to discharge their burden of proof and we respectfully disagree because that is speculative. In *Britestone Pte Ltd Vs Smith & Associates Far East Ltd* [2007] SGCA 47 it was held that;

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.”

21. Consequently, it is our finding that at the end of the proceedings and consideration of all the materials including the evidence presented, the Court will make a proper determination of the Petitioners’ claim.



We opine that the Applicant has nothing to fear as it will be able to present its evidence to controvert the Petitioners' assertions.

**Who should bear the Cost of this Application**

- 22. This application belonging to the genre of public interest litigation, all parties will bear their costs for the application.
- 23. In the foregoing, the court finds the Notice of Motion application dated the 15<sup>th</sup> October, 2021 unmerited and hereby dismisses it.
- 24. We further make an order that the instant Petition shall proceed as per the directions issued by the court on 21<sup>st</sup> July, 2021.

**DATED, SIGNED AND DELIVERED AT MAKUENI THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2023.**

**CHRISTINE OCHIENG**

**JUDGE**

.....

**THERESA MURIGI**

**JUDGE**

.....

**ANNET NYUKURI**

**JUDGE**

