



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 37 OF 2013**

**ELIJAH SIKONA & GEORGE PARIKEN NAROK *on behalf of***

**TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE.....PLAINTIFFS**

**VERSUS**

**MARA CONSERVANCY.....1ST DEFENDANT**

**SAMUEL KUNTAI OLE TUNAI.....2ND DEFENDANT**

**KOYA KIJABE TONAI.....3RD DEFENDANT**

**NAROK COUNTY GOVERNMENT.....4TH DEFENDANT**

**TRANSITIONAL AUTHORITY.....5TH DEFENDANT**

**MINISTRY OF DEVOLUTION AND PLANNING**

**THROUGH THE ATTORNEY-GENERAL.....6TH DEFENDANT**

**RULING**

1. This Ruling relates to two complimentary applications namely -

(a) the Notice of Motion dated 16th May 2013 and filed on 17th May 2013 by Samuel Kuntai Ole Tunai, the Second Defendant, and in which the Applicant seeks orders inter alia -

i. *that the Complaint dated and filed on 30th April 2013 be struck out in so far as it relates to the Second Defendant, and*

ii. *that the costs for the suit against the Second Defendant be granted to the Second Defendant, and*

(b) the Notice of Motion dated and filed on 17th May 2013 by Koya Kijabe Tonai, the Third Defendant and in which this Defendant seeks orders -

(i) that this application be heard concurrently with the Plaintiff's application dated 30th April 2013,

ii. that the Plaint dated and filed on 30th April 2013 be struck out as against the Third Defendant.

2. The said Notices of Motion (*the Applications*) are premised upon the Certificates of Urgency under which they were filed, the grounds on the faces thereof and the respective Supporting Affidavits of Samuel Kuntai ole Tunai, sworn on 16<sup>th</sup> May 2013, and Koya Kijabe Ole Kijabe sworn on 17<sup>th</sup> May 2013. With regard to the Second Defendant, this Defendant claims that the suit against him is a disguised challenge to his election as Governor of Narok County which can only be lawfully challenged under the provisions of the Constitution of Kenya 2010, and the Elections Act, 2012.

3. On his part, the Third Defendant contends in his application that the gist of the suit against him is premised upon his being a director of the First Defendant, and that not being a director of the First Defendant, the suit therefore discloses no reasonable cause of action against him, and that the suit is therefore scandalous, frivolous and vexatious against him. This Defendant further contends that the Plaintiffs have no *locus standi* to institute this suit against him.

4. I am of the view that in an application for striking out an entire suit (*as sought in the two applications herein*), it is prudent, albeit briefly, to set out, the Plaintiffs' claim as against the Defendants as a whole and establish whether the Plaintiffs' have *locus standi*, and whether indeed, their Plaint or claim discloses no reasonable cause of action even if they were granted opportunity to amend their pleading. In their suit, the Plaintiffs claim *inter alia* -

1. that the First Defendant entered into a management contract executed on 27th May 2001, and extended on 12th April 2005 with the Trans-Mara County Council for the exclusive right of management of the Mara Triangle, a public reserve, (para. 8)
2. that at all material time the Second and Third Defendants (*who is alleged to be a relative of the Second Defendant*), were directors of the First Defendant, and that they were elected Governor of Narok County, and a Member of the Legislative Assembly, respectively, (para. 9)
3. that during their tenure which stretched over ten years, the First Respondent lost funds in excess of one billion Kenya shillings (*Kshs 1,000,000,000/=*) (para. 10),
4. the Second and Third Defendants have not relinquished their offices of Director of the First Defendant since their election as Governor and Member of County Assembly, and have not declared their interest, (para. 11),
5. that the First Defendant is not a registered company and the Second and Third Respondents are therefore engaged in profitable venture by exploiting public resources and disbursing payments to private companies owned and/or managed by the Second and Third Defendants through their agents, cronies or other directors of the First Defendant, (para. 12),

6. that the First Defendant through the Second and Third Defendants have misappropriated the funds of the Fourth Defendant and residents of Narok County Council have been deprived of the right to own, manage and benefit from this World renowned international destination (*para. 24*).

and consequently accused the Second and Third Defendants of -

(a) *Conflict of interest,*

(b) *Failing and/or condoning fraud,*

(c) *misuse of and/or misappropriation of public funds,*

(d) *the beneficiaries are not the Maasai community as alleged,*

(e) *misleading the Fourth Defendant to enter into a contractual agreement with an unregistered company,*

