



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 22 OF 2014

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: ARTICLES 10, 21, 22, 23, 25, 26, 27, 28, 29, 35, 39, 40, 47, 48, 50, 258, 7259
AND SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION**

AND

**IN THE MATTER OF: THE ALLEGED EVICTION OF THE PETITIONERS FROM THEIR
LAND BY KENYA FOREST SERVICES**

AND

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 21 AND 22 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: THE FOREST ACT 2005 LAWS OF KENYA

BETWEEN

MANASE GUYO & 260 OTHERS.....PETITIONERS

AND

KENYA FOREST SERVICES.....RESPONDENT

AND

THE REGISTERED TRUSTEES KIPINI WILDLIFE AND

BOTANICAL CONSERVANCY TRUST.....INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. By a Petition dated and filed on 25th April, 2014, the Petitioners sought the following orders -
 - (a) A declaration that your Petitioners fundamental rights to the protection of their property and from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing have been breached.
 - (b) A declaration that the Respondent and its agent have acted in breach of Articles 10, 21, 23, 25, 26, 27, 28, 29, 35, 39, 40, 47, 48, 50, 258 and 259 of the Constitution.
 - (c) A declaration that the Petitioners have been illegally, wrongfully and unlawfully been evicted from Mkoma Mmoja Village in Kipini area in Tana River County.
 - (d) An order directing the Respondent to carry out a thorough survey of Kipini Forest in conjunction with the Survey Department Tana River County, Land Registrar Hola, Tana River County and the Lands and Physical Department Tana River County and other stakeholders.
 - (e) Consequently, an order prohibiting the Respondent whether by itself or through other persons from interfering with your Petitioners property or enjoyment of the “**disputed forest land**”.
 - (f) Costs of the Petition be borne by the Respondent.
 - (g) Any other relief as the Honorable Court deems fit.
2. The Respondent herein (the Kenya Forest Service) are sued in their capacity as a State Corporation which carried out the eviction of the encroachers in a Gazetted Provisional Forest (“KIPINI”). In opposition to the Petition are firstly, the Replying Affidavit of Esther W. Keige, the Respondent’s Corporation Secretary and the Head of Legal Services, sworn on 11th June, 2014 and secondly the Replying Affidavit of Omar Saleh Sherman sworn on 11th June, 2014, and attached to the Interested Party’s Notice of Motion of even date therewith.

3. The Interested Party, the registered trustee, Kipini Wildlife and Botanical Conservancy Trust having an interest in the Petition filed a Notice of Motion dated 11th June, 2014, supported by the Affidavit of Omar Saleh Sherman, sworn on the said date (11th June, 2014). That motion was compromised by a consent dated and filed on 4th July, 2014 by counsel for all parties. The Petitioners withdrew their Notice of Motion dated and filed on 25th April, 2014 for conservatory order, and the matter was set for hearing and the parties agreed to proceed by way of Affidavit evidence and annexures thereto, and the court directed parties to file written submissions. The Petitioners’ counsel’s submissions are dated and were filed on 27th July, 2015. The Respondent’s counsel’s submission dated 20th August, 2015 were filed on 21st August, 2015. The Interested Party’s counsel’s submissions dated 19th August, 2015 were filed on 21st August, 2015.

BACKGROUND

4. In brief, the Interested Party is the managing agency of a company known as Nairobi Ranching Company Limited, the registered proprietor of the suit land detailed in paragraph 4 of the Affidavit of Omar Saleh Sherman aforesaid, measuring approximately 22,016.4 hectares and all together known as **Kipini Wildlife and Botanical Conservancy**, and commonly known as Nairobi Ranch (“Kipini”).

5. Due to increased pressure from illegal grazers, loggers and encroachers, the Respondent approached members of the **Trust** to assist managing the conservancy. The Respondent then carried out a survey of the property, carried out due diligence of the conservancy and gazette the private property as a provisional Forest, per Legal Notice Number 214 of 15th December, 2010. The Respondent subsequently entered into a Memorandum of Understanding with Kipini Wildlife and Botanical Trust Conservancy dated 24th January, 2013.

6. Following increased pressure, the Petitioners, were given adequate notice to quit the conservancy areas and whereas some of their member vacated the forest areas voluntarily, others were forcibly evicted from the conservancy, the Petition, the subject of this Judgment.

THE PETITIONERS' CASE

7. The Petitioners claim that on or about April, 2014, the Respondent started burning houses belonging to the Petitioners destroying crops, trees, arresting the Petitioners, alleging trespass **“in the forest land and burning off the houses belonging to the Petitioners, and leaving them destitute, and exposing them to rain and disease.”**

8. The Petitioners claim that no forest boundary areas have been established either by the Government of the Tana River County or indeed the Respondent, and contend that their eviction by the Respondent from disputed land without proper establishment of the boundaries, and beacons of the alleged forests to confirm the forest area boundaries and specific encroachment (if any) was not done or carried out as outlined in the Constitution. The Petitioners therefore contend and submit that the actions of the Respondent were **“irregular, unlawful, malafide, and geared towards hindering development** in the area that was marred by **tribal violence that is facing serious security challenges, a well-known fact.”**

9. The Petitioners' counsel also submit that the Respondent's actions have rendered the Petitioners destitute as they have become internally displaced persons, their houses have been destroyed, and they have been violently evicted causing them untold suffering as young children and women were not spared by the Respondent.

