



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. 20 OF 2019

IN THE MATTER OF CONCESSION AGREEMENT

TRUST DEED FOR NGARENDARE FOREST

AND

IN THE MATTER OF PROVISIONS OF ARTICLE 40, 42,

43, 47, 48, 56 OF THE 2010 KENYA CONSTITUTION

NGARENDARE C.B.O Suing thro' their Rep.

CHAIRMAN – KASHARA KITONGA

SECRETARY – GLADYS WAMUCII

TREASURER – MARGARET MUGAMBI

MEMBER – MUGAMBI MORRIS.....PETITIONERS

VERSUS

NGARENDARE FOREST TRUST THRO'

BOARD OF TRUSTEES.....1ST RESPONDENT

BOARD OF TRUSTEES.....2ND RESPONDENT

KENYA FOREST SERVICE.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. Ngarendare C.B.O through its officials has brought a petition dated 18.4.2019 against the 1st, 2nd and 3rd respondents. It describes itself as a community based organization registered with the Ministry of Labour, Social Security and Services with effect from 2003, comprised of members of Ngarendare community who majority of them farmers and pastoralists.

2. The petitioners aver they have relationship with other community based organizations, namely Ethi Manyangalo, Subuiga, Kisima and Mbuju C.B.O's which are governed by a concession agreement/trust deed entered with the 1st and 2nd respondents on 1.10.2009 expiring on 30.9.2041, (hereafter the agreement).

3. It is averred the respondents have completely neglected the aforesaid agreement in breach of which there has been inability to address the petitioners' issues/problems in line with the laid down principles of decision making in a consultative manner.

4. The petitioners aver in utter disagreement of the agreement, the 1st respondent unilaterally reviewed and or approved the management plan of the Ngarendare forest, ignored the petitioner's duly elected leadership and instead went ahead to carry out a fresh election before the expiry of the previous leaders' term.

5. Further the petitioners aver the alleged actions of the 1st respondent are unprocedural, are being undertaken without notice to the community residents within the Trust and was contrary to the principles of public participation.

6. Additionally, the petitioners aver the 1st respondent has failed to call for a general meeting as provided, has assumed powers not envisaged by the agreement such as adding a board of trustee without consulting key players in the trust and seeking to implement the renewed and approved management plan for Ngarendare forest without considering the interests of the petitioners.

7. Despite complaints, the petitioners aver the 1st respondent has disregarded their claims but instead monopolized the forest trust as if it was a private entity rather than a community resource where all stakeholders have control and stake.

8. As a indication of the 1st respondent unilateral decisions and plans, the petitioners aver it has set up recreational tourist facilities in Ngarendare river such as swimming pool, upstream to the detriment of the community downstream, riparian rights yet they utilize the water for their domestic use.

9. Similarly, the petitioners aver the 1st respondent contrary to the agreement has failed to register the natural resources as fit for tourist attraction that derive income hence denying the community and the government public revenue.

10. The petitioners avers the 1st respondent has engaged in an irregular mapping of the grazing areas to the detriment of the petitioners who are pastoralists which has led to arbitrary arrests, charges and punitive fines before courts of law.

11. The petitioners therefore pray that the court declares the respondents to have breached the agreement/trust deed; an order for representation and recognition of all registered community based organizations of Ngarendare forest trust; an order that the 1st respondent is illegally in office and they should conduct election and lastly that the management plan 2017-2021 is null and void for lack of public participation and compliance with the law.

12. The petition is supported by an affidavit sworn by Kashara Kitonga on 1.4.2019 attaching a copy of authorities to swear, certificate of registration of the C.B.O, minutes and by-laws of the C.B.O, copy of the trust deed, copy of the concession agreement, report showing developments/representation by the petitioners to the 1st respondent, copy of the approved plan, correspondence between the parties and lastly a letter authorizing fresh election all marked as annexures **Kgg 1 – 13**.

13. Other than the 1st respondent, there is no indication if the 2nd and 3rd respondents were duly served with the petition. That notwithstanding on 18.11.2019, Miss Kungu Learned Litigation Counsel for the 2nd and 3rd respondents sought for the matter to be referred for an alternative dispute resolution. There being no progress on the alternative dispute resolution or reply to the petition, the matter was certified ready for formal proof on 27.1.2020. Parties were ordered to file responses and skeleton submissions by 8.8.2020. Following fresh directives the 1st respondent filed a replying affidavit sworn by Dominica Maringa Ikuathu on 24.1.2021 opposing the petition.

14. The 2nd and 3rd respondents was given a last chance to reply to the petition by 19.5.2021 with a hearing scheduled for 28.7.2021.