(f) *illegal and unlawful management of public funds,*

(g) *irregular and unlawful awarding of the management contract,*

(h) *placing management of Mara Triangle in the hands of foreigners,*

(i) *persecution of herders.*

5. The Plaintiffs consequently claim the restoration of the Mara Triangle to the Narok County Government to benefit the community and a forensic audit of the contract between the First Defendant and the Transmara County Council (*now defunct*) by the Fifth Respondent and/or an independent auditor. For all those reasons, the Plaintiffs sought the following orders -

(a) *A declaration that the management contract between the first and fourth Respondent is null and void,*

- (b) A declaration that the Second and Third Defendants are respectively unfit to hold offices of Governor and Member of Narok County Assembly,
- c. An order restraining the First and Second Respondents or any other person acting on their behalf from transacting in any manner with the Bank Accounts of Mara Conservancy or the Management of Mara Triangle,
- d. An order be issued freezing the Bank Accounts in the name of Mara Conservancy pending forensic audit,
- (e) An order directed at the Fifth and Sixth Defendants to carry out a forensic audit of the Management of Mara Triangle by the First Defendant and/or by an independent auditor,
- (f) Reimbursement of any funds illegally withheld by the First Defendant in the Audit Report,
- (g) An order directed at the Fourth Defendant to appoint a caretaker committee for purposes of running the Mara Triangle pending competitive recruitment of a new Management Company,
- (h) An order for collection and preservation of all property, documents, vehicles and money previously belonging to the Fourth Respondent (Trans-Mara County Council),
- i. Any other order this court may deem fit to grant,
- (j) Costs of the suit and interest.

6. From the averments in the Plaint and consequential orders sought, the plaintiffs' claim is premised upon two issues, **firstly**, the Management Contract between the County Council of Trans-Mara (now defunct) and the Mara Conservancy, the First Defendant, and **secondly** the status of the Second and Third Respondents whom the Plaintiffs believe have a conflict of interest between their positions as directors of the First Defendant, and as Governor of Narok County (which includes the former Trans-Mara County Council), and as the Member of the County Assembly for Kimintet Ward in Narok County, and that are consequently not fit to hold those political offices. These issues therefore take us back to the issues raised by the Second and Third Defendants, whether the Plaintiffs have *locus standi*, and whether the plaint discloses any reasonable cause of action against these Defendants in particular, and other Defendants in general.

7. The immediate issues for determination are therefore (i) whether the Plaintiffs have *locus standi* to institute this suit against the Defendants, and (ii) whether the suit raises any reasonable cause of action against any of the Defendants, and in particular, the Applicants herein.

### **OF WHETHER THE PLAINTIFFS HAVE LOCUS STANDI**

8. I will examine the question of *locus standi* (which means a place of standing recognised in law) from the perspective of the body called “Trusted Society of Human Rights”, a body, as already stated duly registered on 18th November 2011 under Section 10 of the Non-Governmental Organisations Coordination Act, 1990. Section 12(3) of the said Act grants legal personality to such registered NGO in the following terms -

“12 (1) – (2)

***(3) A registered non-governmental organization shall by virtue of such registration be a body corporate with perpetual succession capable of suing and being sued.”***

9. I agree with the submission by counsel for the Third Defendant that the position of an NGO, registered under the NGO Coordination Act, is similar to that of a company registered under the Companies Act. Both are invested with power to sue and be sued. Counsel referred me to the rule in **FOSS VS. HARBOTTLE (1843) 2 para 46** which relates to corporate membership rights. Corporate membership rights are rights which the member has agreed to submit to the will of the majority, provided that that will is expressly in accordance with the law and articles, (*of association of the company*) and with respect to this membership, the principle of the supremacy of the majority applies. It is a procedural rule as restated by Jenkins L.J. in **EDWARDS VS. HALLIWELL [1950] 2 ALL E.R. 1064** at 1066 -

***“The rule in FOSS VS. HARBOTTLE as I understand it, comes to no more. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio.”***

10. However by way of exceptions to that rule the majority cannot confirm -

- (i) an act which is ultra vires the company or illegal,***
- ii. an act which constitutes a fraud against the minority and the wrong-doers are themselves in control of the company, or***
- iii. a resolution which requires a qualified majority but has been passed by a simple majority.***

11. Put differently where a statute vests upon a registered body power to sue or be sued, or confers such power upon the registered body, only that body may sue or be sued. The proper Plaintiff in respect of a non-governmental organisation (NGO), registered under the Non-Governmental Coordination Act, 1990, is the NGO itself. Any other party purporting to do so, is likened to a busy and idle body. Such

is the case of the Plaintiffs in this case.