10. Counsel therefore submits that the petitioners' fundamental right to protection of property whether as citizens or non-citizens which is comprehensively secured under Article 40 of the Constitution was violated by the Respondent and the Interested Party while purporting to carry out illegal evictions. The Petitioners consequently also claim compensation. The Petitioners counsel submits that the eviction, and **“acquisition”** of their grazing lands does not satisfy the famous maxims of law that the welfare of the people or the public is the paramount law (*salus populi est suprema lex*), and that **“public necessity is greater than private”** (*“necessita publico major est quam”*) cited in the Indian Supreme Court case of **CHARANJIT LAL VS. UNION OF ALL INDIA (Report 1951, S.C.41)**

11. Counsel submitted that if the Respondent was acting for the public good, then it should have offered compensation, for the power to exercise right or eminent domain is subject to the Constitution, and a Gazette Notice published away in Nairobi, is not adequate notice to them as the Gazette Notice is not commonly read in rural areas of Kenya.

12. Counsel submitted that the Respondent Article 10 which sets out the national values and principles of good governance is not only intended to guide but also binds all state organs, state officials, public officers and all other people acting in similar capacity. Likewise Article 20 of the Constitution declares that the Bill of Rights binds all state organs and all persons. Counsel submitted that the Respondent violated Articles 21, 22 and 40 of the Constitution, which rights the Petitioners have under Articles 47, 48 and 159 of the Constitution. Counsel relied upon the **dictum** by the Namibian Court in **S. vs. ACHESON 1991 (2) ISA 805 (NMHC)** where the Judges said –

“The Constitution of a nation is not simply a statute which mechanically defines the structures of the government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations, of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenour of the constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.”

13. It was counsel's further submission that the right to life includes the right to live with human dignity. Counsel relied on the decision of the Supreme Court of India in **FRANCIS CORIALE vs. UNION TERRITORY OF DELHI, [1978] ALL INDIA Report, S.C. 597**, where that court held that –

“the right to life is not restricted to mere animal existence. It means something more than just physical survival. The right to live is not confined to the protection of any faculty or limb through which life is enjoyed or the soul communicates with the outside world but it also includes the right to live with human dignity and all that goes with it, that is, the bare necessities of life, that is nutrition and clothing.”

14. Relying on the same Supreme Court of India decision where a five Judge bench construing Article 21, (Article 26 of our Constitution), said that the right to life includes the right to **“livelihood”, “because no person can live without the means of livelihood. If the right to livelihood is not treated as part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood.”**

15. Counsel consequently concluded that the Respondent violated the Petitioners’ right to livelihood without giving the Petitioners a reasonable opportunity to be heard, adequate notice in a language understood by the majority and that this was illegal, arbitrary and unjust.

16. Counsel submitted finally that the Petitioners were living in the suit lands, well before survey and issue of letters in 1994, and could not be regarded as trespassers, and that they had never in any event damaged the flora and fauna in the conservancy area as alleged. The Petitioners deny that they have engaged in poaching, illegal logging or felling of trees or engaged in any wanton destruction in the conservancy or disputed area.

17. The Petitioners also claim that the exercise of eviction was executed with bias as those residents who were alleged to have encroached from Lamu County were never evicted from the disputed area or conservancy, but that the Petitioners were all forcibly evicted, men, women and children, without any adequate and thus exposed them to harsh weather conditions and to disease.

18. For all those reasons counsel urged that the Petition be allowed with costs to the Petitioners.

THE RESPONDENT’S CASE

19. As stated earlier, the Respondent’s case is set out in the Replying Affidavit of Esther W. Keige sworn and filed on 11th June, 2014. The Respondent denied all the allegations of breach of the Petitioners’ rights, and liability in damages in respect thereof. The Respondent contends that the actions of Petitioners and others in encroaching the forest, illegal logging and poaching and grazing in the forest area had reached intolerable proportions, and that after giving the Petitioners due warnings and notices, the Petitioners were removed from the forest area, and their abandoned temporary structures razed to the ground. The Respondent denies that there was bias as against the Petitioners vis-a-vis persons who encroached the forest area from the side of Lamu County.

20. On the extent, and boundary beacons of the disputed forest area the Respondent submits that prior to the gazettement of the Provisional Forest, the Respondent undertook due diligence study of the forest area to confirm the acreage and demarcation thereof, the proper registered owners and the appropriate location. The Respondent also submits that it carried out a survey of the forest area to establish the relevant beacons and properly demarcate the forest area.

21. The Respondent also established that there was no dispute as to the demarcation of Kipini Conservancy as the same was owned by a family company known as Nairobi Ranching Company Limited (the company), with titles issued as early as 1994. The Respondent pleads that the Petitioners had since the year 2000 trespassed upon the land of Kipini Conservancy which was privately owned, and that the Petitioners further encroached upon the Provisional Forest after the gazettement of the Forest in the year 2010 and thereby causing detrimental effects on the flora and fauna of the forest.

22. It was also the Respondent’s case that contrary to the allegation of the Petitioners under paragraph 6 of the Petition and paragraph 2 of the Affidavit Verifying the Petition, the Petitioners have not lived in the forest area for decades and that neither is the property their ancestral land, as the property was family

owned and was later placed under the management of the Kipini Conservancy Trust, and the Respondent took over the management in 2010 after gazetting it as a Provisional Forest.

