



**Okina v Mele & 2 others (Environment & Land Petition E001 of 2024)
[2024] KEELC 6157 (KLR) (Environment and Land) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6157 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND PETITION E001 OF 2024
EK WABWOTO, J
SEPTEMBER 26, 2024**

BETWEEN

MAURICE OTIENO OKINA PETITIONER

AND

MUNGA KOMBO MELE 1ST RESPONDENT

PATRICK MESO 2ND RESPONDENT

DAMAFECHA COMPANY LIMITED 3RD RESPONDENT

JUDGMENT

1. This judgment is in respect to the Petition dated 1st February 2024 wherein the Petitioner sought the following orders against the Respondents jointly and severally:
 - i. A declaration that as a result of the activities of the Respondents of spray painting of motor vehicles near the Petitioner’s residential home with total disregard to safety measures is in breach of his right to clean and healthy environment which is protected under Article 42 of the *Constitution* .
 - ii. An order of permanent injunction do issue barring the Respondents from continuing with their activities of motor vehicle repairs and painting near the Petitioner’s land.
 - iii. General damages as compensation for the harm occasioned on the Petitioner’s health by the spray painting.
 - iv. Punitive and/or aggravated damages.
 - v. Any other relief this Honorable Court would be pleased to issue.



- vi. Costs of the petition.
2. The Petition was supported by an affidavit sworn by the Petitioner relying inter alia on the following grounds:
 - i. He is the owner of the parcel of land VOI/NDARA "A"/3737 on which he has constructed his residential home.
 - ii. He has lived peacefully in his home and enjoyed clean and healthy environment until recently when the Respondent started their garage business adjacent to his home.
 - iii. He is asthmatic and paint emissions from the garage has caused him severe respiratory complications resulting in being in and out of hospital.
 - iv. He is currently pursuing his PHD at JKUAT and due to the noise emanating from the garage he is unable to concentrate and/or continue with his studies in time due to constant asthma attacks.
 - v. He is apprehensive that the Respondents are determined to continue with their activities owing to the fact that they have ignored his demands.
 3. The Petitioner filed an affidavit of service sworn by Mwazighe Micar dated 19th February 2024 to confirm service of the Petition, hearing notice and supplementary affidavit upon the Respondents.
 4. On 6th April 2024, the Petitioner filed another affidavit of service sworn by Shem Mutunga Mutinda dated 6th April 2024 to confirm service of a mention notice and petitioner's submissions upon the 2nd Respondent.
 5. On 8th April 2024, the Court made the following orders:
 - i. That an order is and hereby issued restraining the Respondents, their servants, agents, workers or any person acting under their instructions, from continuing with the activities of the garage adjacent to the petitioner's residential home pending hearing and determination of this Petition
 - ii. That the Officer Commanding Station Voi Police Station to ensure compliance of this order
 - iii. That the petition be canvassed by way of written submissions.
 - iv. That the petitioner shall file and serve his written submissions within 14 days from today
 - v. That upon service the respondents shall have 21 days to file and serve their written submissions.
 - vi. That the highlighting of submissions shall be on 12th June 2024
 6. The Respondents entered appearance vide a Notice of Appointment of Advocates dated 29th April 2024. The Respondents equally filed a Notice of Motion application of the same date seeking stay of the interlocutory ruling and all other proceedings, setting aside of the orders granted on 17th April 2024 and leave to file their replying affidavit and any other documents in their defense.
 7. On 7th May 2024, the Court considered the Notice of Motion application and dispensed off it in the following terms:
 - i. That the Respondents are hereby granted 21 days leave to file and serve their responses together with written submissions in respect to the main petition
 - ii. That prayer 2 and 3 of the application are declined



