



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 336 OF 2015**

**BETWEEN**

**MASAI MARA (SOPA) LIMITED .....PETITIONER**

**AND**

**NAROK COUNTY GOVERNMENT .....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner, a limited liability company, operates various tourist facilities within East Africa. It also owns and operates the Masai Mara Sopa Lodge (“the Lodge”) situate within the administrative boundaries of the Respondent county. The Respondent also hosts the Masai Mara Game Reserve (“the Park”). The Petitioner states, and it is not denied, that the Lodge is situate on the boundaries but not within the Park.
2. Challenged by the Petitioner in this Petition is the Gazette Notice No. 16729 of 2010 of 24<sup>th</sup> December 2010 (“the impugned Gazette Notice”) through which the Respondent’s predecessor the County Council of Narok had reviewed the entry fees to the Game Reserve. The Petitioner alleges violation of Articles 40 and 47 of the Constitution by way of challenge to the impugned Gazette Notice and the resultant public notices. The Petitioner also alleges breaches of the principles of legitimate expectation and proportionality.
3. The Respondent is one of the 47 devolved County Governments within the Republic of Kenya. It has contested the Petition.

***Factual Background***

4. The events and facts leading to the Petition may be retrieved from the affidavit sworn in support of the Petition by Kennedy Ayoti on 11<sup>th</sup> August 2015.
5. I may rehash the events briefly as follows.
6. In 1986 the Petitioner opened the Lodge. It was situated just outside the boundaries of the Park. The Lodge is frequented by both local and foreign tourists. Some stay over-night, others pass through. Most of the tourists seek to visit the Park and to do so they have had to pay park entry fees. The park fees were regulated by the Respondent’s predecessor the Narok County Council. The Respondent now regulates it. The Respondent also collects the revenue. Previously a singular payment would entitle a tourist to multiple entries in a day.
7. On 24<sup>th</sup> December 2010 the Respondent ( which for purposes of this ruling includes its

- predecessor the Narok County Council) gazetted the new entry fees to the park. The Gazette Notice being No. 16729 of 2010, pointed different rates for adults and children. Different rates were also provided for East African residents and non-residents as well as for East African citizens. Additionally, there were new rates for motor vehicles, trucks, camping, special campsites and balloon service. The gazette notice also did away with the re-entry or multiple entries in a day upon the payment of the single park fees. Visitors residing within the park were now to pay a different park fees from those like the Petitioner's patrons residing outside the park in the sense that the outsiders were subjected to multiple payments in a day.
8. On 7<sup>th</sup> January 2011, the Respondent notified the public that the new park fees pursuant to the impugned Gazette Notice would become effective and operational on 1<sup>st</sup> March 2011.
  9. The new park fees became operational and by 2013 the Respondent was enforcing the same. Parties obliged. Tourists paid. Some players in the tourism industry were however not happy. One, Mada Holdings Ltd, complained then rushed to court. It obtained orders in its favour restraining the Respondent from enforcing the new park entry fees against it and its patrons or residents on tour.
  10. The Petitioner held on but saw its business dwindle. It then also moved the court in 2015 as it was now threatened with the decision to close its own business due to the alleged effect of the new fees.

### ***The Petitioner's case***

11. The Petitioner's case as may be gathered from both the Petition and the Supporting Affidavit is that the new park entry fees effected vide the impugned Gazette Notice are discriminatory and contrary to Article 27 of the Constitution. The Petitioner states that as the visitors from lodges or tourists outside the park including the Lodge were paying more than those who were resident within the Park by way of daily multiple fees there was discrimination. This led to an unfair advantage to those who operated lodges within the park with the result too that there was unfair competition as between those who operated lodges outside the park and those who did so within the park.
12. The Petitioner further contends that the new park entry fees were promulgated in complete breach of the provisions of Article 47 of the Constitution. In this regard, the Petitioner states that no consultations took place with any stakeholder prior to the introduction of the single entry rule. In these regard as well, the Petitioner states that in so far as the park entry fees are different for those resident within the park and those outside the park, the decision to impose such fees was not only discriminating but also unreasonable.
13. Thirdly, it was also the Petitioner's case that the new park fees have infringed on the Petitioner's right to own and acquire property contrary to the provisions of Article 40 of the Constitution. In this regard, the Petitioner pointed out that its bed-occupancy plummeted from 60% before the introduction of the new park fees to a current average of 19%. The Petitioner also stated that its gross revenue nose-dived between 2011 and 2014.
14. Additionally, the Petitioner contended that the new park fees went against the Petitioner's legitimate expectations. In this regard, the Petitioner pointed out that since 2003 they had operated only a single entry payment and further that the Petitioner had legitimately expected not only that such arrangement would continue but further that the Respondent would act in public interest to promote tourism. The Petitioner added that the new park fees were not proportionate as they led to a loss of revenue through reduction of the number of tourists.
15. Finally, the Petitioner contended that the Respondent had contravened Article 232 of the Constitution which dictated that the public service and servants adopt the value and principle of responsive, prompt, effective and impartial and equitable provision of services.
16. For all its case, the Petitioner sought declaratory orders that the impugned Gazette Notice contravened Articles 27, 40, 47 as well as 232 of the Constitution. The Petitioner also sought mandatory orders to quash the Gazette notice. The Petitioner asked for prohibitory orders to restrain the Respondent from enforcing the new park entry fees introduced through the impugned gazette notice.