23. In answer to the Petitioners complaints that they were not given any, or any adequate notice, the Respondent contended that due to the Petitioners' continued illegal occupation of the provisional forest by encroaching and carrying out unlawful activities such as cultivating, illegal logging, erecting temporary structures, allowing livestock in a protected forest, poaching, cutting, felling and destroying flora and forest produce, contrary to the Forest Act, the Respondent issued a notice to all relevant public officers to issue 14 day eviction order to all the illegal settlers and boundary encroachers to facilitate better conservation of the Forest. The relevant agencies included, the District Environment Committee, Tana Delta, Lamu West-Lamu, the Head of Coast Conservancy Zonal Forest Manager Lamu, District Commissioner Tana Delta, District Commissioner Lamu West, District Officer, Kipini, District Officer Mpeketoni and the public at large.

24. Pursuant to the said Notice, the National Environment Management Authority (NEMA), by letter dated 18th June, 2012, issued a Notice to the Head Teacher of the Maisha Masha Primary School against the construction of a primary school in the forest without an Environment Impact Assessment Report contrary to Sections 58 and 137(b) of the Environment and Coordination Act 1999 (EMCA).

25. The Respondent therefore contended that despite the Petitioners' claim to the contrary it acted within its mandate under the law to ensure that all illegal activities in the forest are stopped and that the continued destruction of the environment is put to an end, and that the Respondent had properly demarcated the forest area prior to gazetting the same, and were not fuelled by any malice as alleged by the Petitioners.

26. Finally, the Respondent specifically denied any alleged violation of the Petitioners' rights under Articles 10, 20, 27, 40, 47 or 48 of the Constitution, and urged the court to dismiss the Petition with costs.

THE INTERESTED PARTY'S CASE

27. As already stated at the beginning of this Judgment, the Interested Party's case is set out in the Supporting Affidavit of Omar Saleh Sherman, sworn and filed on 11th June, 2014 and the Interested Party's counsel's written submissions dated 19th August, 2015 and filed on 21st August, 2015. The Interested Party essentially reiterated the facts which I have set out extensively in the case of the Respondent.

THE ISSUES

28. Considering the pleadings by the Petitioners, the Respondent and the Interested Party and the respective counsel's submissions, I perceive the following issues for determination by the court.

- (1) whether the Petition is properly filed on behalf of the Petitioners;
- (2) whether the Petitioners have any interest in the property capable of protection by the court;
- (3) whether the Petitioners were properly removed from the forest;
- (4) whether the Petitioners' constitutional rights have been infringed, and if so, which rights and how they have been infringed, and
- (5) whether the Petitioners are entitled to the reliefs sought in the Petition.

29. I will take each of these issues in turn.

WHETHER THE PETITION IS PROPERLY FILED ON BEHALF OF THE PETITIONERS

30. Though I did not discuss this question among the Respondent's arguments, it was the contention of counsel for the Respondent that the Petition herein was not a representative Petition because not all the alleged Petitioners had signed written authority allowing the First Petitioner Manase Guyo, to swear an Affidavit on behalf of such Petitioners and to file the Petition herein. Counsel submitted that lack of such authority was contrary to Order 4 rule (3) and Order 1 rules 8 and 13(1) and (2) of the Civil Procedure Rules 2010. These provisions require persons alleged to be represented to issue written authority to those filing suit on their behalf. In this regard counsel relied on the case of **KELVIN KARIUKI KINYUNE vs. DEDAN KIMATHI UNIVERISTY OF TECHNOLOGY [2014]eKLR** where Wakiaga J found that the Petition was not representative, but that the Petitioner had the right to bring the Petition.

31. On these same principles, counsel for the Respondent also relied on the decision of Makau J in the case of **M'BECHI NKANDAU & 5 OTHERS vs. ATTORNEY-GENERAL [2011]eKLR**.

32. Whereas the latter case was an ordinary civil action, and was subject to the Civil Procedure Rules, the former was a Constitutional Petition which was subject to different rules of procedure namely, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules 2013, (LN No. 117 of 2013), in which rule 4 empowers any person acting in his own interest or on behalf of another person who cannot act in their own name, to institute court proceedings. In addition to the formal Petition under rule 4, the court is also obliged to accept and reduce into writing an oral application, letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom. Besides Article 159 of the Constitution imposes upon the court the obligation to determine all disputes in accordance with substantial justice without undue regard to technicalities of procedure. The absence of a written authority to institute a Petition on behalf of himself and others is not fatal to an alleged representative Petition. A court has therefore a discretion to limit the orders sought to those Petitioners who have given their written consent to the institution of the Petition.

WHETHER THE PETITIONERS HAVE ANY INTEREST IN THE PROPERTY CAPABLE OF PROTECTION BY THE COURT

33. It was the Respondent's submission that the Petitioners have no recognized interest in the property which can be protected by the court. The Petitioners also pray that their right to property has been breached and consequently an order prohibiting the Respondent and any other person from interfering with their enjoyment and use of the disputed forest.

34. The right to enjoyment and acquisition of property is recognized under Article 40 of the Constitution of Kenya, 2010. However in order to claim a breach of the right to property a Petitioner has to clearly demonstrate the manner in which such property is acquired. The authors of Halsburys Laws of England, 4th Edition (Re-issue) Volume 8(2) paragraph 165 noted at page 25 –

“25. the protection under the Constitution of the right to property does not obtain until it is possible to lay claim in the property concerned...an applicant must establish the nature of his property right and his right to enjoy it as a matter of domestic law.”