12. Though Order 1 rule 9 of the Civil Procedure Rules 2010, declares that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and requires the court to deal with the matter in controversy so far as the rights and interests of the parties actually before it can hardly be said that the Plaintiffs' case is a representative suit as contemplated by Order 1, rule 8 of the Civil Procedure Rules 2010. The Plaintiffs have neither demonstrated that this is a representative suit nor have they sought, nor been granted leave of court to commence such a suit.

13. Further the action herein was filed on 30th April 2013, when the registration of Trusted Society of Human Rights Alliance was still subsisting. However the said organisation was among those whose certificates of Registration were cancelled by Gazette Notice Number 11962 of First August 2013, published on 16th August 2013. Currently therefore there is no lawfully existing body on whose behalf the Plaintiffs can purport to act. It would therefore be an abuse of the court process to have a suit pending by or on behalf of a non-existent organization. It would defeat the entire overriding objective of civil litigation to apply both the court's time and resources not for the proper administration of justice, but on imaginary and illusory wrongs.

14. Having failed both the corporate and representative suit tests, the Plaintiffs did not argue that those are technical considerations. The Constitution of Kenya confers capacity to every person to institute court proceedings on any issue concerning the enforcement of the Bill of Rights, a claim that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened (*Articles 22(1) and 258(1)*).

15. Secondly Article 159(1) of the Constitution declares that judicial authority is derived from the people and is vested in, and shall be exercised by, the courts and tribunals established under the Constitution. And Article 159(2)(d) enjoins courts and tribunals to administer justice without undue regard to technicalities.

16. My understanding of Article 159(2)(d) is that while courts and tribunals will be guided by some procedure, the courts and tribunals vested with jurisdiction will not deny a litigant justice where there is disclosed a cause of action but the claim is not set out in the usual or prescribed format, the courts are bound to disregard the lack of form and determine the dispute in accordance with the dictates of substantial justice. Article 159(2)(d) therefore, is not only a constitutional restatement of Section 72 of the Interpretation and General Provisions Act (*Cap. 2, Laws of Kenya*) but also of the court's inherent power, under Section 3 of the Civil Procedure Act (*Cap 21, Laws of Kenya*), to make such orders as will meet the ends of justice. On format, Section 72 aforesaid says-

***“...wherever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of deviation therefrom which does not affect the substance of the instrument or document or which is not calculated to mislead.”***

17. This provision is further re-emphasised in Order 51 rule 10(2) of the Civil Procedure Rules that an application shall not be defeated or refused for want of form which does not affect the substance of the application.

18. The Complaint herein is drawn in the manner which has evolved into a standard (*but not prescribed*) format following the requirements of the Civil Procedure Act (*Cap. 21, Laws of Kenya*) and the Civil Procedure Rules as to the frame, contents and verification of a Complaint. The averments therein do not disclose a violation or threat of violation or infringement of the Plaintiffs' or other persons' rights and freedoms under the Constitution, by any of the Defendants. In light of the clear provisions of Article 22(1) and (2) of the Constitution, 2010, the court has no basis for invoking the **Githunguri** doctrine, and turn the Complaint into a constitutional Reference or judicial review application.

19. In the premises, I must conclude that the Plaintiffs herein have no locus standi to institute this suit.

**OF WHETHER THE PLAINT DISCLOSES ANY CAUSE OF ACTION AGAINST THE SECOND AND THIRD DEFENDANTS OR IS MERELY SCANDALOUS, FRIVOLOUS AND VEXATIOUS**

20. The applications herein are premised upon the provisions of Section 1A and 1B of the Civil Procedure Act, Order 2, rule 15(1)(b), (c) and (d) and Order 51 rules (1), (3) and 13(2) of the Civil Procedure Rules. In particular, Order 2 rule 15(1)(b), (c) and (d) upon which the applications are primarily based, provides grounds for striking out pleadings. This Rule allows the court at any stage of the proceedings to order to be struck out or amended any pleading on the grounds that-

- (a) *it discloses no reasonable cause of action or defence in law, or*
- (b) *it is scandalous, frivolous or vexatious, or*
- (c) *it may prejudice, embarrass or delay the fair trial of the action, or*
- (d) *it is otherwise an abuse of the process of the court*

21. The court may on those grounds order the suit to be stayed, dismissed or judgment to be entered accordingly, as the case may be.

