



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 74 OF 2015**

**(Formerly CIVIL SUIT NO.154 OF 2009 (OS))**

**JOSEPH LEKAMARIO & 24 OTHERS.....APPLICANTS**

**VERSUS**

**AFRICAN WILDLIFE FOUNDATION.....1<sup>ST</sup> RESPONDENT**

**H.E DANIEL TOROITICH ARAP MOI.....2<sup>ND</sup> RESPONDENT**

**KENYA WILDLIFE SERVICE.....3<sup>RD</sup> RESPONDENT**

**KITUI CHA SHERIA.....1<sup>ST</sup> INTERESTED PARTY**

**YASH PAL GHAI.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. By a notice of motion dated **24th March, 2014** brought under **Articles 28, 39, 40** and **51** of the Constitution of Kenya and **Order 51** of the Civil Procedure Rules, the applicants seek the following orders:-

**i) Spent**

**ii) An order restraining the 3<sup>rd</sup> respondent, its agents, servants and employees from harassing, threatening to arrest, detaining, confiscating their animals and prosecuting them pending the hearing of the application and the suit herein;**

**iii) An order barring the Chief Magistrate's Court Nanyuki from hearing Criminal Case No.231 of 2014 pending the hearing and determination of the application and the suit;**

**iv) An order restraining the 3<sup>rd</sup> respondent from prosecuting them in Criminal Case No.231 of 2014 pending the hearing and determination of the suit herein.**

**v) Cost of the application.**

2. The applicants contend that the 3<sup>rd</sup> respondent is violating their human rights by constantly harassing

them, (arresting them and confiscating their animals without justifiable reason); that the 3<sup>rd</sup> respondent through its servants, constantly beats or threatens to beat them and carries what they call extortionist activities against them; that the 3<sup>rd</sup> respondent has arrested the applicants and their families and preferred illegal charges against them before the Chief Magistrate's court Nanyuki and that the 3<sup>rd</sup> respondent through its agents, wardens and employees burnt their houses/Manyattas and caused them to spend cold and rainy nights in the open. Further that the 3<sup>rd</sup> respondent by purporting that the suit property belongs to it, has constructed permanent structures thereon; that the 3<sup>rd</sup> respondent has vowed that it will ensure that they will never be able to access the suit property despite the suit herein.

3. It is the applicants' case, that since the 3<sup>rd</sup> respondent moved into the suit property, they were barred from utilizing the same as their grazing area while protecting the natural resources.

4. The alleged illegal activities being carried out by the 3<sup>rd</sup> respondent and/or its alleged agents are said to be in total disregard of the Constitution and rule of law. The 3<sup>rd</sup> respondent is also accused of abusing the court process by prosecuting the applicants while aware of a court order barring harassment of the applicants pending the hearing and determination of the suit. As such it is contended that the 3<sup>rd</sup> respondent is in contempt of the said order of the court.

5. In the affidavit sworn in support of the application, the deponent Joseph Lemario (the 1<sup>st</sup> applicant) has reiterated the grounds on the face of the application and annexed the order issued on 24<sup>th</sup> November, 2010 which is said to have barred the 3<sup>rd</sup> respondent from evicting or harassing the applicants marked **JL-1**; and a copy of charge sheet showing the charges preferred against some of the applicants as **JL-2**.

6. The application is opposed through the affidavits of Benson Limo Cheruiyot and that of Kathleen Firtgerald sworn on **31<sup>st</sup> March, 2014** and **3<sup>rd</sup> April, 2014** respectively.

7. In the affidavit sworn by Limo, on behalf of the 3<sup>rd</sup> respondent, it is, *inter alia*, deposed that the suit property is an important wildlife corridor as it is home to so many wildlife some of them endangered species; that the 3<sup>rd</sup> respondent desires to manage it as a heritage for the entire nation by ensuring that it is maintained and protected and to the extent possible.

8. Concerning the applicants' claim of entitlement to the suit property, he has deposed that the suit property is a private property protected under **Article 40** of the Constitution; that at the time the 3<sup>rd</sup> respondent acquired it, it was vacant and it remains vacant to date; that there is evidence on the file, including the testimonies of the applicants, to the effect that the applicants were not occupying the suit property from the year 2009; that in view of the evidence adduced in this suit, the affidavit sworn in support of this application is said to be contradictory and full of falsehoods; that the 3<sup>rd</sup> respondent was not party to the orders allegedly issued in favour of the applicant as it joined the suit after the said orders had been issued (on 17<sup>th</sup> November, 2011).

