



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.405 OF 2017

JANE WAGATHUITU GITHINJI.....1ST PLAINTIFF

ISAAC KAMAU KABIRA2ND PLAINTIFF

JACKSON GICHUKI KABIRA.....3RD PLAINTIFF

VERSUS

SOJANMI SPRINGFIELDS LIMITED.....1ST DEFENDANT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY2ND DEFENDANT

COUNTY GOVERNMENT OF NAKURU.....3RD DEFENDANT

RULING

1. The court on 19th June 2019 delivered a judgment in favour of the plaintiffs. The judgment required both the 1st and 2nd defendants to undertake various post judgment activities to ensure the judgment was implemented. The plaintiff vide a Notice of Motion application dated 23rd July 2019 sought to have the 1st and 2nd defendants held to be in contempt for breaching the terms of the judgment while the 1st defendant by its Notice of Motion application dated 7th October 2019 sought stay of execution of the judgment and decree pending the hearing and determination of an appeal it had lodged before the court of appeal.

2. The court vide a ruling delivered on 4th November 2020 noted that the various applications brought by the plaintiffs and the 1st defendant had somewhat been dealt with by Honorable Justice Ohungo and of concern was whether or not and/or to what extent the terms of the judgment had been complied with. The court in the ruling of 4th November 2020 observed thus:-

10. The Court is of the view that while the plaintiffs application for contempt dated 23rd July 2019 may have been opportune in highlighting the challenges that were being experienced in implementing the terms of the judgment, the court is of the considered opinion that perhaps an audit of the measures taken by all the parties to implement orders 1 to 9 which related to restoration and compliance with environmental dictates would have enabled the court and the parties to identify any gaps in the implementation of the judgment and the measures that may be necessary to fill those gaps. The judgment specifically placed upon the 1st and 2nd defendants participatory obligations in the implementation of the judgment which did not require a one-off action but rather continuous actions.

11. Acknowledging that the nature of the judgment to the extent that it placed on the parties obligations that had to be performed and executed post judgment, the Court equally had a residue role without being rendered *functus officio* to exercise post judgment implementation oversight to ensure the judgment was not merely of academic interest but served to enhance environmental conservation and protection. In the premises I issue the following directions which are aimed at obtaining an audit report on the implementation of the judgment:-

1. The Director General – NEMA is hereby directed to undertake an assessment and audit of the activities of the 1st defendant on its farm in relation to the plaintiffs parcel of land in the context of the judgment delivered on 19th June, 2019 with a view of ascertaining whether the specific orders 1 to 9 have been complied with.

2. The Director General NEMA is directed to prepare a report highlighting the specific actions undertaken by NEMA and the 1st Defendant to comply and implement the judgment.

3. The report by the Director General (NEMA) to identify any specific areas, if any, where there has been no compliance and recommend what actions need to be taken and by who to achieve compliance.

4. The report to be prepared and filed in Court within the next sixty (60) days from today.

5. The Director General and/or a duly authorised officer (other than counsel) to attend Court on 25th January 2021 when the matter will be heard to present the report and to respond to any issues that the Court and parties may raise on the report.

3. Arising from the directions given by the court, NEMA the 2nd defendant filed its report dated 6th January 2021 and a supplementary report dated 4th October 2021. Mr. Jaoko advocate for the plaintiffs took the position that the report filed by NEMA dated 6th January 2021 did not respond sufficiently to the directions of the court issued on 4th November 2020. The court directed the parties to make written comments on the report. NEMA on 26th July 2021 sought and were granted leave to file a supplementary report, which ostensibly was to be an updated report taking account of all the measures that had been undertaken towards the implementation of the judgment. The plaintiffs and the 1st defendant who essentially are the main protagonists in this matter have filed their submissions/comments regarding the two reports filed by the 2nd defendant, NEMA. The County Government Nakuru, the 3rd defendant equally filed a report dated 10th February 2020 as they were required to do under the judgment.