22. There are well established principles which guide the court in exercise of its discretion under these rules. Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial. The court ought to act cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court.

23. A cause of action is “*a factual situation the existence of which entitles one person to obtain a remedy against another person-*” **LETANG VS. COOPER [1965] Q.B. 232**. If a pleading raises a triable issue, hence disclosing a cause of action, even if at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or is groundless or fanciful and/or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognise as legitimate use of the court process, the court will not allow its process to be used as a forum for such ventures.

24. To do so would amount to opening a front for parties to ventilate vexatious litigation which lack *bona fides* with the sole purpose or intention of causing the opposite party unnecessary anxiety, trouble and expense, at the expense of deserving cases. This would be contrary to the spirit of the overriding objective of the Civil Procedure Act which requires the court to allot appropriate share of its resources, while taking into account the need to allot resources to other cases.

25. The question to be asked and answered is when is a pleading said to be scandalous, frivolous, vexatious and an abuse of the process of the court?

A pleading is said to be scandalous if it states -

- (i) matters which are indecent, or
- (ii) matters that are offensive, or

- (iii) matters made for the mere purpose of abusing or prejudicing the opposite party, or
- (iv) matters which charge the opposite party with bad faith or misconduct against him or anyone else, or
- (v) matters which contain degrading charges, or
- (vi) matters that are necessary but otherwise accompanied by unnecessary details.

[See the cases of **BLAKE VS. ALBON LIFE ASSN. SOCIETY (1876) LJ OB, 663; MARTHAAN VS. WERNER, BETT & CO. [1902] 18 TLR 763, CHRISTIE VS. CHRISTIE [1973] LR 8, CH. 499].**

26. However, for purposes of striking out a pleading under Order 2, rule 15, the word “scandalous” is not limited to the “indecent”, “offensive” and “the improper” and that the denial of a well known fact can also be rightly described as scandalous but may not be scandalous of the matter. **J. B. MACHARIA VS. WANGECHE MWANGI & NATION NEWSPAPERS LTD** (Nairobi Civil Appeal No. 179 of 1997). However scandalous is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

27. Again according to the English cases of **DANKINS VS. PRINCE EDWARD OF SAVE WELBICK [1976] 1QB 449, and CHAFFERS VS. GOLDSMID [1994]1 Q.B. 180**, a matter is said to be “frivolous” -

- (i) it has no substance, or
- (ii) it is fanciful, or
- (iii) where a party is fighting with the court; or
- (iv) when to put up a defence would be wasting court's time,
- (v) when it is not capable of reasoned argument.

28. According to the authors of **BULLEN & LEAKE & JACOBS PRESENTS OF PLEADING** (12th Edn) – a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks *bona fides* and is hopeless and offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.”

A matter is said to be “vexatious” when -

- (i) it has no foundation, or
- (ii) it has no chance of succeeding, or
- iii. the pleading (*plaint or defence*), is brought merely for the purpose of annoyance, or
- iv. it is brought so that the party's pleading should have some fanciful advantage, or
- v. where it can really lead to no possible good (per **WILLIS VS. EARL BEAUCHAMP (1866) 11 PD 59**).

29. In **STROKES VS. GRANT (1878) AC, 345**, **HARDNDORB VS. MONK (1876) 1 Ex. D. 367**, it was held that a pleading tends to prejudice, embarrass or delay fair trial when -

(i) it is evasive, or

ii. obscures, conceals the real question in issue between the parties in the case.

and it is embarrassing if -

(i) it is ambiguous and unintelligible, or

(ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense, or

(iii) it is a pleading the party is not entitled to make use of, or

(iv) when a defence does not say how much he admits and how much he denies.

30. Likewise, a pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and irrelevant issues which may involve expense, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action, and lastly, a pleading which is an abuse of the process of the court really means in brief, a pleading which is a misuse of the court machinery or process – **TRUST BANK LTD VS. HEMANSHUSIRKAT AMIN & CO. LTD & ANOTHER**, (Nairobi HCC No. 984 of 1999).