9. With regard to the incidents which led to some of the applicants being arrested and charged in court, the deponent has deposed that on 13<sup>th</sup> March, 2014 there was an attempt by unknown persons to enter the suit property. Vide O.B NO. 4/13/3/14, he reported the incident to Ngare Nyiro Police Station. After the police were satisfied that a criminal offence had been committed, they elected to arrest and charge the trespassers with the impugned charges. He denies having arrested and prosecuted the applicants, having extorted monies from them or having confiscated the applicant's animals. The deponent has also denied all other allegations made against the 3<sup>rd</sup> respondent and/or its agents including but not limited to the allegation that the 3<sup>rd</sup> respondent's servants threatened to shoot the applicants, raid their Manyattas or that they burnt the applicant's houses or looted, abused and/or assaulted women or children.

10. The applicant's accusation against the 3<sup>rd</sup> respondent and its officers are said to be calculated at drawing the sympathy of the court.

11. He reiterates that the applicants have not been residing in the suit property and contends that the applicants are only seeking to make entry into the suit property while knowing that such an action is not only provocative but unlawful. The allegation that there was or there is collusion between the 3<sup>rd</sup> respondent and the police is said to be unproven and in bad taste.

12. Reiterating that the court order referred in the application herein was issued way before the 3<sup>rd</sup> respondent was made a party to the suit, the deponent explains that the said order required the advocates for the parties in liaison with the manager of the 2<sup>nd</sup> respondent, to identify the squatters in occupation on the suit land which exercise was never carried out.

13. Terming the application untenable, the deponent contends that it was filed by a stranger for and on behalf of strangers; that it seeks prohibitory orders yet it is neither a judicial review application and that it raises Constitutional matters yet it is not a Constitutional Petition for infringement of fundamental rights. For the foregoing reasons the deponent urges the court to dismiss it with costs.

14. In the affidavit sworn on behalf of the 1<sup>st</sup> defendant, the deponent has *inter alia* deposed that at all times material to this suit, the suit property was private property. In this regard the deponent has given a history of ownership of the suit property from OIpejeta Ranching Ltd; H.E Daniel Toroitich Arap Moi; African World Life Foundation and to the 3<sup>rd</sup> respondent (KWS).

15. It is contended that the suit property being private property, the state has a responsibility and duty to protect the owner's proprietary rights under **Article 40** of the Constitution. In this regard, it is deposed that the 3<sup>rd</sup> respondent was within its rights to lodge a complaint with the police and for the police to institute criminal proceedings against anyone illegally invading it.

16. The applicants are said to have a long and well-documented history of trying to trespass/invoke the suit property. In this regard, it is contended that after the 1<sup>st</sup> respondent took possession of the suit property from its previous owner (Arap Moi), no complaints were made by the applicants who were some of the members of the communities neighbouring the suit property. Further, that the applicants' sole request was for consultations between them and the 1<sup>st</sup> respondent on the benefits of the intended conservation and that after the 1<sup>st</sup> respondent declined to exclude other communities from benefiting from the project as demanded by the applicants, the applicants filed Nanyuki SRMCC No.16 of 2009 seeking to be involved in the 1<sup>st</sup> defendant's intended conservancy as the neighbouring communities. The suit is said to have been dismissed on 22<sup>nd</sup> July, 2009.

17. It is contended that in that suit, the applicants' had stated on oath that they were neighbours to the suit property and that they enjoyed good neighbourhood relations with the 1<sup>st</sup> respondent's predecessor in title, Arap Moi.

18. It is explained that it's only after the 1<sup>st</sup> respondent refused to accede to the applicants' request and dismissal of their suit that the applicants became hostile and began trespassing into the suit property. Further, that on 8<sup>th</sup> November, 2010 the applicants while armed violently, attacked guards causing them to flee and to seek police assistance. As a result of this incident, the applicants are said to have been arrested and charged for malicious damage to property.

19. It is further explained that on 19<sup>th</sup> October, 2009 the applicants filed a suit against the 1<sup>st</sup> respondent in which they obtained some injunctive orders. The said injunctive orders are said to have lapsed on 2<sup>nd</sup> November, 2009. That notwithstanding, on 8<sup>th</sup> February, 2010 an order for maintenance of status quo was issued.

20. It is contended that in the applicant's application for injunction dated 27<sup>th</sup> January, 2010 the 1<sup>st</sup> applicant admitted that they were evicted from the suit property on or about 8<sup>th</sup> December, 2009.

21. It is pointed out that the applicants changed their advocate and filed a fresh application seeking maintenance of status quo. Because it was not known which status quo was to be maintained, the court directed that the advocates for the parties, liaise with the 2<sup>nd</sup> respondent's manager to find out if any of the applicants were on the suit property so that if there were any squatters, they were not to be evicted before the hearing of the suit.