35. The Petitioners have not established the nature of their proprietary rights by furnishing the court documentary evidence of such ownership. In this regard, I agree with the observation of the court in **JOSEPH LETUIYA & 21 OTHERS VS. ATTORNEY-GENERAL AND OTHERS, [2014]eKLR** arising out of ELC 821 of 2012 (OS), in which the court said –

“... the process of conferring legal and equitable property rights in land under Kenyan law is well settled, and is dependent upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of legal title of ownership. The process of allocation of forest land is further governed by the Forests Act that requires a process of excision of forest land before such land can be allocated. The Applicant did not bring evidence of such processes of allocation of title to land located in the Mau Forest and relied on their long occupation of the same.” In addition under the law, forest land being government land, cannot be subject to

prescriptive rights arising from adverse possession. This court cannot therefore in the circumstances find that they have accrued any property rights in the Mau Forest that can be subject of the old Constitution or Article 40 of the current Constitution.”

36. The Petitioners rely on a claim of ancestry, but have adduced no evidence in support of that claim. A claim of ancestral land is envisioned in Article 63(1) and (2) of the Constitution that recognizes **Community Land**, which is identified on the basis of ethnicity, culture and similar community interest. Article 63(2) (d) (i) and (ii) in particular recognizes community forests and ancestral land belonging to hunters and gatherers as forming part of community land. Article 63(2)(d) (i) and (ii) provides –

“63. (1)

(2) Community land consists of –

(a) – (c)

(d) land that is

(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities, or

(iii) lawfully held as forest land by the county governments but not including any public land held in trust by the county government under Article 6e(2).”

37. Unfortunately, the Petitioners have not demonstrated a common ancestry, ethnicity, culture or similar community interests. Unlike the **Joseph Letuiya** case (supra) where the Petitioners provided the court with sufficient empirical data (such as the **Report by the Presidential Commission of Enquiry into Irregular Allocation of Public Land, Report of the Government Task Force on Conservation of the Mau Forest Complex**) as evidence of their occupation of the Mau Forest, as indigenous community whose ancestry belonged to hunters and gatherers, the Petitioners have failed to prove their claim.

38. On the contrary, the evidence brought by the Respondent clearly shows title deeds issued to Nairobi Ranching Company Limited in 1994. Prior to the issuance of these titles, there is further evidence provided by the Interested Party in its Affidavit dated 11th June, 2014 and marked “OSS 11” of an agreement for sale of a portion 20,000 acres out of 50,000 acres which comprises the property, under the Conservancy whose ownership dates as far back as 1973.

39. In light of the above, the court must conclude that the Petitioners’ claim to **KIPINI CONSERVANCY** is neither borne out nor supported by evidence, bearing in mind the evidence provided by the Respondent and the Interested Party and which evidence has not been sufficiently rebutted. The Petitioners’ interest to the property cannot be ascertained and therefore protected. The orders sought on this ground must therefore fail.

OF WHETHER THE PETITIONERS WERE LAWFULLY REMOVED FROM THE FOREST

40. Whereas the Petitioners contended that their removal from what they claimed was their ancestral land was illegal and contrary to the Constitution, the Respondent and the Interested Party contend otherwise. To establish which one of these two conflicting positions is the more plausible, it is necessary to examine the relevant statutes and applicable international treaties or covenants.

41. The relevant law in this regard is the Forests Act, (Cap, 385 Laws of Kenya). Section 52(1) of the Forests Act prohibits and constitutes an offence for any person among other activities, to fell, cut, take, burn, injure or remove any forest produce, or erect any building or livestock enclosure, except where the

same is allowed for a prescribed fee, or de-pasture or allow any livestock to be therein, or clear, cultivate or break up land for cultivation or for any other purpose, or to enter any part of a state, local authority or provisional forest.

42. Any person found guilty of any of the prohibited acts is liable to a fine of fifty thousand shillings, or imprisonment of not less than six months. In addition, Section 50(2) (c) of the Forest Act empowers the Director or any forest officer “**to take all reasonable steps**” to prevent the commission of an offence under the Act. What reasonable steps are, is a question of fact. Reasonable steps include **firstly** notification to persons contravening the provisions of the Forests Act, that it is unlawful to do so, and **secondly** in default of heeding such warning, notification in writing or widely advertised barazas (public meetings), that in default of voluntarily ceasing their activities in contravention of the Act, they would be forcibly removed from the forest land.

43. An encroacher of forest land is, like upon any other or private land, a trespasser. At common law an intruder or trespasser is liable at the option of the land owner to be forcibly ejected from the premises or land. The only caution is that the land owner should use no more force than is necessary to eject such intruder or trespasser. Reasonable force used for such purposes is lawful, and the same principles apply as to self-defense. (see for instance Archbold 2015 Edition, paragraphs 19:50 and 19:239.

44. In International Law (which is recognized as part of the law of Kenya, under Article 2(6) of the Constitution) with regard to ratified treaties and conventions, provides for minimum standards in regard to evictions. **General Comment Number 7** (page 106) on the right to adequate housing under the International Covenant on Economic Social and Cultural Rights (ICESCR), recognizes in Comment Number 14, that there are situations where forced eviction is permitted when the same is in compliance with international human rights law and in accordance with the general principles of reasonableness and proportionality. The principles of reasonableness include the issuance of adequate and reasonable notice to all persons affected, and proper information regarding the purpose of the notice and eviction.