### ***The Respondent's case***

17. The Respondent's case may be discerned from the Replying Affidavit of Lenku Kanar Seki, the Respondent's County Secretary.
18. The Respondent contends that the Petitioner is guilty of an inexplicable delay in commencing action. The impugned Gazette Notice became effective in January 2011 but the Petitioner did not file action until nearly four years later.
19. The Respondent also states that the new park entry fees were duly approved by the then Cabinet Secretary and were applicable to all entrants to the park and not limited to the Respondent and consequently there can be no issue of discrimination.
20. The Respondent further asserts that the Petitioner has not adduced any evidence that the Petitioner's Constitutional rights and freedom as guaranteed under Articles 27, 40 and 47 have been violated, while also contending that the park fees were approved pursuant to the law and there was no requirement to consult with the Petitioner or any other person.

### **Arguments in court**

21. The parties respective cases were urged via the medium of written submissions highlighted before me by Ms. Irene Kashindi for the Petitioner and Ms. Melissa Ngania for the Respondent.
22. The factual aspects of the dispute were largely not in controversy.

### *Petitioner's submissions*

23. Making reference to the written submissions filed on behalf of the Petitioner on 13<sup>th</sup> October 2015 and 23<sup>rd</sup> November 2015, Ms. Kashindi submitted that there was evident discrimination introduced by the Respondent through the application of the new park entry fees. The Petitioner contended that effectively there were different rates applicable to lodgers within the Park and those outside the park. Counsel also stated that there existed discrimination in so far as other residents inside the Park paid once and were able to visit the park multiple times while others had to pay several times or each time they set foot out of the Park. The new park entry fees and the impugned Gazette notice demonstrated no equality at all and this was contrary to Article 27 of the Constitution, so submitted counsel.
24. Counsel then submitted that the lack of equality had led to reduced income or revenue for the Petitioner and this meant that the right to property under Article 40 of the Constitution had been violated. The evidence, the Petitioner asserted could, be found in both the reduced income and devalued investments.
25. Counsel then submitted that the Respondent had no power to introduce different park fees without giving the Petitioner any hearing and further that the new park fees were simply unreasonable. This it was stated was contrary to Article 47 of the Constitution. Closely related to this submission was that the lack of consultation by the Respondent prior to introducing the new park entry fees meant that the new fees were void. This it was contended had been the court's finding in the case of **Republic –v- County Council of Narok Ex p Mada Holdings Ltd t/a Fig Tree Camp Misc. Appl. No. 122 of 2011** and the Respondent was now estopped from contesting the court's finding.
26. Ms. Kashindi further submitted that there was no issue of delay in instituting the claim herein as the principles of limitations of actions did not apply where a party sought redress for alleged violation of its fundamental rights and freedoms. For this proposition, counsel referred the court to the cases of **Gerald Juma Gichohi & 9 Others –v- Attorney General [2015]eKLR** as well as **Republic -v- Judicial Commissions of Inquiry into the Goldenberg Affair & 3 Others Ex p Mwalulu & 8 Others [2004]eKLR**.
27. The Petitioner concluded by asking for all the reliefs prayed for on the basis that it had proved its case.

### *Respondent's submissions*

28. Ms. Ngania advocating for the Respondent firstly submitted that the impugned Gazette Notice was legal, constitutional and lawful as statute had mandated the Respondent to set various fees including park fees.

29. Counsel then submitted that the Petitioner had been guilty of inordinate delay in bringing the Petition before the court whilst also adding that as the orders sought by the Petitioner were substantively judicial review orders, Order 53 of the Civil Procedure Rules was applicable meaning that the Petitioner was already outside the six-month period.
30. It was Ms. Ngania's submissions that the Petitioner had failed to prove violation of its rights and freedoms under the Constitution. Making reference to the cases of **Japan Export Vehicle Inspection Center Co. Ltd -v- Kenya Bureau of Standards [2015]eKLR**, counsel contended that the Petitioner's allegations and grounds of discrimination did not fall within any of the grounds listed under Article 27(5) of the Constitution. A finding of discrimination could therefore not be returned, so stated counsel. Besides counsel also stated that the pleadings were vague.
31. On the issue of Article 40 of the Constitution and alleged violation of the Petitioner's property rights, Ms. Ngania submitted that the Petitioner had not shown that any property owned by the Petitioner had been interfered with by the Respondent. In this regard counsel referred the court to the cases of **Veronica Waweru & 4 Others -v- The County Council of Nairobi [2012]eKLR**.
32. Counsel also submitted that no consultation was necessary or required to be made by the Respondent prior to gazetting and implementing the new park entry fees. According to counsel, the statute being the now repealed Local Government Act (Cap 286) at Section 148 permitted the Respondent to impose fees. According to counsel, only the consent of the Cabinet Secretary was necessary. Counsel referred the court to the case of **Republic -v- County Council of Nairobi & Another Ex p Outdoor Advertising Association [2012]eKLR** where the court held that in the discharge of its mandate under section 148 of the repealed statute, the Respondent did not need to consult with any party. Counsel also referred to the case of **Simon Wachira Kayiri -v- The County Assembly of Nyeri & 2 Others [2013]eKLR** for the same proposition.
33. On the issues of legitimate expectation and proportionality, it was the Respondent's submission that the same were not well founded. First, the Respondent submitted that no legitimate expectation arose as there was no promise made to the Petitioner. On this point, the Respondent referred the court to the case of **Republic -v- Nairobi City County & Another Ex p Wainaina Kigath Mungai [2014]eKLR** for the proposition that for legitimate expectation to exist the applicant ought to premise its case on some promise or assurance.
34. Secondly, the Respondent asserted that on the issue of proportionality the public interest favoured the denial of the restraining or prohibitory orders sought. In this regard, the Respondents counsel referred to various cases amongst them **Kenya Pipeline Company Ltd -v- Stanley Munga Githunguri [2011] eKLR**.
35. The Respondent wound up by stating that the Petitioner had failed to prove its case.