22. It is pointed out that the directions given by the court were not complied with. All the witnesses who testified when the matter came up for hearing are said to have stated on oath that they were evicted from or stopped from entering the suit property on or about 8<sup>th</sup> December, 2009. The deponent has also referred to a Parliamentary enquiry concerning the alleged eviction of the applicants and maintained that the applicants were not evicted from the suit property as alleged.

23. Terming the alleged breach of the orders referred to in the application false, the deponent avers that if the allegations were true, the applicants would have cited the 2<sup>nd</sup> respondent for breach of the order.

24. In view of the foregoing, the 1<sup>st</sup> respondent contends that the application herein is solely an attempt to circumvent the due process of the law in the criminal case pending before the Nanyuki Court and as such an abuse of the process of the court.

25. The Director of Public Prosecution, although not a party in this suit was granted leave to file a reply to the issues raised in this suit as they touch on his legal mandate to prosecute criminal cases on behalf of the state. His representative, **Festus Njeru Njue**, in response to the issues raised in the application, swore and filed the replying affidavit sworn on **13<sup>th</sup> August, 2014** wherein he has, *inter alia*, deposed that *prima facie*, the 3<sup>rd</sup> respondent is the owner of the suit property; that unless the suit herein concludes in favour of the applicants, the applicants have no rights over the suit property and that since the applicant's had trespassed into the suit property, the 3<sup>rd</sup> respondent was right in making the complaint that led to their arrest and charges.

26. Referring to the court order referred to in the application herein and the Parliamentary report reoffered in the affidavit sworn on behalf of the 1<sup>st</sup> respondent, he explains that the court order was conditional on advocates for the parties identifying whether there were squatters on the suit land which exercise was not carried out. The report of the Parliamentary Committee on Administration which was made after the court order had been made is said to have established that there were no squatters occupying the suit property.

27. On the basis of the said Parliamentary Report, it is contended that the applicants tried to use the order of the court to trespass on the suit property.

28. The deponent maintains that there has never been any violation of the Constitutional human rights of the applicants.

### **Submissions:**

29. Counsels for respective parties filed submissions and later highlighted them in court on **2<sup>nd</sup> March, 2015**.

30. In this regard, Counsel for the 3<sup>rd</sup> respondent **Mrs. Wachira**, submitted that the 3<sup>rd</sup> respondent is the registered owner of the suit property. Concerning the orders referred to in the application herein, she pointed out that they were made before her client was enjoined to the suit. She further pointed out that the orders were consent orders and as such not binding on her client. She submitted that the orders were on condition that the advocates visit the suit properties and identify whether there were any squatters on the suit property. That condition was never fulfilled. She asserted that by 2009 the alleged squatters were not on the suit property and that by the time the applicants were arrested they were not squatters.

31. She contended that the persons named in the application are not the persons named in the plaint. Arguing that the suit is not a representative one, she contended that the applicant cannot base their claim on the suit yet some of them are not parties to the suit.
32. Concerning the prayer seeking to bar the prosecution of the criminal case lodged in the lower court, she submitted that the function of prosecution is within the office of the Director of Public Prosecution and not the 3<sup>rd</sup> respondent.
33. Mrs. Wachira further submitted that the orders sought in the application are ambiguous and unclear and that the allegations made against the 3<sup>rd</sup> respondent have been totally rebutted.
34. With regard to the affidavit sworn in support of the application, she submitted that it was bad in law for lack of specifics. As for the alleged violation of human rights, she submitted that no evidence has been adduced in support of those allegations.
35. On the allegation that the 3<sup>rd</sup> respondent is in contempt of court, she reiterated that her client was not party to the orders it is alleged to have breached. She pointed out that the issue of contempt was raised in the submissions filed on behalf of the applicant's yet it is not one of the orders sought in the application.
36. On his part, counsel for the 1<sup>st</sup> respondent **Mr. Muthui**, associated himself with the submissions of counsel for the 3<sup>rd</sup> respondent. With regard to the order referred to in the application herein, he explained that he was present when it was made and explained that the order was informed by disagreement by counsels for the parties on which status quo was to be maintained. The court heard that while the applicants maintained that they were in occupation of the suit property, the 2<sup>nd</sup> respondent insisted they were not. Blaming the plaintiff's counsel for non-compliance with the directions given by the court, he stated that the people who were meant to be protected were not verified.
37. Referring to **Article 40** of the Constitution, he submitted that that Article requires the DPP to take action against interference with private property.
38. On whether this court can issue the orders sought, he submitted that it is not within the mandate of a civil court to interfere with the Director of Public Prosecutions when carrying out his mandate. In this regard, he submitted that this court is unable to determine what the criminal case is all about.
39. On behalf of the Director of Public Prosecutions, Mr. Njue pointed out that the 3<sup>rd</sup> respondent is not the prosecutor of the case pending in the lower court. Concerning the prosecution of the applicants while the current suit is pending, he submitted that the law allows concurrent proceedings of Criminal and Civil cases. In this regard he referred to **Section 193A** of the Criminal Procedure Code and argued that the powers of the Director of Public Prosecution to proceed with the Criminal case herein should not be interfered with.
40. With regard to the order allegedly issued in favour of the applicant, Mr. Njue associated himself with the submissions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to the effect that the orders were conditional and that the conditions stipulated therein were not fulfilled. Maintaining that there were no squatters on the suit property at the time the order was made, he made reference to the Parliamentary report herein which suggests that there were no squatters on the suit property and asserted that the applicants were not on the suit property when the order was made.
41. With regard to the prayer for the 3<sup>rd</sup> respondent to be cited for contempt of court for breaching the said order, Mr. Njue submitted that for one to be cited for contempt, proof of contravention of an order of court must be done in an application brought for that purpose.
42. In a rejoinder, counsel for the applicants **Mr. Lempaa**, maintained that the applicants had made a case for being granted the orders sought.