45. In the matter at hand, the Respondent issued not only one but two notices. The (EK8) letter dated 30th May, 2011, and EK11, letter dated 10th February, 2014) Notice (“EK8”) was issued on 30th May, 2011 to all relevant officials including the District commissioner Tana Delta and Lamu West, District Officers and the public. Contrary to the contention by the Petitioners that they were not consulted, or involved, the Notice annexed as “EK8” shows there were meetings held and resolutions passed in which the local administration was present.

46. Further notice was sent out on June, 2012 (“EK9”) by way of a warning to the Head Teacher of Maisha Primary School by NEMA to cease cutting down trees to pave way for the construction of a school without a proper licence and/or Environment Impact Assessment Report. Final Notice was issued to all encroachers on 10th February, 2014 (“EK11”) to cease occupation of the Forest and further cease all illegal activities therein. I note that those notices contained adequate information regarding the purpose of the notices, but it was clearly disregarded by the Petitioners.

47. As already stated above, (paragraph 38), prior to converting the property into a conservancy, the owners of **KIPINI CONSERVANCY** sold 20,000 acres of the property to the Government of Kenya through Settlement Fund Trustees an agency of the Government of Kenya, to ensure that the indigenous communities living within that area were properly settled. That is clear from the Agreement dated 3rd March, 1994, between **NAIROBI RANCHING COMPANY LIMITED and SETTLEMENT FUND TRUSTEES** attached as annexure “OSS 11” to the Affidavit of Omar Saleh Sherman, sworn on 11th June, 2014.

48. I am therefore satisfied that there was overwhelming evidence on record that demonstrates that care and steps were taken to ensure that the Petitioners were given reasonable opportunity to voluntarily vacate the Provisional Forest, and they cannot be heard to say that they were not given any notice or any adequate notice by the Respondent and the Interested Party. This ground of the Petition also fails.

WHETHER THE PETITIONERS’ CONSTITUTIONAL RIGHTS HAVE BEEN INFRINGED

AND IF SO, WHICH RIGHTS AND HOW THEY HAVE BEEN INFRINGED

49. I will show in the subsequent passages of this Judgment why I have reached the conclusion that the Petitioners have neither raised, nor established any constitutional issue nor proof of denial, violation, infringement or threat of violation of their rights and fundamental freedoms. All the Petitioners have done is to catalogue Articles 10, 21, 22, 23, 25, 26,(2), 28, 29, 35, 39, 40, 47, 48, 50, 258 and 259 of the Constitution. At the end of paragraph 17 of the Petition, the Petitioners state that the Respondents breached the provisions of the Constitution, but do not state how they were breached.

50. Admittedly, some of the Articles cited (Articles 10, (the national values and principles of governance), Article 21 (implementation of rights and fundamental freedoms), Articles 22 (Enforcement of the Bill of Rights), Article 23 (authority of courts to uphold and enforce the Bill of Rights), are both substantive and procedural in nature, (such as Article 10, on national values and principles of governance), to constitute a breach, a Petitioner must demonstrate both the breach and how it was breached. This cardinal interpretation of rights and freedoms, is enshrined in many decisions. I will in this Petition refer to (1) **FRIENDS OF LAKE TURKANA TRUST VS. THE HON. ATTORNEY-GENERAL & 2 OTHERS** (supra), (2) **JOSEPH LETUIYA & 21 OTHERS VS. THE HON. ATTORNEY-GENERAL & 5 OTHERS** (supra) and **MATIBA VS. THE HON. ATTONRNEY-GENERAL**, (HCC Misc. Application No. 666 of 1996) where the courts have reiterated that –

“... it is a firmly established principle that a party who seeks redress for infringement of his or her fundamental rights is duty bound to demonstrate to the court in the clearest way possible how and in which manner the rights have been violated.”

51. To succeed in their Petition, the Petitioners are required to state in a clear, concise and precise manner the correlation between the alleged infringement and the action of the Respondent. It was not sufficient to merely cite provisions of the Constitution they belief to have been infringed but to also state the manner in which the provisions were infringed. This is because as it was held in **LYOMOKI AND OTHERS VS. ATTORNEY—GENERAL [2005] E.A. 127**, the onus, in constitutional Petitions, as in other ordinary civil actions, is upon the Petitioner or the Plaintiff to establish a **prima facie** case, and thereafter the burden shifts to the Respondents to justify the limitation to those rights.

52. For instance, the Petitioners alleged the burning of crops and houses, but they have neither established any *prima facie* case of any interest in the property nor named any perpetrators of those acts. Newspaper cuttings and reports are not sufficient proof and are of no probative value in this case. Section 35 of the Evidence Act (Cap 80, Laws of Kenya) is clear with regard to admissibility of evidence based upon newspaper reports. It provides that **“statements by a person in a document and tending to establish that fact is ... admissible on production of the original document, where the maker of the statement had personal knowledge of the matters dealt with in the statement or the document forms part of a continuous record made in the performance of a duty to record information supplied to him by a person who had or might reasonably be supposed to have personal knowledge of those matters, and if the maker of the statement is called as a witness in the proceedings.”**

53. In **WAMWERE vs. ATTORNEY-GENERAL [2004]1KLR** and **RANDU NZAI RUWA & 2 OTHERS VS. INTERNAL SECURITY MINISTER & ANOTHER [2012] eKLR** the courts observed **“that media articles have no probative value and the court cannot rely on them as the basis for determining a matter.”**