31. A pleading is an abuse of the process where it is frivolous or vexatious or both; but where the pleading as it stands is not really embarrassing – it is wiser to leave it un-amended or to apply for further particulars – **KEMSLEY VS. FOOT [1952] A.C. 325**.

32. The question here therefore is whether in light of the facts set out in the foregoing paragraphs of this Ruling, the pleading by the Plaintiffs discloses any reasonable cause of action (*a factual situation the existence of which entitles one person to obtain a remedy against another person*), or it is merely a scandalous, frivolous and vexatious suit which is brought to embarrass the Second and Third Defendants (*the Applicants*) herein in particular, and the other Defendants in general.

36. The first issue to be determined concerns the status of the First Defendant. In opposition to the twin applications Elijah Sikon a Chairman of the Plaintiff in a Further Affidavit sworn on 20th June 2013 and filed on the same day, claimed that the First Defendant is not a registered company and attached a copy of a letter dated 31st May 2013 from the Registrar of Companies confirming to the Plaintiff's Advocates, that name "**Mara Conservancy Limited**" was available for registration and was reserved for 30 days. This allegation is also contained at paragraph 12 of the Plaint wherein it is further averred that not being registered,

***“the Second and Third Defendants are therefore engaged in a profitable venture by exploiting public resources and disbursing payments to private companies owned and/or managed by the Second and Third Defendants through their agents, cronies or other directors of the First Defendant.”***

37. I will for purpose of this Ruling ignore the rather confused contradictory pleadings of the Plaintiffs. I say confused because *at one stage* the Plaintiffs acknowledge that the First Defendant exists legally, and allege that the Second and Third Respondents are or were directors thereof, and had not resigned therefrom, and *at another stage* the Plaintiffs, on the basis of a letter of search and reservation of a name, say, the First Respondent does not exist. In English idiom, that is called “*blowing hot and cold*” which means to be “*inconsistent and vacillating*”.

38. A little more diligent search would have revealed that “*Mara Conservancy*”, and “*Mara Conservancy Limited*” would be two different entities, and both could be registered (*subject to objection on confusion by the similarity of the words “Mara” and “Conservancy”*). But the more fundamental point is the denial by the Plaintiff and their counsel that “*Mara Conservancy*” is a registered limited company not by shares, but by guarantee. That simple statement of the law finds support in Section 21 of the Companies Act which permits the registration of companies whose objects are the promotion of art, commerce, environmental conservation, and whose profits are not to be distributed by way dividends to its promoters to be registered as companies “*limited by guarantee*”, and without the addition of the word “*limited*”.

39. The Certificate of Incorporation is conclusive evidence of the registration of “*Mara Conservancy*” as a company limited by guarantee. That is the effect of Section 17 of the Companies Act. The contention by the Applicant's to the contrary has no basis in law. That ground too therefore fails.

40. The other grounds concern the Second and Third Defendants, whether or not there is a cause of action against either of them jointly or severally. The Plaintiff claims in paragraph 12 of the Plaintiff -

**“12. That the First, the Second and Third Defendants have received and disbursed funds in excess of Kenya Shillings one billion (Ksh 1,000,000,000/=) for more than ten years when it was vested with the management rights of the “Mara Triangle”.**

41. The Plaintiff avers in paragraph 11 of the Plaintiff that the Second and Third Respondents have been elected to public office as Governor and Member of the County Assembly respectively and have not relinquished or declared their interest in the First Defendant and/or the Camps and Lodges within the Mara Triangle.

42. I will deal with the question of whether or not the Second and Third Defendants have relinquished their positions of directors. Section 185 of the Companies Act, (*Cap. 486, Laws of Kenya*) provides for removal of any director from office, notwithstanding the provisions in its Articles of Association, or any agreement he may have with the company.

43. Article 30 of the First Defendants' Articles of Association sets out for several grounds for a cessation of office by a Director of the Company. Under Article 30(d) the Office of a director shall be vacated if he resigns his office in writing to the Conservancy, that is, the First Defendant.