- iii. That the matter shall proceed for highlighting of the parties submissions on 12th June 2024 as earlier scheduled.
8. On 12th June 2024, the Respondents Counsel sought an adjournment which was opposed by Petitioner’s Counsel but was granted by the Court as a final adjournment and highlighting of submission set down for 17th July 2024.
9. On 17th July 2024, the matter proceeded with the highlighting of the parties submissions in the absence of Respondents who were aware of the said court proceedings. The Petitioner filed written submissions dated 29th April 2024 and supplementary submissions dated 25th September 2024. The Petitioner relied upon the case of *Adrian Kamotho Njenga v Council of Governors & 3 others* [2020] eKLR and *Martin Osano Rabera & Another v Municipal Council of Nakuru & 2 others*[2018] eKLR to reiterate the importance of the right to clean and healthy environment.
10. It was also submitted that the Petitioner had approached NEMA offices and upon which the Respondents had been served with an improvement notice with clear warnings. In spite of this, the Respondents continued to disregard the directive by NEMA and continued with the impugned activities.
11. The Petitioner further relied upon the precautionary principle as articulated under Principle 15 of the *Rio Declaration* that “where there are warnings of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason of postponing cost-effective measures to prevent environmental degradation”. The Petitioner also cited several cases in support of its cases i.e. *Odando & another (suing on their behalf and as the registered officials of Ufanisi Centre) v NEMA & 2 others*[Constitutional Petition 43 of 2019] [2021] KEELC 2235(KLR) and *NEMA v KM (Minor suing through Mother and Best friend SKS & 17 others* (Civil Appeal E004 of 2020 & E032 of 2021) consolidated[2023] KECA 775 (KLR)
12. The Respondents later with the leave of the court filed a Replying Affidavit sworn by Patrick Meso on the 16th July 2024 and written submissions dated 19th September 2024.
13. It was averred that the 3rd Respondent company was incorporated on 30th May 2017, has a single business permit from the County Government of Taita Taveta and has now been operating in the said premises for a period of over 3 years. It was also averred that the Respondents plot is not close to the Petitioner’s plot neither are they adjacent to each other.
14. It was contended that Asthma has many triggers being an inflammatory condition and that various tests can be undertaken to isolate the allergen. It was also contended that the Petitioner has not proven through tests which of the allergens was isolated and how it was shown to have been from the paint stocked in the garage. It was further contended that the Petitioner has not explained how often he was exposed to the paint and what was the point of interaction.
15. The Respondents in their submissions reiterated the contents of the Respondents Replying Affidavit and urged the court to dismiss the petition with costs. The cases of *Kenya Paper Mills Ltd v Anthony Kimani Mbugua* [2019] eKLR, The *Republic v Kisanga & Others* [2006] 1 KLR [E&L] 137 among others were cited in support of their case.

Analysis and Determination

16. The Court has considered the entire petition, the rival affidavits with the written submissions filed by the parties. The Court is of the view that the salient issues for determination herein are as follows:



- i. Whether the Petitioner has discharged the burden of proof that his right to a clean and healthy environment has been violated.
 - ii. If so what the appropriate reliefs that ought to be granted.
17. The Petition has been hinged on Articles 42, 69 and 70 of the Constitution .
Article 42 stipulates that:

“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.”
18. Article 69 goes on to place obligatory performance on the State to ensure environmental rights and freedoms are respected, management and protected for the benefit of all Kenyans. Additionally, Article 70 gives power of enforcement to aggrieved parties and Courts the mandate to effect discretionary measures in upholding the rule of law in environmental related cases.
19. In the exercise of the Court’s discretionary powers, the Court must be cognizant that mere declaration of rights infringement cannot stand without proper evidence.
20. 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.”
21. In the instant petition, the Petitioner adduced evidence confirming that the Respondents operate a garage where spray painting and noise have adversely affected him. The court was also furnished with Exhibit M00-8, being the Environmental Inspectors Integrated Tool (EIIT) by National Environment Management Authority (NEMA) which confirmed that NEMA Environmental Inspectors had visited the premises and issued a warning against the Respondents activities.
22. The Petitioner also adduced evidence detailing his bouts of illness occasioned by asthmatic attacks due to the Respondents impugned activities which was further corroborated by the letter dated 31st January 2024 by David Musya, the Director at Voi Medical Centre [Exhibit MOO-3]
23. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.