## **Discussion and Determination**

### *Issues*

36. The main issue for determination is the constitutionality of the new park entry fees as effected by the impugned Gazette Notice and the subsequent public notice through the newspapers in January 2011, so far as the Petitioner claims that the new park entry fees have violated the Petitioner's rights and freedoms guaranteed by Article 27, 40 and 47 of the Constitution.
37. Two corollary issues also arise.
38. Firstly, whether the Petition meets the requisite formal competency and, secondly whether by reason of the Petitioner's delay in commencing the claim the court is divested of jurisdiction to entertain and grant the Petitioner the reliefs sought.
39. I will deal with the corollary issues shortly.
40. It is important to note that the facts were largely not in dispute in this Petition. It is not in dispute that the Park is within the Respondent's jurisdiction. It is also not in dispute that it was within the Respondents mandate to set the park entry fees and that by the impugned Gazette Notice the Respondent effectively revised the entry fees and further that such revised entry fees took effect on 1<sup>st</sup> March 2011. It is additionally not in dispute that the new park entry fees did not allow any re-entry and neither did they prescribe any multiple entry fees. It is further not in dispute that the Petitioner's lodge is situated outside the Park's boundaries while there are lodges and hotels within the Park. Residents of lodges and hotels within the park only pay the park fees once.

41. There is however controversy when the Petitioner alleges that its rights have been violated and further that the new park fees are unconstitutional and unlawful.

### ***Whether the Petition is formally competent***

42. The Respondent contended that the Petition was lacking in material particulars and was largely vague. In particular, the Respondent said there were no particulars for discrimination.
43. It is a true position in law that persons who allege any violation of their constitutional rights ought to plead their case with reasonable precision by stating the specific Articles of the Constitution allegedly violated and also the manner of violation: see the cases of **Anarita Karimi Njeru –v- Republic [1976-80] KLR 1272** and **Mumo Matemu –v- Trusted Society Alliance & 5 Others CACA No. 290 of 2012**. The principle of law as to precise pleadings must however not be applied to lock out parties with genuine disputes and claims. The principle ought not be applied line, hook and sinker: see **Samuel Gunja Sode & Another –v- The County Assembly of Marsabit & 2 Others [2016] eKLR** as well as the Court of Appeal in **Peter M. Kariuki –v- Attorney General [2014]eKLR**.
44. In **Nation Media Group Ltd –v- Attorney General [2007] 1 EA 261** the court observed as follows:

***“A Constitutional court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite appropriate sections of the law under pinning the application, the application ought to proceed to substantive hearing...”***(emphasis)

45. The reasoning in **Nation Media Group Ltd –v- Attorney General (supra)** appears flawless and I am in agreement.
46. In the instant case the Petitioner has clearly identified the provisions and Articles of the Constitution it alleges to have been violated. Articles 27, 40 and 47 have been identified and expounded on in the Petition, not forgetting Article 232 of the Constitution as well. The Petitioner has also detailed how it believes its rights have been affected including how it believes the new park entry fees are discriminatory.
47. I was able to painlessly discern the Petitioner’s case. I am satisfied as well that the Respondent understood with little or no difficulty the case it was faced with.
48. I find no merit in the Respondent’s claim that the Petition does not meet the reasonable precision threshold. I hold that the Petition passes the formal competency test. It is not the sort that leads one to succumb to technicality.

### ***A question of delay***

49. The Respondent also contended that the Petitioner was not entitled to the reliefs sought by reason of the inexplicable delay on the part of the Petitioner in filing the claim. Further and still on the issue of delay, the Respondent contended that the reliefs sought by the Petitioner were mainly judicial review reliefs which were guided by Order 53 of the Civil Procedure Rules as to judicial review applications. Accordingly, the claim having been filed more than six months following the administrative action challenged, the Petitioner was caught up with the laws of limitation.
50. The Petitioner, in rejoinder, contended that the orders sought were by way of Constitutional Petition and consequently the provisions of Order 53 of the Civil Procedure Rules were inapplicable. Alternatively, and placing reliance on the case of **Republic -vs- Judicial Service Commission of Inquiry Into the Goldenberg Affair & 3 Others Ex p Mwalulu & 8 Others [2004]eKLR**, the Petitioner contended that the six (6) month limitation period under Order 53 of the Civil Procedures Rules were inapplicable where what was a challenge to regulation, law or gazette notice.
51. The law thus far is that there is no provision for limitation of action where a party claims a violation of the Constitution or of any specific individual rights or freedoms guaranteed by the