15. On 18.11.2021 parties appeared and informed court that they wanted to settle the matter through an alternative dispute resolution process hence required a date to record a possible consent. That notwithstanding, the court directed parties to file written submissions on whether the petition meet the threshold of a Constitutional petition. None filed submissions.

16. The issues for determination are:

- a) If the petition meets the threshold of a constitutional petition.**
- b) If the respondents have infringed the constitutional rights of the petitioners.**
- c) Whether the petitioners are entitled to the prayers sought.**
- d) What is the order as to costs?**

17. The threshold of what is a constitutional petition was set in *Anarita Karimi Njeru –vs- Attorney General [1979] KLR 154 and Trusted Society of Human Rights Alliance –vs- Attorney General & 2 Others [2012] eKLR* to the effect that an applicant must set out with reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to be infringed. The foundation of a petition ought to be the facts, followed by legal arguments.

18. From the two cases, the court held that the actual or real issues in dispute must stand out. It is not for the court to fish out the facts. The petition at paragraphs 2 – 26 lays the facts of the petition as revolves around a concession agreement/trust deed entered between the 1st and 2nd respondents on 1.10.2009. It is alleged the 1st and 2nd respondents have breached the contractual rights of the petitioners hence the prayers for declaration of the breach, recognition of the petitioners as representatives of the community; an order for the 1st and 2nd respondents to conduct elections and lastly a declaration that the management plan 2017 – 2021 is null and void.

19. The **Constitution of Kenya, (Protection of rights and freedoms) rules 2013** sets out what a constitutional petition must contain including the particulars of the rights and freedoms infringed, the nature of injuries and reliefs sought. This petition has not specified which constitutional rights and freedoms of the petitioners have been infringed by the respondents. This leaves a gap and missing links on how the facts are anchored to the petitioners' constitutional rights and freedoms. The court cannot fill in those gaps. On that account alone, the petition falls short of the threshold of disclosing a constitutional question as per **Article 165**.

20. **Article 165 2 (b)** grants a constitutional court powers to determine the questions whether a right or fundamental freedom has been denied, violated, infringed or threatened by the respondents.

21. Secondly, the 2nd respondent is governed by the **Forests Act Cap 385 Laws of Kenya. Section 9 (2)** of the **Forests Act** has internal dispute mechanisms which have to be exhausted before filing a petition.

22. The petitioners' claim is based on **Article 47** of the **Constitution**. Under **Section 9 (2)** of the **Fair Administrative Actions Act**, a party is barred unless there are exceptional circumstances from rushing to court before exhausting the available alternative dispute mechanism under the law in which the dispute arises.

23. **Section 63 (2)** provides/requires a dispute to be referred to the tribunal. **Rule 69** of the **Forest Participation in Sustainable Forest Management Rules 2009** states an aggrieved person of the decision of the 2nd respondent to appeal to the **National Environment Tribunal**.

24. In **Republic –vs- County Government of Kiambu Ex-Parte Fechim Investments Limited [2016] eKLR Odunga J.** held the availability of alternative remedies which are convenient and beneficial to a party is a bar to a party rushing to a constitutional court. **See also Republic – vs- Principal Magistrate Lamu Magistrate's Court & Another Exparte Kenya Forest Service [2016] eKLR.**

25. Thirdly, a claim the petitioners are urging the court to enforce or interpret a contractual obligation between private entities. Contractual obligations are governed by the Law of Contract Act hence fall under the realm of private law. This petition calls for the court to interpret a statute and not the constitution as held by **Mativo J** in **James Kuria –vs- Attorney General & 3 Others [2018] eKLR, Gabriel Mutava & 2 Others –vs- Managing Director Kenya Ports Authority & Another [2016] eKLR.**

26. In **Communications Commission of Kenya & 5 Others –vs- Royal Media Services Ltd & 5 Others,** the Supreme Court of Kenya forbid the engagement of the constitution in all manner of litigation and held the constitution should only be resorted to where it is necessary to do so.

27. In **CIS Directors Crawford International School & 3 Others [2020] eKLR W. Korir J.** held the court will not entertain a contractual obligation dispute attracting both constitutional and statutory remedies if it can be resolved through other means and does not call for the interpretation of the constitution.

28. In sum and for the above reasons, I find the petition herein lacking any constitutional basis. The same is struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26TH DAY OF JANUARY, 2022

In presence of:

Mwirigi holding brief for Mutunga for petitioner

Ayieko for 1st respondent

Kieti for 2nd and 3rd respondents

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE