



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAROK**

**PETITION NO. 1 OF 2019**

**IN THE MATTER OF ARTICLES 1,10,19,20,21,22 AND 258 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION AND THREATENED CONTRAVENTION**

**OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 11,26,28,35,39,40,42**

**,43,47 AND 60 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF WILDLIFE CONSERVATION AND MANAGEMENT ACT, NO. 47 OF 2013**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS**

**AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF SIANA CONSERVANCY LIMITED WITHIN NAROK COUNTY**

**BETWEEN**

MALOI OLE KIU.....1<sup>ST</sup> PETITIONER

TERESA MPETI.....2<sup>ND</sup> PETITIONER

LEMERIA NOONKIPA.....3<sup>RD</sup> PETITIONER

KAMWARO SAYIATON.....4<sup>TH</sup> PETITIONER

PETER SANKAI NOONKIPA.....5<sup>TH</sup> PETITIONER

SEKEROT MPETTY.....6<sup>TH</sup> PETITIONER

MESERE SIRANKA.....7<sup>TH</sup> PETITIONER

RUPARE SIRANKA.....8<sup>TH</sup> PETITIONER

TUMAKI SHUKUR.....9<sup>TH</sup> PETITIONER

MPATINGA LIARAM.....10<sup>TH</sup> PETITIONER

**TOPOIKA LEMPEYIO.....11<sup>TH</sup> PETITIONER**

**& 80 OTHERS**

**AND**

**MARA SIANA CONSERVANCY LIMITED.....RESPONDENT**

**NAROK COUNTY GOVERNMENT.....INTERESTED PARTY**

**RULING**

**A. INTRODUCTION**

1. By Notice of Motion dated 17<sup>th</sup> January, 2019 the Applicants/Petitioners sought for the following orders: -

a) Spent.

b) Pending inter-partes hearing and determination of this Application, a Conservatory Order do issue restraining the Respondent from convening a general meeting scheduled for 18<sup>th</sup> January, 2019 or any other day thereof, signing any new lease agreements within siana conservancy, registering any leases in respect to Mara Siana Conservancy.

c) Pending the hearing and determination of the Petition, a conservancy order do issue restraining the Respondent from convening a general meeting scheduled for 18<sup>th</sup> January 2019 or any other day thereof, signing any new lease agreements within siana conservancy, registering any leases in respect to Mara Siana Conservancy.

d) Costs of this Application be provided for.

2. The application is premised on the 7 grounds thereof and the Supporting Affidavit sworn by SANKAI OLE NOONKIPA on 17.01.2019. The applicants aver that sometimes in 2011 they agreed to set aside 30,000 acres for purposes of establishing a private wildlife conservancy known as Mara Siana Conservancy. The Respondent invested in the said conservancy area and proposed to lease the 30,000 acres of land at a fee of Kshs. 1,000/= per acre annually and subsequently registered its business.

3. They further contend that the conservancy was created and recognized by all stakeholders to carry out public function of wildlife conservation in the said areas. However, despite the Respondent carrying on its business since its inception, only a section of the land owners was paid leaving out majority of the land owners without any payment/ value for their land which was surrendered for purposes of establishing a wildlife conservancy for economic reasons.

4. The Applicants maintains that the Respondent has not adhered to the terms/conditions and obligations that were set out at the time of leasing and surrendering their parcels of land to the Respondent. That the Respondent remains arrogant in its operations and is determined to disregard the constitutional rights to property of the Applicants.

5. That the meeting scheduled for the 18.01.2019 was with an aim of obtaining signatures from members present in order to validate a lease agreement that would otherwise bind the land owners/applicants without a proper plan to pay all the land owners; majority of the land owners/Applicants have remained unpaid and have been deprived of the right to use their land for private purposes despite their land falling within the conservation area.

6. The Respondents also avers that the Respondent has expressed that the new lease shall be for a term not less than 15 years and further that the Applicants/land owners shall not have livestock grazing area and watering points and the same if implemented would occasion the Applicants/land owners irreparable loss and damage. They have never been given copies of the lease agreements signing prior, they are therefore not fully aware of the terms therein.

7. The Applicants are concerned that the new leases which the Respondent seeks to sign; there has been no public participation/ consultations meetings of all the stakeholders- Respondent, tourist partners and all the land owners who surrendered their parcels of land to the conservancy. The select few do not advance the interest of all the land owners particularly those who have remained unpaid for a long time hence the present suit and application.

8. The application was opposed. The Respondent filed its Replying Affidavit sworn by RIMOINE OLE KARAREI, a Director of the Respondent on 31.01.2019 while the Interested Party filed their Replying Affidavit sworn by ELIZABETH SANANGOI OLOLCHOKI on 03.04.2019 in response to the Application dated 17.01.2019.

9. It is the Respondent's assertion that the Applicants/Petitioners are a small group of individuals who have waged war against the conservancy and have opposed all the decisions, regulations and policies that the conservancy have attempted to put in place with the sole intention of collapsing the conservancy and/or take control of the conservancy for their selfish material gain.

10. He also avers that the Applicants/Petitioners have invited and assisted strangers to develop and/or construct unlicensed camps and hotels in the conservancy contrary to the conservation management plans and to the detriment of the conservation efforts. That they collude with the

county government officials, senior officials in County Commissioners Offices and lawyers to intimidate the conservancy and to advance their selfish interests while using the court as a pawn.

11. He further stated that the dispute and the issues raised by the Applicants/ Petitioners relate to a dispute among the land owners of the conservancy; leadership of the land owners and the elections and have nothing to do with the Respondent. He maintained that the Respondent is the management and lease holding company and does not involve itself in the affairs of the land owners or how representatives are elected and remains impartial.

12. It was also their contention that the orders sought to bar the respondent from entering into new leases or contracts with unnamed persons in Siena Conservancy is unconscionable and cannot be granted because it seeks to infringe on the Respondents constitutional rights of association, economic and social rights as enshrined in the constitution. That the court should not issue speculative orders barring a party from entering into future contracts by a party that has not demonstrated any right in any such future contracts. They thus urged the court to dismiss the application as it does not meet the threshold required.

13. The Interested Party on the other hand stated that by law she is the custodian of the Masai Mara National Reserve and therefore the principle stakeholder in all matters pertaining and affecting the management and conservation of the Masai Mara National Reserve. She however maintained that it was not party to the Lease Agreement between the Petitioners/ Applicants and the Respondent.

14. She further deposed on the allegations raised by the Applicants against the Respondent of fraud, public participation, right to property, right to information, right to livelihood and the need to have the same urgently addressed and determined by the court to curb the effect that the same may have on the management and conservation of the Masai Mara National Reserve and strain community relations and overall tourism in Narok County.

15. She thus urged the court to maintain the status quo until an effective resolution of the dispute and indicated that the Interested Party supports the Application dated 17.01.2019 and urged the court to allow the same.

16. On 16.07.2019, the court directed that the Application be disposed by way of written submissions. Only the Applicants filed their submissions which I have read and considered together with the various authorities cited in support of their cases and I have taken the same into account in arriving at my decision.

## **B. ANALYSIS AND DETERMINATION**

17. It is my considered opinion that the sole issue for determination arising is:

a) Whether Conservatory Orders can issue in the circumstances.

18. The Applicants herein sought Conservatory Orders against the Respondent restraining the Respondent from convening any general meeting, signing any new lease agreement within Siena Conservancy and from registering any new leases in respect to Mara Siena Conservancy.

19. The Supreme Court of Kenya in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Other (2014) eKLR** while addressing the concept of Conservatory Orders held that:

***“‘Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.” (Emphasis supplied)***

20. The subject of the dispute between the parties herein is a 3000 acres of land forming part of the Mara Siena Conservancy; the conservancy also serves as a dispersal point/area for the larger Maasai Mara National Reserve. This in my opinion, bears a public law connotation and has elements of public interest. The Maasai Mara National Reserve is a tourist attraction within Narok County and the same contributes to the overall tourism sector in the national government.

21. The principles to be satisfied in granting of a conservatory order were expressed by Justice Onguto J. (as he then was) in the case of **Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others [2015] eKLR** are as follows: -

***“In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”(emphasis mine)***

22. In determining the Application herein this court is limited to examining and evaluating the material placed before it, in order to ascertain whether the Applicants have made out a prima facie case to warrant grant of conservatory orders, I am minded not to delve the merits of the main petition.

23. From the above decision by Onguto J. four principles stand out in determining an Application for conservatory orders as follows; -

- a) *An Applicant must establish a prima facie case with a likelihood of success;*
- b) *An Applicant must also demonstrate that he is likely to suffer prejudice;*
- c) *The court needs to consider whether the petition or its substratum will be rendered nugatory unless the conservatory order is granted;*
- d) *The court must also consider the public interest and the relevant material facts.*

24. I will now proceed to discuss each of the principles as stated above. It is now well settled that an Applicant seeking conservatory order must demonstrate that he has a prima facie case with chances of success. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General, Nairobi High Court Petition No. 16 of 2011; {2011} eKLR** it was held as follows: -

***“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”***

25. What amounts to a prima facie case has been defined in a number of cases. A prima facie case is not a case which must succeed at the hearing of the main case, an Applicant must also demonstrate a real and imminent danger. However, it should not be a frivolous case.

26. I am further guided by the decision by **Mwongo J in Martin Nyaga Wambora vs Speaker of The County of Assembly of Embu & 3 others {2014} eKLR, on what amounts to real danger** where he expressed himself as follows:

***“The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”***

27. The Applicants herein have made several allegations against the Respondent touching on the lease agreement between them as the land owners and the Respondent. It is their contention that the Respondent has not been fulfilling its obligation as per the agreement between them at the time of surrendering their parcels of land, that majority of them have not been paid their dues as agreed, that most of the decisions being made by the Respondent are made without consultation and public participation when in fact they are affected by such decision among other concerns. The Respondent in response dismissed the said allegation and maintained that the issues raised was between a section of the land owners themselves and was intended defeat the function of the Respondent.

28. It is therefore clear from the rival positions taken by the Applicants and the Respondent that there is an issue which needs to be resolved, whether the same is between the Applicant and the Respondent or between the Applicants who are a section of the land owners within the conservancy and the other land owners is a matter that will be determined at the hearing of the main petition. It is my considered view that the Applicants have raised legitimate and genuine concerns which amounts to a prima facie case. The same has therefore been satisfactorily established.

29. The second limb to be considered is whether the Applicants have demonstrated the prejudice there are likely to suffer should the orders sought not be granted. The Applicants have made allegations of fraud, lack of public participation, the right to property, right to information and the right to information among other rights as having been violated by the operations and actions by the Respondent. The Respondent on the other hand has not clearly addressed each of the said allegation but has in return maintained that the Applicants are intent on frustrating and interfering with its operation to achieve their ulterior motives.

30. The Applicants have demonstrated the effect the decision and actions of the Respondent; of signing and registering new leases without their involvement, knowledge and participation and the prejudice they are likely to suffer. From the onset it is key to point out that the subject of the dispute herein is a 3000 acres parcel of land, donated/surrendered/leased out by different individuals, each having diverse acreage, to form the large Siena Conservancy. The idea of the conservancy was a brainchild of the land owners, who came together and agreed to surrender portions of their private property for purposes of carrying out public function of wildlife conservation. There is therefore a legitimate expectation that any decision by the Respondent or any other person or entity, that has a likelihood of affecting their individual holding of the conservancy must be made in their knowledge and participation. The Applicants herein are individuals who have been forfeited the right to use their parcels of land for private purposes for a consideration in return. I therefore find that they have satisfactorily proved the prejudice that they are likely to suffer unless the orders sought are granted.

31. Owing to the above explanation I find that the substratum of the Petition will be rendered nugatory should the orders sought not be granted. If allowed to proceed with the plans of signing and registering the new leases; whose terms, conditions and obligations have not been communicated to a section of the land owners, without participation the same might have an adverse effect of the constitutional rights of the said section of the land owners and/or Applicants. Some of the issues in the main Petition is on the compliance by the Respondents of its obligations as initially agreed and the need to be furnished with copies of the initial lease agreement signed by all the stakeholders. If a new lease were to be signed before then the petition would be overtaken by events, as a consequence thereof I find that there is need to preserve the substratum of the petition pending the hearing and determination of the petition.

32. Further, this court needs to consider the net effect of allowing the application and whether the same would be against the grain of public interest or in favor of the same. In so doing, I have considered the prejudice likely to be suffered by the Applicants as explained above and their constitutional rights that may be infringed in the process. I have also considered the effect of not allowing the application and the

possibility of the Respondent signing the new lease which may adversely affect the individual holdings, right to property and the freedom to use private property of the Applicants who are also land owners and members of the Siena Conservancy. I wish to echo the sentiments by the Interested Party that disallowing the same would strain the community relations and have a negative ripple effect to the Maasai Mara National Reserve and on the overall tourism in Narok County and the national government at large. The totality of the foregoing, it is in the interest of justice that the Application be allowed.

### **CONCLUSION**

33. In the upshot, I accordingly find that the Application dated 17.01.2019 **is merited** and is therefore allowed with no orders as to costs in the following terms;

**a) Conservatory Orders be and is hereby issued restraining the Respondent from signing any new lease agreements within siana conservancy and/or registering any leases in respect to Mara Siana Conservancy pending the hearing and determination of the Petition.**

**b) That the Conservatory Order hereinabove does not in any way affect previous leases signed and registered prior to the instant Notice of Motion.**

It is so ordered.

**DATED, SIGNED AND DELIVERED IN VIRTUALLY AT MIGORI ON 23<sup>RD</sup> DAY OF FEBRUARY, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

**Ruling delivered in the presence of:-**

Nonappearance for the Applicants/Petitioners

Mr. Oyombo for the Respondent

Nonappearance for the Interested Party

Tom Maurice- Court Assistant