4. The court has reviewed the reports dated 6th January 2021 and 4th October 2021 by NEMA and the submissions and affidavit filed on behalf of the plaintiffs, the submissions and/or comments by the 1st Defendant respecting the reports by NEMA, and the report filed by the County Government dated 10th February 2020 and observes as follows: -

(a) That the judgment by Munyao, J delivered on 19th June 2019 indicted both the 1st defendant and the 2nd defendant and specifically found that each one of them was guilty of acts of omission and commission which resulted in the degradation of the environment that adversely affected the plaintiffs and the community. As a consequence, the judge issued specific orders that required the 1st and 2nd defendants to each undertake certain specific acts to ensure the degradation of the Environment was restored and conserved and where appropriate timeframes for the carrying out of the various tasks were provided.

(b) The implementation of the judgment required that both the 1st defendant and the 2nd defendant collaborate and the 2nd Defendant as the lead Agency in matters relating to the conservation and protection of the environment was expected to play a key role in the implementation of the judgment.

(c) The court recognizing that the 2nd defendant was to be instrumental in having the judgment implemented, sought to have a status report on the implementation of the judgment prepared by the 2nd defendant to ascertain the level of compliance and implementation of the judgment in view of the concerns raised and highlighted by the plaintiffs.

(d) That the orders in the judgment that required specific actions to be undertaken and which were not subject to the order of stay issued by the court and subsequently the court of appeal were orders 1-9 in the judgment which related to the restoration and conservation of the environment.

5. NEMA vide the status report dated 4th October 2021 acknowledges the report dated 6th January 2021 was deficient and with the leave of the court to file a supplementary report NEMA constituted a Multi-Agency Technical Teams Comprising officers from NEMA, Water Resources Authority, National Construction Authority, and County Government of Nakuru and jointly undertook inspection of Sojanmi Springfields Ltd in Njoro on 24th August 2021 to establish the current status. This resulted in the report dated 4th October 2021. The report has given summarized actions taken by NEMA in regard to each of the specific court orders and the current status in regard to the implementation thereof.

1. Quality of water discharged as effluent within the 1st defendant's farm.

NEMA indicated after carrying out Effluent Analysis it was found that discharge from the chemical deactivation soak pits did not meet the discharge standards. Accordingly, NEMA deferred the issuance of Effluent Discharge Licence (EDL) to the 1st defendant for 2020 and 2021 due to the effluent discharge being above the allowable limits. A water Resource Authority (WRA) Water quality analysis report was awaited.

2. Quality, capacity and effectiveness of soak pits used by the 1st defendant.

As in (1) above NEMA observed that the Effluent Analysis Results indicated that the effluent from the chemical deactivation soak pits had chromium above the discharge standards. Consequently, NEMA requested Water Resource Authority and the Pest Control Products Board (PCPB) to do annual inspection to investigate source, magnitude and environmental and social impacts and risks of the chromium in the discharge to inform the appropriate mitigation and remedial actions.

3. EIA for the construction of main dam within 60 days from date of judgment failure to which dam be decommissioned.

The report indicated the 1st defendant submitted Terms of Reference for undertaking an EIA on 2nd August 2019 only 15 days to the expiry of the 60 days' time frame given by the court. NEMA could not process the TOR and as a consequence issued a Restoration Order dated 9th September 2019 for the 1st defendant to stop using the Main Dam and to decommission the same within 14 days.

On the current status NEMA indicated the dam was still in use and no decommissioning plan had been submitted and neither had an EIA licence been issued for the dam. NEMA further stated it instituted criminal proceedings against the defendant's manager for failure to comply with a lawful order. The Criminal case was still pending.

4. NEMA barred from issuing an EIA licence for the construction of the second dam before a full EIA study Report is undertaken.