44. By letters dated 18th February 2013, under the signatures of Samuel K. Tunai, and Kuya Kijabe Ole Tunai, the Second and Third Defendants respectively resigned from the Board of Directors of the First Defendant. The letters were identical - “*I hereby resign as a Director and member of the Mara Conservancy with immediate effect. I confirm that I have no outstanding claims of whatsoever nature against the Company.*”

45. Their voluntary resignation from the Board of the First Defendant, was obviously in obedience to Section 12(2) of the Public Officer's Ethics Act (*Cap 183, Laws of Kenya*) which provides, *inter alia*, that-

**“... a public officer shall not hold shares or have any other interest in a corporation, partnership or other body, directly or through another person, if holding these shares or having that interest would result in the public officer's personal interests conflicting with his official duties.”**

46. In an extract from the Directors Resolution dated 26th February 2013, and entitled **RESIGNATION OF DIRECTORS**, the Board accepted the resignations of the Second and Third Defendants in these terms -

**“Noted that Messrs Kuya Tunai Ole Kijabe and Samuel Kuntai Tunai had vide their letters dated 18th February 2013 tendered their resignation as Director of the Company.**

**RESOLVED to accept the resignations of Messrs Kuya Tunai Ole Kijabe and Samuel Kuntai Tunai as Directors of the company with effect from 18th February 2013.”**

The said extract is certified by the signature of both the Chairman, and Company Secretary on the 26th February 2013.

47. The Replying Affidavit of Brian Heath, the First Defendant's Managing Director makes reference to a statutory declaration of Mr. Kuya Tunai ole Kijabe, the Second Defendant made on 27th February 2013 sworn in support of the filing with the Registrar of Companies of the necessary Notification of Change of Directors and “*Transfer of Shares*” issued by the Registrar of Companies dated 2nd March 2009.

48. Also attached to the said Affidavit is a Certificate by the Registrar of Companies showing the Directors of Mara Conservancy erroneously indicated by the Registrar of Companies as Mara Conservancy “*Limited*” as at 15th May 2013.

49. The Companies Act makes certain matters admissible in evidence. The Certificate of Incorporation is made “*conclusive evidence*” that all the requirements of incorporation and of matters precedent and incidental thereto have been complied with. That is the effect of Section 17 of the Companies Act as already stated.

50. Section 20 of the Act provides that the Register of members shall be *prima facie* evidence of any matters by the Act directed or authorised to be inserted therein, while Section 145(2) states that the minutes of proceedings of general meetings of directors or managers, if purporting to be signed by the Chairman of the meeting or the next successive meeting, shall be “*evidence*” of the proceedings.

51. As regards the annual returns and other documents of the company which have to be filed with the Registrar of Companies and are not made expressly evidence by the Act, the rules of evidence under Section 80 of the Evidence Act (*Cap. 80, Laws of Kenya*) on admission of public documents apply. These rules are more or less summarized in the English case of **REGINA VS. HALPIN (R VS. HALPIN) [1975] 3 WLR 260, at 263** – these conditions are -

**(1) the document must be brought into existence and preserved for a public purpose,**

**(2) it must be open for public inspection,**

(3) *the entry must be made promptly after the events it purports to record,*

(4) *the entry must be made by a person having a duty to inquire and satisfy himself as to the recorded facts.*

52. Finally, Section 384(3) of the Act declares that -

***“... a copy of, or extract from any document kept and registered at the Office of the Registrar (of companies), certified to be a true copy under the hand of the Registrar (whose official position shall not be necessary to prove) shall in all legal proceedings be admissible as prima facie evidence of such document as the case may be, and of the matters, transactions and accounts therein recorded.”***

53. By a letter dated 15th May 2013, the Registrar of Companies provided a list of the names and current Directors of **“Mara Conservancy”** and not **“Mara Conservancy Limited”**. This is conclusive evidence that the Second and Third Defendants are not directors, and were not directors of the First Defendant either as of 15th May 2013, or at the time of filing these proceedings on 30th April 2013, they having resigned on 18th February, 2013 and had their resignations accepted by the First Respondent on 26th February 2013, well before the General Elections of 4th March 2013. The claim that the Second and Third Defendants are directors of the First Defendant have then no foundation in law or fact. A reading of the First Defendant's Memorandum and Articles of Association would have made it plain to any disinterested person that the Second and Third Defendants having resigned as a Director of the Company, the chances of conflict of interest were non-existent. The claim to the contrary fails.