54. I now turn once again to the specific provisions upon which the Petition is grounded. I have stated before, and reiterate, that some of the Articles alleged to be infringed, are merely declaratory of the national values and principles of governance, (Article 10), Article 19 (rights and fundamental freedoms), 20 (application of the Bill of Rights), 21 (implementation of rights sand fundamental freedoms), 22 (Enforcement of Bill of Rights), 23 (authority of courts to uphold and enforce the Bill of Rights), contain the general provisions relating to the Bill of Rights including rules of standing and powers of the court in dealing with a matter alleging violation of constitutional rights. Article 258 and 259 also contain general provisions. Article 258 echoes the provisions of Article 22, while Article 259 contains provisions with

regard to the construction of the Constitution.

55. The Petitioner also alleged violation of Articles 2 and 10 of the Constitution. Article 2 of the Constitution provides that the constitution is the supreme law of the land and binds all persons and all state organs at all levels of government. Article 10 sets out the national values and principles of governance, and provides that these national values and principles bind all state organs, state officers, public officers and all persons.

56. There can be no dispute about the binding nature of the Constitution in general and these provisions in particular. Such conduct as the Respondents or any other party (including the Petitioners) is alleged to have committed, would be contrary to these provisions of the Constitution, and would be clearly unconstitutional. However, a declaration of breach of these provisions of the constitution would not lie without clear proof.

57. Article 26 guarantees the right to life. Indeed as held in the Indian cases (supra), it would be a sterile and inanimate life, if the right to life did not include the right to shelter, food and clean environment. Indeed as Nyamu, Ibrahim JJ (as they then were) and Emukule J, affirmed the principle of clean environment in the case of **PETER K. WAWERU VS. REPUBLIC [2006]1KLR (E&L) 677** at page 691, in respect of the right to life under Section 71 of the repealed Constitution –

“We have added the dictionary meaning of “life” which gives “life” a wider meaning, including attachment to the environment. Thus a development that threatens life is not sustainable and ought to be halted. In environmental law, life must have this expanded meaning.”

58. These broad environmental considerations were adopted in the **Ogiek Case** (Joseph Letuiya & others vs. Republic) (supra), where the Petitioners who were hunters and gatherers were highly dependent on the forest for their livelihood and removal of the community from the Forest was found to be a gross violation of their right to life.

59. Contrasted with this case, the Petitioners herein were involved in massive destruction of the Forest. The charge sheet marked “EK12”, annexed to the Replying Affidavit of Esther Kigen, the Respondent’s Corporation Secretary, the photographs marked “OSS9” enclosed in the Interested Party’s Affidavit and correspondence from the United Nations Environment Programme (UNEP) dated 26th October, 2004, and marked “EK10” all demonstrate that the actions of the Petitioners were very detrimental to the environment.

60. The UN Conference on the Human Environment, 1972, that issued the seminal Stockholm Declaration, noted that the environment was **“essential to the enjoyment of basic rights, even the right to life itself.”** Principle I noted that –

“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”

61. The UN Conference on Environment and Development in 1992 commonly known as the **Rio Declaration** Principle recognized the environment as an integral part of the right to life and stated –

“... human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

62. On the African Continent, Article 24 of the African Charter of Human and Peoples Rights 1981 provides –

“All peoples shall have the right to a general satisfactory environment favorable to their development.”

63. Rights are mutual and reciprocal. The direct destruction of the forest, trees and forest cover by the Petitioners is not only a violation by the Petitioners not only of their own right to life and livelihood, but also the livelihood of others.

64. The Petitioners claim that their removal from the KIPINI PROVISIONAL FOREST, (the forest) was discriminatory contrary to Article 27 of the Constitution. But what is discrimination in constitutional terms? Article 27(1) declares that every person is equal before the law and has the right to equal protection and equal benefit of the law, (the equality before and equality of the benefit of the law). Article 27(4) declares that the state shall not discriminate directly or indirectly against any person or 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.”

65. Article 27(4) describes particular areas of discrimination. It does not define discrimination on grounds stated. However, Section 82(3) of the repealed Constitution defined what discrimination in terms of equality before, and equality of the benefit of the law means. Section 82(3) stated –

“82 (1) – (2)

(3) In this section the expression

“discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinion, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

66. This expression “discriminatory” in Section 82(3) of the former Constitution was used in a special restrictive manner as Chesoni J held in **NGANGA vs. REPUBLIC [1985] KLR 451**.

67. For the Petitioners to succeed under Article 27, therefore, they would need to demonstrate that they or any one other person or group of persons was accorded treatment different from that afforded to other persons, and that such treatment was attributable wholly or mainly to their respective descriptions on the grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

68. The Petitioners claimed that encroachers from Lamu East were allowed into the Forest. This however cannot be correct, as the notices and warnings to vacate the Forest were equally given to all the encroachers. Consequently the Petitioners have not demonstrated how the right of equality before the law or the equality of the benefit of the law was taken away in relation to them and not others. The Petitioners fail on this ground as well.

69. As discussed earlier, paragraph 33-39, .Article 29 of the Constitution grants to every person the right to freedom and security of the person, and this includes the right not to be deprived of freedom arbitrarily or without just cause.