The report indicated the second dam had been under construction as the case was proceedings and an EIA licence No. 0044469 dated 18th April 2018 had been issued on the basis of a project report. After the judgment NEMA issued the 1st defendant an improvement order on 10th July 2019 directing stoppage of construction of the dam and for the 1st defendant to undertake a fresh EIA study report. On 9th August 2019 NEMA cancelled the EIA license No.0044469 for construction of the second (central) dam and ordered the 1st defendant to stop any further construction of the dam and to restore the site to its original state and undertake a fresh EIA study.

On the current status NEMA reported the second dam (Central dam) was currently in use and no fresh EIA study had been submitted to the Authority. The 1st defendant appealed the NEMA order cancelling its EIA License to the National Environmental Tribunal but later withdrew the appeal. NEMA has instituted criminal proceedings against the 1st defendant for failure to comply with a lawful order.

5. NEMA engages other relevant state Agencies institutions to undertake a dam integrity test and provide the requisite guidance depending on the results of such assessment.

NEMA indicated it held a meeting with the relevant agencies on 11th July 2019 to evaluate the judgment and assign roles and responsibilities regarding the implementation of the same. NEMA wrote to WRA on 24th July 2019 to undertake dam integrity test. The 1st defendant submitted a dam integrity test by their Engineer to WRA on 27th September 2019 for technical review and advise

to NEMA.

On the current status WRM vide a letter dated 6th September 2021 forwarded a report on the technical review of the water quality and it was their finding that the water quality discharged from the 1st defendant's farm was contaminated and was not safe to be discharged to the environment. The report indicated the embankments and structures of the main pan and the central dam were safe at the time of inspection.

6. NEMA to investigate whether the 1st defendant applied for an EIA licence to expand its operations by a further 18 greenhouses, and if found no EIA was conducted direct one to be conducted forthwith and no later than 60 days of date of judgment, and if none is conducted have the additional greenhouses decommissioned.

NEMA upon inspection on 8th July 2019 affirmed that out of 45 green houses in the 1st defendants farm only 27 had been licensed. On 25th July 2019 NEMA issued a Restoration Order requiring the 1st defendant to undertake an EIA for the additional 18 greenhouses.

After the 1st defendant failed to comply with the Restoration Order aforesaid NEMA vide a letter dated 9th September 2019, directed the 1st defendant to decommission the 18 greenhouses and to submit a report to NEMA within 7 days of the date of the order.

On the current status the NEMA report confirmed the 18 unlicensed greenhouses were still in use. An EIA project report for the 18 greenhouses submitted to NEMA on 18th September 2019 was not evaluated as it was furnished outside the period of 60 days ordered by the court.

As the 1st defendant continued operation of the unlicensed 18 greenhouses in defiance of the court order and NEMA'S environmental restoration orders (ERO's) NEMA has instituted criminal proceedings against the 1st defendant.

7. 1st Defendant to ensure full compliance with all the Restoration orders issued by NEMA prior to the suit and any further orders it may issue.

NEMA issued a restoration order on 25th July 2019 for the 1st defendant to undertake an EIA for the additional 18 greenhouses; on 9th August 2019 NEMA cancelled the EIA license No.0044469 for construction of the second (Central) dam and ordered stoppage of further construction of dam and restoration of the site to its original state; and further on 9th September, 2019 NEMA ordered the 1st defendant to stop usage of the main (central) dam and to decommission the same within 14 days.

On the current status NEMA report indicated the 1st defendant did not comply with any of the Environmental Restoration Orders (ERO's) which precipitated in the institution of Criminal proceedings against the 1st defendant and the case are ongoing.

8. NEMA in consultation with all relevant agencies institutions, directed to undertake a study on the changed topography and hydrology of the Mwihoti area, and directed mitigation measure and a master plan on how to manage the same to avoid loss to the population of the locality.

NEMA stated a meeting was held with all stakeholders on 11th July 2019 to discuss the judgment and its implementation.