54. Having considered the other issues herein, and established that the Second and Third Defendants are not directors of the First Defendant, that they have not been properly enjoined in this suit, that there is no conflict of interest between the Second and Third Defendants' roles as Governor and Member of County Assembly, Narok respectively, and that the First Defendant is a limited liability company, I am satisfied beyond per adventure that the suit herein against the Second and Third Defendants is absolutely scandalous, frivolous, vexatious, embarrassing and is an abuse of the court process. It discloses no reasonable cause of action against either these Defendants. The question is whether it discloses any cause of action against the First, Fourth, Fifth and Sixth Defendants.

#### **OF WHETHER THE SUIT DISCLOSES ANY CAUSE OF ACTION AGAINST THE FIRST, FOURTH, FIFTH AND SIXTH DEFENDANTS**

55. I will commence with the case against the First and Fourth Defendants. The Plaintiffs seek an order directed against the First Defendant restraining it from transacting in any manner with the Bank Accounts of Mara Conservancy or the Management of the Mara Triangle. The Plaintiffs also seek an order for reimbursement of any funds illegally withheld by the First Defendant in the Audit Report.

56. The First Defendant is the body entrusted with the management of the Mara-Triangle. The Fourth Defendant is the now devolved second time of Government of the Republic of Kenya which under the transitional arrangements took over the affairs of the former Mara County Council. In its portfolio would include the affairs of the Mara Conservancy under the Management Agreement with the Mara Conservancy. The Fourth Respondent has not complained or raised any issue of breach or threatened breach of the Management Agreement. The Fourth Defendant would therefore have no basis, and the court would have no ground for making an order annulling the Management right directing the Fourth Defendant to appoint a caretaker committee for running the Mara Triangle in place of the First Defendant

pending the recruitment of a new Management Company.

57. Similarly, the Plaintiffs sought orders directed at the Fifth and Sixth Defendants to carry out a forensic audit of the management of the Mara Triangle by the First Defendant or by an unnamed independent auditor. The grounds for this prayer are set out in paragraph 4(6) of this Ruling, alleging malice, loss and damage by the Second and Third Defendants, the particulars of which included, conflict of interest by the Second and Third Respondents, condoning of fraud, misuse or misappropriation of funds, illegal unlawful management of public funds, irregular awarding of management contract, placing of Mara Triangle in the hands of foreigners and persecution of Maasai herders.

58. For all those reasons, the Plaintiffs claim for an order for the restoration of the Mara-Triangle to the Narok County Government to benefit the community.

59. However, in the Replying Affidavit of Philip Kipngeno Langat sworn on 16th May 2013 and filed on 17th May 2013, on behalf of the Fourth Respondent, the said Philip Kipngeno Langat depones inter alia that he has been serving as an Accountant at the Trans-Mara County Council, a predecessor of Narok County, his current employer and acknowledges the validity of the Management Agreement between the Trans-Mara County Council and the Mara Conservancy (*the First Defendant*) over the Mara-Triangle, and that the rights and obligations of the Trans-Mara County Council under the said Agreement have by operation of law now been taken over by the Narok County Government.

60. This deponent also averred that until the General Elections held on 4th March 2013, he administered the revenue received from the First Respondent pursuant to the Management Agreement over the Mara-Triangle. The said deponent further deponed that there is no basis for the orders sought in the suit and the Plaintiffs' suit because:

- i. ***under the Management Agreement, the Clerk of the Trans-Mara County Council was a member of the Board of the First Defendant to oversee the interests of the County Council,***
- ii. ***there has been a sworn administration of the said Management Agreement and that the Fourth Defendant is satisfied with the First Respondents performance, or its obligations under the said Agreement, and that all revenue due to the Fourth Defendant has been remitted by the First Defendant in accordance with the Agreement, and that there are no issues of misappropriation or loss of revenue as alleged by the Plaintiffs,***
- iii. ***there is no basis for the ..... that the First Respondent had received the sum of Ksh 1 billion through the Second and Third Defendants.***

***(iv) that clause 12(1)(h) of the Management Agreement does not yield self serving interpretation that the Plaintiff give to it. The clause merely provides – that the Agreement shall be terminated by notice – if any Government or any other competent authority nationalises, seizes or otherwise expropriates or assumes custody or control of all or any of the share capital, property, assets or business of the conservancy.”***

***(v) there was no decree by the Government or any other authority to nationalize the assets of the First Respondent,***

***the Plaintiffs are merely waging a political contest against the Second and Third Defendants and that the allegations touching on the Management Agreement are feigned,***

***vi. the suit is not brought in the interests of the people of Narok County, as the Plaintiffs have never sought any information from them, and the letter dated 15th April 2013 from the Plaintiff's Advocates was never served on them.***

61. In his Further Affidavit sworn and filed on 20th June 2013 Elijah Sikona merely denies the averments of Philip Kipngeno Langat and does not answer any of the latter's averments and reiterates the same false assertions that the First Respondent was not a registered company because the name "*Mara Conservancy Ltd*" was available for registration.