- Constitution. The rider though is that an aggrieved party should always have some zeal and motivation in enforcing his or her rights if the same are being deemed to be violated: see **Attorney General of Uganda & Another -v- Omar Awadh & 6 Others [EACJ] No. 2 of 2012** and also **Gitau Njau & 9 Others -v- Attorney General HCCP No. 340 of 2012 [2013]eKLR**.
52. In the instant case, the Petitioner has been faulted for delaying without any reason the filing of its claim for a period of more than three years. I take into cognizance the fact that this was a constitutional petition. I also take into account that where a party alleges discrimination there is need to show that the discrimination was not only unfair but also had an unfair impact, on the Petitioner.
53. A look at the Petition would reveal that over the three or four years period the Petitioner put together evidence of its reduced revenue and income. I am not convinced that there was an unreasonable delay that cannot be excused on the part of the Petitioner. I am also not convinced that the delay, in the circumstances of this case, in anyway prejudiced the Respondent's defence to the claims by the Petitioner.
54. On the issue of the application of Order 53 of the Civil Procedure Rules to a constitutional petition where a party seeks judicial review reliefs, I must hasten to point out that since the promulgation of the Constitution in 2010, administrative law actions and remedies were also subsumed in the Constitution. This can be seen in the eyes of Article 47 which forms part of the Bill of Rights. It is safe to state that there is now substantive constitutional judicial review when one reads Article 47 as to the right to fair administrative action alongside Article 23(3) which confers jurisdiction, on the court hearing an application for redress of a denial or violation of a right or freedom in the Bill of rights, to grant by way of relief an order for judicial review.
55. Order 53 of the Civil Procedure Rules do not consequently apply to Constitutional Petitions where the court is expected to exercise a special jurisdiction which emanates from the Constitution and not a statute.
56. I consequently decline to accede to the Respondent's contention that the Petitioner ought to be denied the reliefs sought on the basis that the Petition was filed more than six months after the action complained of took place.

### ***Violation of the Constitution***

57. The Petitioner contended that the new park entry fees breached the Constitution and actually violated the Petitioners rights and freedoms indexed in the Constitution. In particular, the Petitioner pointed to Articles 27, 40, 47 and 232 of the Constitution as Articles called to question by the promulgation of the new park entry fees.
58. I must first point out that the burden of proving a violation of a right or fundamental freedom guaranteed by the Constitution always rests on the person alleging such a violation: see the cases of **Matiba -v- Attorney General [1990] KLR 666**, **Attorney General -v- Butambala [1992] LRC 496** as well as **Githunguri Dairy Farmers Co-operative Society Ltd -v- The A.G & 2 Others [2016]eKLR**. The evidential burden is to be discharged on a balance of probabilities and the Petitioner needs to show not only that the right existed but also that it has been violated before the burden shifts to the state or the Respondent to show that the violation or alleged violation was saved by the Constitution: see **Catholic Commission for Justice & Peace in Zimbabwe -v- Attorney General [1993] 2 LRC (Const) 279** as quoted extensively in **Githunguri Dairy Farmers Co-operative Society Ltd -v- AG & 2 Others (supra)**.
59. Where the Constitutionality of a statute or regulation or rule is challenged, the approach is similar with the State or the Respondent only called to action once a Petitioner establishes that the statute or subsidiary legislation ex facie contradicts the Constitution: see the cases of **Attorney General of Trinidad & Tobago -v- Morgan [1985] LRC 770, S -v- Zuma & Others [1995] 2 SA (CC) 642**, **Ndyanabo -v- A.G [2001] EA 495** and **Obondi Victor & Others -v- Law Society of Kenya [2015]eKLR**.
60. From the foregoing the approach for the court is to determine through the Petitioner's evidence whether the Bill of Rights applies to the instant dispute. Secondly, will be to answer the question whether the Petitioner's rights or freedoms have been impinged. Finally, if the rights have been impinged, is to determine whether there is a justification for the limitation to the right in question according to the criteria set out in Article 24 of the Constitution.

## ***Discrimination***

61. The Petitioner claims that it has been placed at a position of disadvantage relative to such other persons who also own tourism enterprises including lodges and hotels operating from within the Park. According to the Petitioner this equates discrimination.

62. Article 27 of the Constitution guarantees equality and freedom from discrimination either by the state or any other person. It provides as follows:

***(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***

***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

***(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres....***

***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***

***(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***

***(6) ...***

***(7) ...***

***(8) ....” (emphasis)***

63. For purposes of Article 27 a person guaranteed the equal benefit of the law and freedom from discrimination includes companies, associations as well as any other body of persons whether incorporated or unincorporated: see Article 260 of the Constitution. The Petitioner is a company duly incorporated and entitled to the benefit of the provisions of Article 27 of the Constitution.