On the status NEMA stated that in August 2020 the government established a taskforce for the resettlement of communities in Eastern Mau Forest where the 1st defendant's farm is located. The government task force was mandated to examine ways and means of conserving and restoring Mau Forest Complex as a critical water catchment ecosystem. The taskforce has prepared a resettlement action plan to rehabilitate, conserve and protect the environmentally sensitive areas within the Mau catchment area (report annexed as XVII).

6. The foregoing is a brief review of the report on the implementation of the judgment filed by NEMA pursuant to the directions issued by the court on 4th November 2020. Although NEMA was the 2nd defendant in the suit, the court acknowledged that its role in the implementation of the judgment was pivotal and it's no wonder, the orders 1-9 as per the judgment fell to be implemented

under its superintendence. It is on that account the court vide its directions issued on 4th November, 2020 sought that NEMA advises it on the current state of implementation and compliance with the judgment.

7. The plaintiffs and the 1st defendant made submissions/comments on the report submitted by NEMA. The plaintiffs submitted that NEMA did not comply with directions 1, 3 and 4 issued by the court on 4th November 2020. The plaintiffs further submitted the 1st defendant had disobeyed all the court orders issued in the judgment of 19th June 2019 and in particular continued illegally with its operations which were not licensed in total disregard of the court orders issued in the judgment as well as the Restoration orders issued by NEMA to the detriment of the environment, the community and the plaintiffs. The plaintiffs argued that the unlawful acts of the 1st defendant are a threat to the environment and the community including the plaintiffs and are likely to cause harm.

8. According to the plaintiffs, NEMA was required to visit the plaintiffs farms while undertaking their assessment/audit to confirm compliance by the 1st defendant with the orders 1 – 9 as per the judgment. The multi-Agency Technical Team constituted by NEMA only inspected the 1st defendant's farm on 24th August 2021 and not visit any other farms. The plaintiffs further submitted that the report made by NEMA merely highlighted actions taken with the intention of hoodwinking the court that NEMA was intent in implementing the judgment.

9. The plaintiffs observed that even though the NEMA report noted the discharge from the chemical de-activation soak pits of the 1st defendant did meet the discharge standards it only deferred issuance of the Effluent Discharge Licence to the farm for 2020 and 2021 and took no further action. The 1st defendant yet continued its operations notwithstanding the discharge of contaminated and harmful chemical effluent to the environment. The plaintiffs argued NEMA failed to ensure there was compliance with order No.1 in the judgment that required NEMA to ensure the water quality discharged from the 1st defendant's farm was not contaminated and was safe to be discharged to the environment.

10. The plaintiff further submitted that despite the 1st defendant being required to obtain an EIA licence for the dam they had in use and for the construction of the second dam (central dam) they did not do so and still continued to operate the dams. The court had ordered the EIA for the dams to be obtained within 60 days failing which the dams was to be decommissioned. The plaintiffs argued it was not sufficient to merely prefer criminal charges against the farm manager while letting the 1st defendant to continue with illegal operations.

11. The plaintiffs further submitted the 1st defendant failed to obtain EIA licences for the additional 18 greenhouses and continued to operate unlicensed 18 greenhouses contrary to the court order and to the Restoration Order issued by NEMA to have their operations discontinued.

12. The 1st defendant in its submissions contended the tests respecting the water quality discharged as per WRA could be faulty depending at what in the water system the tests were carried out. They argued tests of the water at the inlet stage may have higher chemical content than at the outlet stage. The 1st defendant submitted NEMA's report dated 4th October 2021 erroneously indicted the chromium levels in the water were high when all were less than 0.004ppm when the level considered high was 0.10ppm. The 1st defendant submitted further that the EIA licence that was cancelled was for the Central dam and that they did not continue with the construction since the judgment and the order from NEMA. The 1st defendant contended that it had never initiated any actions that would constitute breach of the orders of court. They argued water may have collected in the dam during the rains and that may have led NEMA and the multi-agency technical team to come to the the conclusion that dam was in use.