70. The freedom and security of the person, includes, the freedom of movement. Article 24 however recognizes that a right can be limited by law where such limitation is reasonable and justifiable in a democratic society based on human dignity, equality and freedom taking into account all relevant factors, including –

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;

- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others, and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

71. The Forests Act, is one piece of legislation contemplated under Article 24(2) (a) of the Constitution where the right to freedom of movement is expressly restricted under Sections 50-51 thereof, and where such limitation is for purposes of protection of the environment, fauna and flora of Kenya, and is both reasonable and justifiable in a democratic society. Section 50 empowers **Forest Officers** to arrest, seize and detain any parcels, conveyance, hut or building under the control of a person who has committed an offence under the Act. Such offences are provided for under Section 52 of the Act, and indeed some of the Petitioners were charged with various offences as shown in annexure “EK12” of the Replying Affidavit of Esther Keige, the Respondent’s Corporation Secretary.

72. As it was held in the case of **COUNTRY BUS OWNERS ASSOCIATION VS. CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & OTHERS** (JR No. 2 of 2013), Article 24(3) places the burden on the person seeking to justify a particular limitation to demonstrate to the court, tribunal or other authority that the requirements of this Article (24(1) and (2)) have been satisfied.

73. I am satisfied that the Respondent has discharged this burden. The evidence on record shows that there had been massive destruction and deforestation of the land. I have already referred to the charges brought against the Petitioners (annexture “EK12”) notice issued by “NEMA against the felling of trees (0SS9), photographs of deforestation (“EK10”), letter to the District Commissioner, Lamu from UNEP. These clearly show that the Petitioners have been directly involved in destruction of the KIPINI CONSERVANCY Provisional Forest, and their freedom or liberty to move at large was curtailed through both arrest, prosecution, and eviction from the said forest. Neither the provisions of Article 29 nor Article 24 were violated. The Petition likewise fails on this ground.

OF THE RIGHT TO INFORMATION (ARTICLE 35)

74. Article 35 of the Constitution provides as follows –

“35 (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicize any important information affecting the nation.”

75. Indeed as Lady Justice Ngugi held in **NAIROBI LAW MONTHLY COMPANY LIMITED VS. KENYA ELECTRICITY GENERATING COMPANY LIMITED (Kengen) & 6 OTHERS, [2013]eKLR**, Article 35(1) provides for two distinct scenarios –

(a) the first is that Article 35(1) (a) gives every citizen as of right, access to information held by the State;

(b) the second is that Article 35(1)(b) where a citizen could access information from private

person for the exercise for promotion of another right or freedom

76. I agree with Mumbi J that the entitlement of the citizen to information held by the State under Article 35(1)(a) is indisputable, and that the State has a duty not only to proactively publish information in the public interest but also publicize such information. This I believe is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State **to publish and publicize any important information affecting the nation**, but also to provide open access to such specific information as people may require from the State.

77. I also agree with Mumbi J that in order to enforce the right to obtain information held by a private person, a citizen claiming this right must not only show that the information is held by the person from whom it is claimed, the citizen must go further and show that the information sought is **required for the exercise or protection of another right**.

78. In this case the Petitioners claimed access to information held by the Respondent in order to exercise a right under Section 35(b) of the Constitution. The Petitioners must show that they needed such information from the Respondent in order to exercise or protection of another right. The information regarding the declaration of KIPINI CONSERVANCY as a Provisional Forest was properly publicized in a Gazette Notice, which is a properly recognized means of publicizing information in terms of Section 35(3). All other information including maps and title deeds are public documents that can be accessed by any individual upon request. There is no evidence demonstrating that the Petitioners requested for this information and which request was denied.

79. The Petitioners fail on this Article as well.

OF THE RIGHT OF MOVEMENT (ARTICLE 39)

78. Article 39 of the Constitution guarantees the right of movement in the following terms –

“39 (1) Every person has the right to freedom of movement.

(2) Every person has the right to leave Kenya.

(3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.”

80. I discussed the right to free movement and the right to enter, remain and reside anywhere in Kenya in relation to Article 29 on the freedom and security of the person. Other than the restriction from entering and remaining and residing in the provisional forest, which I found and held to be unlawful, the Petitioners have not demonstrated the curtailment of movement under Article 39 of the Constitution. This ground too has no foundation.

OF THE RIGHT TO PROTECTION OF PROPERTY (ARTICLE 40)

81. I have discussed at length the question whether the Petitioners have any proprietary interest capable of protection while discussing the right of equality and protection before the law of every person. In this section, I will consider the specific right of every person, either individually or in association with others to acquire and own property –

(a) of any description; and

(b) in any part of Kenya

and prohibition upon the State not to deprive a person of property of any description, or of any interest in, or right over property of any description, unless it is for purposes specified in Article 40(3), and provision is made for compensation to be paid to the occupants in good faith of land acquired under said sub-article (3), who may not hold title.

82. I reiterate the position of the right to property as stated in Halsbury's Laws of England 4th Edition, (Re-issue) Vol. 8(2) at paragraph 165 –

“The protection under the Constitution of the right to property does not obtain until it is possible to lay a claim in the property concerned...an applicant must establish the nature of his property right and his right to enjoy it as a matter of domestic law.”

83. I also reiterate the dictum in **Letuiya** (supra) **that settlement and acquisition of land is a process.** The onus is upon the Petitioners to show that they had exhausted that process or that they were legal or had acquired an equitable interest in the land. They laid no basis for submitting that the Respondent was exercising the right of eminent domain.