64. Discrimination has been defined generally as:

***“...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society”***

That was in the Canadian case of **Andrews -v- Law Society of British Columbia [1989] 1 SCR 143.**

65. The court in **Peter K. Waweru –v- Republic [2006] eKLR** was even terser in its definition of discrimination. The court defined discrimination as

***“... A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”***

66. The grounds listed in Article 27(4) of the Constitution are intended to be of illustrative and permissive application rather than strict and exclusive application. The word ‘including’ as used in Article 27(4) has been used as a word of enlargement to embrace not only the listed grounds but also any other ground that leads to direct or indirect discrimination. The essence of Article 27 is to ensure that no act or omission including rules, law, practice, condition, policy or situation directly

- or indirectly imposes burdens, obligations or disadvantages on or withholds benefits, opportunities or advantages from any person on one or more prohibited grounds. Laws, policies, rules, regulations, conditions or practice when applied or enforced should ensure equality of outcome. In short, achievement of substantive equality and not comparative or formal equality is the goal of Article 27 of the Constitution.
67. In pleading discrimination, the Petitioner not only cited Article 27 but also stated that the new park entry fees have disadvantaged the Petitioner relative to other private entities in the same business as the Petitioner.
  68. The Petitioner pointed out in particular to the fact that the new park entry fees introduced through the impugned Gazette Notice distinguished between residents of lodges within the park and those situate outside of the park. The residents of lodges within the park did not need to pay daily to visit the park, they only paid a one-off amount. On the other hand, residents outside the park had to pay daily if they wanted to visit the park. The Petitioner and its patrons fell in the latter category. The Lodge is situate outside the park's boundaries.
  69. The Petitioner further contended that the differences had led to a negative impact on the Petitioner's business leading to a drop in revenue and income as a result of the reduced bed occupancy.
  70. There is certainly a differentiation in the new park entry fees imposed by the Respondent. This is not denied. Residents within the park pay a one off-fees and it matters not how long they reside within the Park and visit various spots within the expansive Park. Those residing outside have to pay the entry fees every time they exit the park and seek to re-enter. They include but are not limited to the Petitioner's patrons.
  71. Mere differentiation does not however amount to arbitrariness and the impairment of the fundamental dignity of a person, the simple reason being that it is generally impossible to regulate affairs of people without differentiation. The categorization of park visitors with those who are not residents must therefore not be deemed as discrimination without a cautious further interrogation. The same no less applies to the categorization or differentiation between foreign visitors who are to pay in foreign currency and 'local' visitors who pay in local currency.
  72. The interrogation would even be more necessary in view of the fact that the differentiation is not on any of the grounds specified under Article 27(4).
  73. For purposes of the interrogation, the test to help establish discrimination should truly be as was laid down in the case of **Harksen –v- Lane NO [1998] 1 SA 300** by the Constitutional court of South Africa when interpreting Section 8(2) of the Interim Constitution of South Africa which is the equivalent of our Constitution's Article 27. The Court in **Harksen v Lane NO (supra)** stated as follows:

***“[47] The question whether there has been differentiation on a specified or an unspecified ground must be answered objectively. In the former case the enquiry is directed at determining whether the statutory provision amounts to differentiation on one of the grounds specified... Similarly, in the latter case the enquiry is whether the differentiation in the provision is on an unspecified ground ...If in either case the enquiry leads to a negative conclusion then Section 8 (2) has not been breached and the question falls away. If the answer is in the affirmative, however, then it is necessary to proceed to the second stage of the analysis and determine whether the discrimination is “unfair”. In the case of discrimination on a specified ground, the unfairness of the discrimination is presumed, but the contrary may still be established. In the case of discrimination on an unspecified ground, unfairness must still be established before it can be found that a breach of section 8(2) has occurred.”***

74. In summary, applying the test to Kenya the question is firstly whether the differentiation amounts to discrimination. If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination depends on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
75. Secondly, if the differentiation amounts to 'discrimination' does it amount to 'unfair