13. The 1st defendant regarding the EIA study ordered by the court for the dam following cancellation of the EIA license submitted that it had submitted to NEMA terms of reference and approval had been given to conduct the EIA which actions by the plaintiffs hindered leading to the filing of the appeal at the NET Tribunal which however was settled by consent dated 18th June 2020. The 1st defendant stated no licence was issued for the construction of a second dam and that no construction was ongoing. In regard to the integrity test for the dam, the 1st defendant submitted the report confirmed that the dams were not structurally defective and did not pose any threat or danger to the environment.

14. As regards the additional 18 greenhouses the 1st defendant submitted NEMA had approved an EIA project report to be prepared and the 1st defendant also made a response to the orders by NEMA. The 1st defendant reiterated that following settlement of the Appeal before the Tribunal by consent the stay remains in force until the appeal was determined. The 1st defendant maintained all the restoration orders were being complied with notwithstanding there were stay orders in existence.

15. The court having carefully studied the status report filed by NEMA and the annexures thereto, and the submissions and annexures filed by the plaintiffs and the 1st defendant makes determination as set out hereunder: -

16. That although the 1st defendant appealed against the judgment delivered by Munyao, J on 19th June, 2019 and filed an application for stay of execution of the judgment before the court of appeal, stay of execution was only granted in regard to orders 11 and 12 of the judgment. The court of appeal while rendering its ruling on the application for stay of execution on 7th May 2021 noted that:-

“The rest of the orders were aimed at commencing and furthering the process of restoration of the environment and such related factors”

17. In particular Orders 1 to 9 which NEMA was directed to prepare a status report on were not stayed and were clearly intended to have environmental matters which the court found to have been breached remedied, restored and conserved.

18. On the basis of the NEMA status report dated 4th October 2021 and having regard to the submissions of counsel for the plaintiffs and the 1st defendant, I am satisfied that the water quality discharged from the 1st defendant's farm is contaminated and does not meet the discharge standards allowable and on that account the 1st defendant has not been issued by NEMA the appropriate Effluent Discharge Licenses (EDL) for 2020 and 2021. To that extent orders 1 and 2 of the judgment have not been satisfactorily complied with.

19. The 1st defendant has not demonstrated that it complied with Order No.4 of the judgment that required it to undertake a fresh EIA study within 60 days to enable it continue with operations of the dam that had apparently been given an EIA license to operate but which the court held to have been irregularly and unlawfully issued prompting the court to revoke the same. The reference to this dam as is clear in the judgment was the dam that burst its banks in 2014 (*pages 84 to 94 of the judgment*). NEMA in its status report of 4th October 2021 referred to this dam as the “main dam” of the 1st defendant and it was in respect of the same that the 1st defendant furnished Terms of Reference (TOR) on 2nd August 2019 for undertaking an EIA study which NEMA declined to process as it was submitted late – only 15 days before the expiry of the time frame given by the court in the judgment. The 1st defendant continued using the main dam notwithstanding no fresh EIA had been undertaken and despite being issued a Restoration Order by NEMA on 9th September 2019. At the time of inspection on 24th August 2021 by the Multi-Agency Technical Team constituted by NEMA, the 1st defendant was still using the dam. Although the 1st defendant in their submissions denied they were using the dam, I am not, in the face of the report prepared by persons who were physically on the ground during the inspection, able to accept that submission. I thus find and hold the 1st defendant had failed to comply with Order No.4 of the judgment.

20. Order No.5 of the judgment barred NEMA from issuing the 1st defendant an EIA licence for the construction of a second dam referred to in NEMA status report as the central dam before a full EIA study was carried out in accordance with the law. The EIA license that had been issued on the basis of the project report was revoked by NEMA and the 1st defendant was directed to undertake a fresh EIA study as ordered by the court. The 1st defendant did not comply and NEMA issued a restoration order stopping any further construction of the dam and restoration of the site. At time of inspection in August 2021, the Technical team found the Dam to be in operation notwithstanding no fresh EIA study was submitted to NEMA. There was thus no compliance with this order of the judgment by the 1st defendant.