### **Analysis and determination:**

43. It is not in dispute that on **17th November, 2011** the trial court issued a direction/order requiring the advocates for the parties represented in the suit at the time, to visit the suit property and verify if there were any squatters on the suit property. The order of the court was intended to accord protection to the persons identified as having been on the suit property pending the hearing and determination of the suit.

44. Unfortunately, for undisclosed reasons, the advocates of the parties to the consent order failed to act on the order/direction of the court. As a consequence, the applicants' who claim to have been in possession and entitled to protection of the order/direction of the court were arrested while in the suit property and charged with the criminal case hereto which they want stayed pending the hearing and determination of the application herein and the suit.

45. Although advocates for the parties addressed me at length on the rights of the parties to the suit property and the power of this court to issue the orders sought, I wish to state that the fact that the 3<sup>rd</sup> respondent is the registered holder of the suit property and that the rights of the applicants' to the suit property are yet to be determined, cannot prevent this court from issuing orders in favour of the applicants' if it is proved that the prosecutions that are ongoing are being carried out in contravention of a court order or the applicants' were arrested with a view of compromising their interest in the suit property. The duty to prove breach of the alleged court order lay with the applicants. The applicant had a duty to prove that they were beneficiaries of the said court order and that they were arrested and charged in contravention of the said order.

46. Having read the order, the applicants seek to rely on it to obtain the orders sought. I agree with the submissions by counsels for the respondents' that the order was conditional. Since the advocates for the parties did not comply with the order of the court, it is not easy to determine with certainty whether the applicants were in occupation. The applicants' would only have benefited from the order if they had been identified as squatters pursuant to that order.

47. Although there is possibility that the criminal proceedings herein were instituted to compromise the applicants' claim, the duty lay with the applicants to not only make allegations to that effect but to prove them. In this application, no such allegation was made against the office of the Director of the Public Prosecution which is the office prosecuting the applicants. If the 3<sup>rd</sup> respondent had any role in the impugned proceedings, that role was in law limited to making a complaint to the relevant state organs like the police. It is the police who, if satisfied, arrest and charge suspects on recommendations of the office of the Director of Public Prosecutions.

48. Although given the civil nature of the dispute herein, it would have been prudent for the office of the Director of Public Prosecution to satisfy itself that the criminal proceedings were not meant to settle scores, more so given the fact that the parties herein are laying claims to the suit property and entitlement pursuant to a court order, since the applicants have not adduced any evidence capable of proving that either the police or the Office of the Director of the Public Prosecution was informed of the applicants' claim and failed to consider it, it would be speculative to hold that the prosecutions sought to be stayed are being carried for a purpose other than establishing the applicants' culpability under the offences they are alleged to have committed.

49. I also find the application to be bad in law because it seeks to restrain actions which are not being carried out by the 3<sup>rd</sup> respondent.

50. The upshot of the foregoing is that the application is without merits and is dismissed.

**Dated, signed and delivered at Nyeri this 17<sup>th</sup> day of April, 2015.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Mr. Lempaa for the applicant

Mr. Muthui for the 1st defendant/respondent

Mr. Kiplenge for the 2nd defendant

Mr. Nderi holding brief for Mrs Ombonya for the 3rd defendant

Mr. Njue for the D.P.P.

Mr. Lempaa holding brief for the 1st & 2nd interested parties

Lydia – Court Assistant