- discrimination'? If it is found to have been on a specified ground under Article 27(4) then unfairness is presumed. If however it is on an unspecified ground then the complainant has to establish the unfairness, and the test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
76. Finally, where the discrimination is found to be unfair then a determination is to be made as to whether there can be any rational justification under Article 24 of the Constitution.
77. In the instant Petition, the alleged discrimination was not based in any of the specified grounds. The Petitioner contends that the park entry fees structure or regulations have imposed burdens, obligations and disadvantages on the Petitioner which have not been imposed on others. The opportunity for the Petitioner's patrons and other Kenyans to visit the park as many times as those resident in hotels and lodges within the park has been denied. The Respondent on the other hand insists that the new park entry fees have not discriminated against the Petitioner in any way.
78. There is evidently a differentiation.
79. The facts as largely admitted by both parties reveal that one group of visitors to the hotels/lodges have access to advantages and benefits which another group does not have. I am satisfied that even without bringing itself to one of the specified or listed grounds, the Petitioner has been able to demonstrate that the differentiation has had the effect of imposing burdens, obligations and disadvantages on those who reside outside the park with the result that opportunities, benefits and advantages in so far as visiting the park is concerned have been limited.
80. As to whether or not the discrimination is unfair is dependent on the impact of the discrimination on the Petitioner as I am unable to presume unfair discrimination as the proven discrimination is not pegged on any of the grounds listed in Article 27(4).
81. The Petitioner's contention was, however that the Petitioner's business has been negatively affected. The Petitioner provided instances of the alleged negative impact. These were basically that there has been a substantial drop in the number of guests and patrons to the Petitioner's lodge from 60% to 19%. It was also stated that this has led to a loss of revenue leading to amongst other factors loss of jobs and also inability to service back loans due to liquidity (fiscal) problems. It was stated that the revenue dropped by nearly 40% over a period of three years following the introduction of the new fees.
82. Secondly, the Petitioner also contended that the Petitioner's assets and investments have been heavily devalued.
83. I must admit that I was not exceedingly impressed by the evidence tendered by the Petitioner with a view to establishing the negative and unfair impact of the differentiation. Firstly, and as had been submitted by the Respondent, the reduction in bed occupancy leading to low revenue could also have been occasioned by various factors. The Respondent did not however, strenuously contest the fact that the new park entry fees could have contributed to the reduction in revenue as well, only stating that there could have been other factors. Secondly, the actual figures presented also reveal that when the new park entry fees were introduced in 2011, the Petitioner's revenue indeed increased but only for that one year. Thereafter the decline was also heavy.
84. I however hasten to add that when it comes to discrimination, it is not about mathematical accuracy when the two groups of people are compared or even when the impact is assessed. It is enough for the complainant to show that there was or there has been an impact and this is to be done on a balance of probabilities. I am satisfied in the circumstances of this case and on the facts and evidence before me that the Petitioner has established that there was certainly an impact, a negative impact for that matter, fetched upon the Petitioner and its business by the new park entry fees introduced by the Respondent in 2011.
85. In the result, I find that the Petitioner has proven that in differentiating between those residing within the Park and those outside, and in further levying different park entry fees with the persons residing outside the Park having to pay multiple entry fees, there was on the part of the Respondent an unfair discrimination with a negative and unfair impact on the Petitioner.
86. By way of justification of the differentiation, the Respondent through Ms. Ngania stated that the resorts and lodges within the park are already burdened with levies and therefore to ask them to pay the same amount would itself not equate equality.
87. I am not convinced that such a justification to a limitation of a constitutionally guaranteed right would stand the test of Article 24(1) of the Constitution. I do not see the rationale behind arguing that there may be no equality when the limitation, as I have found, itself leads to inequality. The

nature of Article 27 rights and their core intent is to help achieve equality. In an open and democratic society based on human dignity equality and freedom, all endeavors ought to be made to ensure substantive equality difficult as it may be.

88. I am, on the other hand, satisfied that there is certainly a less restrictive means to achieve the purpose of the limitation, which was/is to raise additional revenue for the Respondent. Besides, the Petitioner's lodge is situated within the administrative boundaries of the Respondent County and I have little doubt, if any, that the Petitioner already pays levies to the Respondent.
89. In the end, on the question of discrimination, I find for the Respondent.

### ***Right to property***

90. The Petitioner also attacked the new park entry fees on the basis that they violated the Petitioner's rights under Article 40 of the Constitution.
91. Article 40 of the Constitution protects the rights to property. It is not an absolute Article, just like Article 27. Article 40 essentially covers a claim to immunity against uncompensated expropriation of private property. It also covers a claim of eligibility to hold or own property or to acquire property. The Article protects both corporeal as well as incorporeal property rights, which essentially means that an individual's relationship with the physical property is protected. The relationship includes the right to exclusively use the property as well as alienate it.
92. The Petitioner's contention was that in introducing new park entry fees which do not meet the Petitioner's favour, the Respondent interfered with Petitioner's right to property resulting in the loss of revenue and the possibility of closing shop. In response, the Respondent was firm that the Petitioner had not proven that its rights to property had been taken away as the fees charged was never at any time owned by the Petitioner and the Respondent had not interfered with any of the Petitioner's property.
93. I would agree with the Respondent.
94. The Respondent levied new park entry fees, whether daily or multiple fees, on visitors to the park and not on the Petitioner. The Park is also not owned by the Petitioner. I am unable to see how the Petitioner's rights guaranteed by the provisions of Article 40 could have been interfered with or impugned by the Respondent in introducing the new park entry fees.

### ***Of a fair administrative action***

95. On two fronts the Petitioner attacked the new park entry fees levied by the Respondent since 2011. First, the Petitioner contended that the new park entry fees were unreasonable. Secondly, it was also stated that no consultation took place between the Respondent and any of the stakeholders, including the Petitioner before the new park entry fees were effected.
96. For the two reasons, the Petitioner asserted that the new park entry fees violate both the letter and spirit of Article 47 of the Constitution as to fair administrative action.
97. Article 47 provides, inter alia, as follows.

***“47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”***

98. The Fair Administrative Action Act 2015 has effectively sought to promote and give effect to the rights in Article 47. The Act, in not so many words, defines administrative action as any decision, power or action taken or not taken by a state organ or natural person in exercise of public power and which affects the legal rights of any person to whom such action relates. Evidently, administrative action does not include executive, legislative or judicial action.
99. There is no doubt that in introducing the new park entry fees, the Respondent was exercising public power in terms of and pursuant to an empowering provision of the law. Section 148 of the now repealed Local Government Act (Cap 265) mandated the Respondent to impose fees in respect of any person or matter. The section read as follows:

***(1) A local authority may—***

*(a) charge fees for any licence or permit issued under this Act or any other written law or in respect of any person or matter, premises or trade, whom or which the local authority is empowered to control or license;*

*(b) impose fees or charges for any service or facility provided or goods or documents supplied by the local authority or any of its officers in pursuance of or in connexion with the discharge of any duty or power of the local authority or otherwise.*

*(2) All fees or charges imposed by a local authority shall be regulated by by-law, or if not regulated by by-law, may be imposed by resolution of the local authority with the consent of the Minister and such consent may be given either in respect of specified fees or charges or may be given so as to allow a specified local authority to impose fees or charges by resolution in respect of a specified power or a particular matter.*

*(3) Save where the contrary is expressly or by necessary implication in any written law provided, a local authority may authorize the remission in whole or in part of any fees due to it or charges imposed by it under this Act or any other written law.*

In exercise of such power the Respondent had to be reasonable and procedurally fair.