21. There has been a measure of compliance with regard to Order 6 in the judgment that required integrity tests on the dam to be undertaken by NEMA in consultation with the various agencies/institutions and I find no fault on any party as relates to the compliance with this specific order.

22. As regards order No.7 of the judgment that required NEMA to investigate whether the 1st defendant had applied for an EIA licence to expand its operation by a further 13 greenhouses and if not to have same conducted within 60 days and/or have the additional greenhouses decommissioned, NEMA in its status affirmed that there were in fact 18 additional greenhouses that were in use and the same were not licensed. The 1st defendant did not comply with restoration order to decommission the 18 additional green houses and there was an ongoing criminal case. It is thus quite evident the 1st defendant did not comply with this order of the judgment and Order 8 that required that the 1st defendant complies fully with any orders issued by NEMA.

23. The court in rendering the judgment that it did on 19th June 2019 had appreciated that the matter involved and raised environment issues that required to be addressed with some degree of urgency. That explains the timelines that the court gave in its

order for the carrying out the various activities/actions aimed at remedying the breaches that may have occurred and at the same time restoring and conserving the environment. 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 legislature and other measures particularly, those contemplated in Article 69;

24. Article 69 (2) of the constitution places a duty on every person to play a role in the protection and conservation of the environment it provides thus: -

69 (2) Every person has a duty to co-operate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

25. Whereas NEMA has taken some actions toward having the judgment complied with by the 1st defendant, it does appear the 1st defendant has somewhat bluffed the interventions, and NEMA has in turn invoked its powers under EMCA to initiate criminal proceedings. As per the record the criminal process was initiated in 2019 and as at the time the inspection was carried out in August 2021 these proceedings had not been concluded. If as was alleged there was a threat to the environment being degraded irreversibly where does that leave the environment" Would the conclusion of the criminal proceedings remedy any breaches occasioned to the environment". It definitely cannot, and there must therefore be proactive measures taken to protect and conserve the environment.

26. There is a valid judgment notwithstanding an appeal was lodged. The court of appeal did not stay the restoration of the environment as ordered by the court, and neither can the existence of the appeal be a license for a party not to comply with the law. It cannot be right or proper for the 1st defendant to discharge contaminated water from its farm downstream onto the plaintiffs farm and the wider members of the public who may access this water further afield. Though according to NEMA the Effluent Analysis showed there was contamination, this was disputed by the 1st defendant with some justification and this requires further verification. The court directs NEMA in liaison with WRA and in consultation with the 1st defendant to have fresh samples taken both from the inlet and outlet sites and an analysis and report filed in court within 60 days of the date of this ruling.

27. The 1st defendant did not undertake an EIA study for the main dam as ordered by the court and as per the Restoration Order issued by NEMA. The court directs that this main dam be decommissioned within the next 30 days from the date hereof under the supervision of NEMA Inspectors.

28. The 1st defendant equally did not undertake an EIA study in respect of the second (central dam) dam as ordered by the court and as per the restoration Order issued by NEMA. The court directs that the second (central) dam be decommissioned within the next 30 days from the date hereof under the supervision of NEMA Inspectors.

29. The 1st defendant further did not undertake an EIA study report for the 18 additional greenhouses which are therefore not licensed by NEMA. The court directs that, these greenhouses be decommissioned within 30 days from the date hereof under the supervision of NEMA Inspectors.

30. The costs for the decommissioning of the two dams and the 18 greenhouses shall be borne by the 1st defendant. The OCS Njoro police station shall if required to do so by NEMA provide security to facilitate implementation of the court orders issued hereof.

31. NEMA will cause a report on the decommissioning of the two dams and the green houses to be prepared and filed in court within 45 days of the date hereof.

32. Matter to be mentioned on 6th April 2022 to confirm compliance and /or further directions orders.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 27TH DAY OF JANUARY 2022.

J M MUTUNGI

JUDGE



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