24. The court has carefully perused and considered the Respondents' Replying Affidavit and written submissions and it is evident that the Respondents did not dispute the existence of their impugned activities described by the Petitioner and further they did not adduce any evidence controverting this position. The court also notes that the Respondents contested the proximity and nexus of the Petitioner's property to their property when they argued that the same is not close nor adjacent to their property. However, considering that the Petitioner has moved this Court by way of a constitutional petition alleging a violation of his right to a clean and healthy environment, it is the position of this Court that the said argument has no basis pursuant to the provisions of Article 70 of the Constitution which stipulates that any person who alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
25. In view of the foregoing, the Court arrives at the conclusion that the Respondents did operate a garage within the given premises and further the activities undertaken therein adversely affected the Petitioner thus violating his right to a clean and health environment. The mere fact that the premises were licensed by the County Government does not in itself constitute a defence to violations of any of the Petitioner's rights. The Petitioner has been able to prove the infringement of this right and he is in order to seek refuge from this Court. This court is equally bound to uphold and protect the said right.
26. In respect to the reliefs sought by the Petitioner, Article 23 (3) of the Constitution sets out the reliefs the court may grant to include a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order of compensation; and an order of judicial review. This court is equally mandated by Section 3 of EMCA to make orders, issue such writs or give directions it may deem appropriate to prevent, stop or discontinue any violations to the right to a clean and healthy environment.
27. As concerns general damages, the law is that the same are discretionary. In Meru ELC Petition No E004 of 2021, the court held citing with approval Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, that the same must be a reminder to the respondents that constitutional edicts are not mere words but have implications. The Petitioner submitted and urged this court to grant a sum of Kshs 2,000,000 as an all-inclusive amount for damages and compensation. Therefore, based on comparative jurisprudence of Gitobu Imanyara & 2 others v AG (*supra*), Mohamed Feisal & 19 others v Henry Kandie Chief Inspector of Police, OCS Ongata Rongai & 2 others (2018) eKLR, Edward Akongo Oyugi & 2 others v AG (2019) eKLR, Kooba Kenya Ltd v County Government of Mombasa (2022) eKLR and Meru Petition No E004 of 2021 Evangeline Gikono v Joyce Nkuene & 4 others, Wanyeki v Kenya Urban Roads Authority & 2 Others; National Environment Management Authority & Another (Interested Parties) (Environment & Land Petition E299 of 2022) [2023] KEELC 17879 (KLR) (25 May 2023) (Judgment), Odando & another [*supra*] and NEMA v KM case [*supra*] this court proceeds to award the sum of Ksh 150,000/- as adequate compensation to the Petitioner.
28. On the issue of costs, its trite law that the court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice. Having regard to all the relevant circumstances of this petition and considering that the Petitioner is the successful party, this court awards him costs which shall be paid by the Respondents.



Final Orders

29. In the end, the following reliefs are hereby issued in respect to the petition dated 1st February 2024:

- i. A declaration is hereby issued that the Respondents' spray painting of motor vehicle activities being undertaken on parcel of land known as Voi/Ndara A/3024 in total regard to the safety protection measures amount to a violation and breach of the Petitioner's right to clean and healthy environment.
- ii. A permanent injunction is hereby issued against the Respondents barring them from continuing with their activities of motor vehicle repairs and spray painting at the said property.
- iii. General damages of Kshs 150,000 is awarded to the Petitioner.
- iv. The Petitioner is also awarded costs of the Petition capped at Kshs 50,000/- to be paid by the Respondents.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY AT VOI THIS 26TH DAY OF SEPTEMBER 2024

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mwazighe for the Petitioner.

Ms. Atieno h/b for Ms. Dinah Katema for the Respondents.

Court Assistant; Mary Ngoira and Norah Chao.