100. The Respondent contends that it was reasonable and procedurally fair in effecting the new park entry fees. It is the Respondent's assertion that consultation with stakeholders was not necessary and further that due procedure having been followed the impugned Gazette Notice is beyond rebuke. The Respondent relied on the two cases of **Republic -v- City Council of Nairobi & Another Ex P Outdoor Advertising Association [2012]eKLR** and **Simon Wachira Kagia -v- The County Assembly of Nyeri & 2 Others [2013]eKLR** for the proposition that consultation was not necessary when the Respondent was exercising its mandate under Section 148 of the repealed Act (Cap 265). The only person whose consent was necessary was the minister, now known as the Cabinet Secretary.

101. In the case of **Republic –v- City Council of Nairobi & Another Ex P Outdoor Advertising Association [2012] eKLR**, the court stated that:

*“As long as the council adheres to the land down process of reviewing its fees and charges as stipulated under Section 148 of the Local Government Act, it is unlikely that the court will interfere with such fees and charges”.*

102. In the context of the challenge which had been advanced in **Republic –v- City Council of Nairobi & Another Ex P Outdoor Advertising Association()**supra which was that the amount of increase in fees was too high and unreasonable, I would wholly agree. It is not for the court to substitute its judgment with that of state organs. However with regard to constitutional values and principles, the dictates are that there ought always when public power is exercised a sense of acceptance and ownership of any decision that affects individuals. It is for this reason that there is always the need to have public participation and consultation, if only to promote good governance.

103. In the instant case, it is not for the court to determine whether the new amounts charged were reasonable but it is certainly the courts business to ensure that public organs and servants involve the public in as many a decision making process as possible. The need for public participation and consultation can certainly not be gainsaid.

104. Both parties did not dispute the fact that there was no consultation. Indeed, collateral estoppel or issue preclusion would be easily invoked by reason of the decision of the court in the case of **Republic –v- County Council of Narok Ex p Mada Holdings Ltd t/a Fig Tree Camp Misc. Appl. No. 122 of 2011** where the court found as a fact that the Respondent herein had not consulted the stakeholders who were to be affected by the new park entry fees.

105. While I am of the view that the Respondent ought to have consulted with stakeholders prior to gazetting the new park entry fees, I am satisfied that the period between the gazettment of the new park entry fees and the time when the new park entry fees were implemented or made effective provided ample time for the Petitioner and other shareholders to make any

- representations. It has not been indicated to the court that the Petitioner or any stakeholder for that matter made any representations to the Respondent.
106. In the circumstances, I do not view it that the Petitioner's rights under Article 47 were breached or violated at all. The new park entry fees were lawful.

### ***Of legitimate expectation and proportionality***

107. The Petitioner's case was further that the Respondent in effecting the new park entry fees acted contrary to the Petitioner's legitimate expectations. The Petitioner contended in these respects that the Respondent did not only fail to give the Petitioner a hearing but also failed to take into account the fact that since the year 2003 the Kenya Wildlife Service under whose jurisdiction the park also fell had granted a twenty four hour access upon a singular park entry fees payment. Additionally, the Petitioner added that it had carried on business under an old arrangement since 1986 on the basis that the Respondent would not do anything to affect the Petitioner's business.
108. The Respondent's answer was curt. Legitimate expectation did not arise because the law allowed the Respondent to act as it had done and legitimate expectation could never override the law. Secondly, no promise or assurance had previously been made to the Petitioner by the Respondent to warrant the application of the legitimate expectation doctrine.
109. The English Law doctrine of legitimate expectation, first used by Lord Denning MR in the case of **Schmidt and Another –v- Secretary of state for Home Affairs [1969] 1 ALL ER 904, 906** in the context of procedural fairness and not being deprived of an interest without hearing, is part of Kenya's common law. The doctrine had earlier received the House of Lord's seal of approval in the case of **Council of Civil Service Unions and Others –v- Minister for the Civil Service [1984] 3 ALL E R 935, 9434** where Lord Frazer stated as follows:

***“But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law...Legitimate or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue (emphasis mine)***

110. The doctrine of legitimate expectation clearly protects the procedural expectation to be accorded a hearing as well as the substantive expectation that a regular practice giving some benefits, privilege or advantage would be continued or be retained. As was stated by **De Smith, Woolf and Jowell** in **Judicial Review of Administrative Action 5<sup>th</sup> Ed**, legitimate expectation

***“arises where a person responsible for taking a decision had induced in someone who may be affected by the decision, a reasonable expectation that he will receive or attain a benefit or that he will be granted a hearing before the decision is taken”.***