62. From the above, it is clear to me that the Plaintiffs have no cause of action against the Fourth Defendant, the averments of its Account bad credence to the assertion by the Second and Third Defendants that the Plaintiffs suit against these Defendants is nothing but a vided Petition against their election as Governor of Narok County, and a Member of the Assembly of Narok County. This is both contrary to the Constitution and Elections Act 2012, and must fail also on this ground alone.

63. The Plaintiffs' claim against the Fifth Defendant is an order for the restoration of the Mara-Triangle to the Narok County Government to benefit the Maasai Community and a forensic audit of the Management Agreement between the First Defendant and the Trans-Mara County Council (*not defunct*). The Plaintiffs do not say why the Fifth Defendant should be ordered to itself or an independent entity, carry out a forensic audit. The Accountant of Narok County, who was the accountant for the Trans-Mara County Council, has stated on oath that the defunct council and its successor the Narok County Government was and is satisfied with the terms of the Management Agreement, and the Fifth Defendant has no mandate to interfere with the affairs of the Narok County Government, and cannot in any event micro-managed it even if had that mandate.

64. Likewise, the Sixth Defendant is under Article 156 of the Constitution of Kenya 2010, the National government's principal legal adviser, although he is referred to as the principal legal adviser of the Government, manning both the National and County Governments (in matters referred to him by a County Government for legal advice). The Management Agreement in question has no reference to the Attorney-General except perhaps in the extreme case of nationalization of the Mara Conservancy. The Plaintiffs did not allege any such eventuality now exists and calling for the intervention of the national government. Again it is clear to me that there is no basis for orders against Sixth Defendant (*the Ministry of Devolution and Planning*).

## **CONCLUSION**

65. The First Defendant is an independent legal entity which entered into a Management Contract with the defunct Trans-Mara County Council (*the Council*) under which the Council was to administer all the revenue received from the First Defendant. The Council's Clerk was under the Management Agreement to be a Board Member of the First Defendant, no doubt to safeguard the interest of the Council. The Second Defendant having been the Council's Clerk was appointed Director of the First Defendant. As already indicated, the Second Defendant voluntarily resigned from the Board of the First Defendant.

66. The Second and Third Defendants have no shares in the First Defendant and have no powers to prompt the Sixth Defendant by way of Plaint to carry out a forensic audit of the Management of the Mara Triangle by the First Defendant.

67. This equally applies to the Fourth Defendant, the Narok County Government. The Plaintiffs have no oversight authority over the Fourth Defendant in as much as they find no such authority over the

Trans-Mara County Council. They neither have privity of contract with either the First Defendant or the Fourth Defendant. They have no capacity to sue upon any provision of the Management Agreement whether between the Council, or the successor to the Council, the Government of the County of Narok. Similarly they have no mandate to purport to act for either the Fifth or Sixth Defendants.

68. For those reasons, I would strike out the suit not just against Second and Third Defendants but against all the Defendants.

In summary therefore, I make the following findings -

1. ***The Second and Third Defendants are not Directors of the First Defendant,***
2. ***The Second and Third Defendants are not properly enjoined in this suit,***
3. ***There is no conflict of interest between, the Second Defendant's role as Governor of Narok County and the Third Defendant's role as a Member of the County Assembly of Narok and the First Defendant,***
4. ***It is absolutely clear that the First Respondent is a private company limited by guarantee,***
5. ***The suit against the Second and Third Defendants in particular, and other Defendants in general, is an abuse of the court process,***
6. ***The Plaintiffs are not entitled to any reliefs whatsoever.***

69. The law regarding costs is that costs follow the event. The Plaintiffs having put themselves into the legal arena without apparent awareness of what they were upto, they, Elijah Sikona and George Pariken Narok, shall bear the costs of the suit, and the applications by the Second and Third Respondents.

70. There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 18<sup>th</sup> day June, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**