“Eminent domain” is the inherent power of government to take privately owned property especially land, and convert it to public use, subject to reasonable compensation for the taking.”

84. On the contrary, I think the Petitioners' submissions are grossly misguided. The property in question has never been acquired by the Respondent for purposes of conservation. The land in question is and has been privately owned by Nairobi Ranching Company Limited, and is under management of the Interested Party in collaboration with the Respondent by virtue of a Memorandum of Understanding (annexture “OSS6” in the Interested Party's Application of 11th June, 2015), and the provisions of Section 26 and 27 of the Forest Act which sections empower the Minister to declare a private forest as a provisional forest, as is the case herein.

85. This court also takes judicial notice of the fact that the maps and survey plans attached to the various Affidavits filed in court show that all the land surrounding **KIPINI CONSERVANCY** is all government land, part of which was sold by Nairobi Ranching Company Limited, as registered owner to Settlement Fund Trustees a body corporate and itself a state organ. The Petitioners fail on this ground as well.

OF FAIR ADMINISTRATIVE ACTION (ARTICLE 47), OF ACCESS TO JUSTICE (ARTICLE 48) AND OF THE RIGHT TO FAIR HEARING (ARTICLE 50)

86. Articles 47, 48 and 50 of the Constitution respectively provide as follows –

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

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action;

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall –

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration” and

Article 48 says -

“48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

87. Article 50 provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another

independent and impartial tribunal or body.

88. For any liability or culpability to attach to the Respondent, the Petitioners needed to show the correlation of the alleged breach of Articles 47, 48 and 50 with the actions of the Respondent. In **MATIBA vs. ATTORNEY-GENERAL** cited in the case of Joseph Letuiya (supra) the Respondents submitted that the Petitioners had failed to meet the threshold laid out in the above case because the Petitioners had listed a number of constitutional provisions allegedly contravened in respect of them but had failed to draw a correlation between the said infringements with the action of the Respondents. The court said –

“... it is a firmly established principle that a party who seeks redress for infringement of his or her fundamental rights is duty bound to demonstrate to the court in the clearest way possible the manner in which the rights had been violated.”

89. As already stated the Respondent issued proper and adequate notices twice and all the notices were addressed to the relevant Provincial Administration offices and were in turn communicated to the encroachers who included the Petitioners herein. In addition, the final notice gave at least three months prior to the removal of the encroachers. Further, I note that all the stakeholders, the agencies of the national government concerned with the conservation of the Provisional Forest and the removal of encroachers, thereof, that is to say, the District Commissioners or now the County Commissioners of Lamu and Tana River Counties and District Officers, or Sub-County Commissioners, for Kipini and Mpeketoni publicized the notices and were directly involved and effecting the communication and/or notices to the encroachers to vacate the Provisional Forest.

90. Articles 48 and 50 respectively relate to access to justice, and the right to fair hearing. Article 50 requires and grants every person the right to have any disputes that can be resolved by application of law, decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body. There is however no material to support the Petitioners’ claim of violation by the Respondent or the Interested Party of the Petitioners’ rights under Articles 48 and 50 of the Constitution. Again listing provisions of the Constitution without stating how they have been breached amounts to a shot in the dark, and is no proof or violation of rights set out in the cited Articles of the Constitution. Once again the Petitioners fail in their claim of violation of their rights under Articles 48 and 50 of the Constitution.

DETERMINATION

91. Article 23(3) of the Constitution donates to the court the discretion to grant any of the reliefs set out in sub-clauses 3(a)-(f) of Article 23(3) and these reliefs include a **“declaration of rights”**. However, for such a right to be declared, the Petitioners must show denial, violation, infringement or threat. For a declaration to issue with regard to ownership or interest in forest land, the Petitioner failed to show any material justifying any such declaration.

92. Like prayer two, the Petitioners failed to furnish proof of violation of their rights, and there was no material to show the manner of alleged violation of the Petitioners’ rights. The Petitioners were given notice to peacefully vacate the provisional forest before lawful removal.

FINAL ORDERS

93. Following the above analysis, I am satisfied that no rights of the Petitioners have been infringed by the Respondent, Interested Party or any other party. The Petitioners have dragged the Respondent and he Interested Party into this Petition well knowing that they had no right to the **KIPINI FOREST CONSERVANCY** or the Provisional Forest. It is a classic abuse of court process.

94. The Petitioners are invaders of a forest. Forests are vital to the conservation of the environment, and water catchment areas. Any unplanned and unregulated reduction of forest cover is extremely detrimental to the environment. Forests purify water, and absorb carbon dioxide a vital process for flora

and fauna, and for life itself.

95. Property rights are guaranteed rights under Article 40 of the Constitution. Taking away or interference with those rights must be done in accordance with the process laid down in the law and the Constitution. No person in Kenya should be deprived of his property without due process by illegal invasions or encroachments on whatever grounds of need.

96. For all those reasons, the Petition dated and filed on 20th April, 2014, is hereby dismissed.

97. This Petition cannot be termed to be brought in the public interest. It is as I have said, an abuse of process. The Petitioners shall pay costs to the Respondent and the Interested Party.

98. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 29th day of July, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Otwere holding brief Oduor for Petitioners

Mr. Omwenga holding brief Mahida for Respondent

Mr. Omwenga holding brief Hamza for Interested Party

Mr. Silas Kaunda Court Assistant