111. Locally, the doctrine has been adopted and applied by the court in various cases. The requirements for successful reliance on the doctrine were however well articulated by the Court of Appeal in the cases of **Oindi Zarpeline 39 others-v- Karatina University & Another [2015]eKLR** and even more clearly by the Supreme Court in **Communications Commissions of Kenya & 5 Others –v- Royal Media Services Ltd and 5 Others Petition No. 14 of 2014**. In the *Royal Media Services'* case the court stated as follows at paragraph 269 that the emerging principles on legitimate expectation may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;***
- b. the expectation itself must be reasonable;***
- c. the representation must be one which was competent and lawful for the decision-maker to make; and***

***d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.***

112. In the instant case, I agree with Ms. M. Ngania that the representations on which the Petitioner seeks to rely do not meet the above or any of the requirements. First there was no clear unambiguous representation devoid of any qualification. I state so because even the single 24 hour access fees by KWS had previously been revised. There is no suggestion by word or conduct that the Respondent had promised or represented that the park entry fees in subsistence as of January 2010 would not be revised. Secondly, there is the consensus between the parties that the Respondent had the power to impose the fees, through law and in particular section 148 of the repealed Local Governments Act (Cap 265). Thirdly, there is evidence availed through the Petitioner that revision of park fees has been done previously.

113. I must consequently decline the invitation by Ms. Kashindi to invoke the doctrine of legitimate expectation in favour of the Petitioner.

114. I am now left with the issue of the relevance of the proportionality principle to this case. This truly has more to do with the ultimate reliefs to be granted than the substantive merits of the case: see **Gatirau Peter Munya –v- Dickson Mwenda Githunguri & 2 Others [2014]eKLR**. The principle no doubt could also be relevant to the substance and merits of the case. In this case however, I take the view that it is not.

115. In **Kenya Pipeline Company Ltd-v- Stanley Munga Githunguri [2011]eKLR**, the Court of Appeal stated that

***“... the ingredients of proportionality include the size of the claim, importance of the case, complexity of issues and financial position of each party... and where the claims are so disproportionate ... the court must endeavor to achieve a proper balance by learning in favour of proportionality”.***

116. Evidently, proportionality is all about counsel of prudence where factors are lopsided. The court must take into account all the circumstances including balancing both private and public interest before making any final orders which may have practical effect or impact on the parties as well as others.

### **Summary of findings**

117. I have come to the conclusion on the issues originally reserved for determination as follows:

***a. As to whether the Petition meets the competency threshold, the answer is yes.***

***b. As to whether the Petition is defeated by reason of delay, the answer is no.***

***c. As to whether the new park entry fees are unfairly discriminatory with unfair impact on the Petitioner, the answer is yes.***

***d. As to whether the new park entry fees violate the Petitioners right to property, the answer is no.***

***e. As to whether the Respondent in effecting the new park entry fees violated the Petitioners right to fair administrative action including the Petitioner’s legitimate expectation, the answer is no.***

### **Reliefs and costs**

118. The Petitioner has been partially successful and the only question now is what relief the court is to grant.

119. The Petitioner sought sweeping orders to quash the Gazette Notice No. 16279 of 24<sup>th</sup> December 2010 and effectively prohibit or restrain the Respondent from applying and charging the rates outlined in the Gazette Notice. The Petitioner also sought orders to restrain the Respondent from

continuing to implement the single entry rule to visitors resident in hotels and lodges from outside the park.

120.I am conscious of the fact that the park fees collected is for the benefit of the residents of Narok County. I am also conscious of the fact that the Respondent is entitled to raise revenue for its own operations. I am further conscious of the fact that the park fees were lawfully imposed. However, constitutional values also dictate that equality at all levels should be promoted and where therefore the court has identified any sense of inequality, the court is duty bound to act. I am not bound to only issue the reliefs sought by the Petitioner, the court may actually fashion appropriate reliefs: see **Nancy Makhoha Baraza -v- Judicial Service Commission & 9 others [2102] eKLR.**

121.Balancing all factors, I would deem it appropriate to grant such relief as may be tailored to ultimately ensuring equity besides merely making a declaratory or injunctive order.

122.I would consequently make the following orders:

- a. There shall be issued a permanent injunction restraining the Respondent whether by self or its officers employees or agents from imposing and collecting the park entry fees set out in Gazette Notice No 16729 of 24 December 2010 in so far as they impose a single entry rule to visitors to Maasai Mara Game Reserve or daily entry fees to visitors and establishments situated outside the Masai Mara Game Reserve and also in so far as it imposes a different rate to visitors residing inside and outside the park.
- b. The Respondent is further ordered to immediately engage other stakeholders with a view to ensuring that the park fees are reviewed and a better arrangement availing multiple entries worked upon .
- c. Each party shall bear its own costs of the Petition.

123.I am grateful to Ms. Irene Kashindi as well as Ms. Mellissa Ngania who appeared for the Petitioner and the Respondent respectively for their assiduous research and meticulous submissions. If I did not capture any parts of their submissions, it was not out of derision.

**Dated, signed and delivered at Nairobi this 29<sup>th</sup> day April, 2016**

***J.L.ONGUTO***

**JUDGE**