REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 9 OF 2014

IN THE MATTER OF ARTICLES 22, 70 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 22, 27, 32, 35, 42, 43, 44 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 2(5) & (6), 10, 60, 62, 63, 67, 69, 70, 71, 73, AND 174 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

LAW & SOCIAL DEVELOPMENT

TRUST (LASODET) ..... 1ST PETITIONER

ATIRIRI BURURI MA CHUKA TRUST ..... 2ND PETITIONER

WENDY W. MUTEGI AND OTHER

3000 PETITIONERS ..... 3RD PETITONERS

VERSUS

THE HONOURABLE ATTORNEY GENERAL ..... 1ST RESPONDENT

THE CABINET SECRETARY

MINISTRY OF ENERGY AND NATURAL

RESOURCES ..... 2ND RESPONDENT

THE CABINET SECRETARY

MINSTRY OF LANDS ..... 3RD RESPONDENT

THE NATIONAL LAND COMMISSION ..... 4TH RESPONDENT

THE KENYA FOREST SERVICE ..... 5TH RESPONDENT

KENYA WILDLIF SERVICES ..... 6TH RESPONDENT

THE CABINET SECRETARY

MINISTRY OF INFORMATION &

COMMUNICATION ..... 7TH RESPONDENT

THARAKA NITHI COUNTY GOVERNMENT ..... 8TH RESPONDENT

RHINO ARK ..... 9TH RESPONDENT

THE NYAYO TEA ZONES

DEVELOPMENT CORPORATION ..... 10TH RESPONDENT

NATIONAL ENVIRONEMNTAL

MANAGEMENT AUTHORITY (NEMA) ..... 11TH RESPONDENT

FOREST COMMUNITY NEIGHBOURS ..... 1ST INTERESTED PARTY

SAW MILLERS ..... 2ND INTERESTED PARTY

R U L I N G

There are 2 applications which are the subject of this ruling. One is dated 22.4.214 and the other one is dated 13.6.204

This Notice of Motion application brought under article 22 (3) 23 and 165 (3) of the Constitution of Kenya seeks the following orders:

(a) THAT service of the petition and this Motion be dispensed with in the first instance.

(b) THAT this application be certified as urgent and be heard over the High Court Vacation.

(c) THAT an injunction do issue against the 5th respondent, or their agents from issuing licenses of access to the Chuka Forest pending the hearing and determination of this application.

(d) THAT an injunction do issue against the 5th respondent, or their agents from issuing licenses of access to the Chuka Forest pending the hearing and determination of this petition.

(e) THAT a conservatory order do issue preserving the Chuka Forest in it's status quo pending the hearing and determination of this application and subsequently, the hearing of the petition filed herewith.

(f) THAT this Honourable court do visit the site and subject matter prior to the hearing of this petition.

(g) THAT this Honourable court do visit the site and subject matter prior to the hearing of this petition.

(h) Costs be provided for

It has the following grounds:

(i) The application is urgent

(ii) The Constitutional proceedings will be rendered nugatory unless the orders are granted.

(iii) A conservatory order will enable the court to maintain the status quo so that it would still be possible that the rights and freedoms of the applicants will be capable of protection and enforcement upon determination of the petition.

(iv) Unless the orders are granted the trial will be a futile academic discourse.

The application is supported by the Affidavit of Wendy Wanja Mutegi sworn on 22nd April, 2014. The affidavit states:

1. THAT I am the above named, an adult female of sound mind and duly authorized to swear this affidavit on my own behalf and on behalf of the Petitioner's.

2. THAT I am a founding Trustee of the 1st petitioner.

3. THAT I am a member of the 2nd petitioner and at the same time have authority from the 2nd petitioner together with the over 3000 members to act on their behalf. Attached herewith and marked "WM1" is a copy of the said authority and membership certificate of participation.

4. THAT the petitioner's are committed to Sustainable Natural Resources Management in Tharaka Nithi and have taken the role of monitoring the management, use and conservation of the environment voluntarily.

5. THAT about 4 weeks ago, the petitioners learnt that the 5th, 6th and 9th Respondents were ready to start an electric fencing project with the purpose of reducing wildlife/human conflict.

6. THAT while coming to terms with the electric fencing project, the petitioners also learnt that the Respondents and or their agents have since approved two tourist sites, one in Kiangondu and another at Tungu River, to be located in the Chuka Forest, as part of Mt. Kenya Forest.

7. THAT, the petitioners were never engaged at the conception of the projects and therefore were and still are not aware of the impacts of such projects, who is to implement and for whose benefit, and even how any negative impacts are to be mitigated by the implementing agencies. The petitioners are entitled to information and public participation which constitutional rights have been denied to them wholly. The only meetings that the Respondents involved the petitioners in, are what the petitioners would refer to as validation meetings.

8. THAT, whereas the petitioners would naturally appreciate such noble projects, the Respondents have operated in a manner that threatens the petitioner's Constitutional rights, more so for the reasons mentioned herein below.

9. THAT, the 1st petitioner, having conducted research, established that a claim by the Chuka Community is authentic and various meetings involving all the stakeholders to see how best to bring this matter into rest, have been held. Committee meetings and general meetings involving the public were held both at Kibugua and Kirobia grounds in Chuka Tharaka Nithi County, as is summarized on the annexture hereto and marked "WM2". Nothing would have been better than the respondents attending the public forums and informing the petitioners of such intentions.

10. THAT the second petitioner duly constituted themselves many years ago to pursue a long time issue of what they refer to as "Magundu ma Chuka" on behalf of the Chuka Community , and which constitute a historical injustice. The said "Magundu ma Chuka is a section of Mt Kenya Forest, or a part of the Chuka Forest, to which the Chuka Community maintains that the Forest Reserve encroached into their land. Attached and Marked "WM3a" is a map showing Mt. Kenya Forest Reserve, with an extrusion marked X that indicates the said section in question.

11. THAT during such meetings, very sensitive issues were raised, such as the fact that the 5th Respondent had authorized various timber merchants and massive logging was going on in Mt. Kenya Forest, and more specifically in the area where the petitioners lay a great stake. In fact on one occasion, on the 25th January, 2013, when the petitioner could not be heard by the Respondent's the petitioners took to the street and demonstrated against logging in Mt. Chuka Forest. Attached and marked WM3a" are photos showing some of the meetings, the demonstration and a tree planting session.

12. THAT, further, the petitioners have watched massive degradation of the Chuka Forest, with the authority of the very institution that is meant to safeguard their environment.

13. THAT pursuant to the meetings, the petitioners all agreed on one thing, that they were to conserve the section they so hold very dearly, as opposed to laying individual claims as is the case with the Embu and Mwimbi sides.

14. THAT, Constitutional mandate to the petitioners to conserve the environment and their right to a clean and healthy environment, which is key to their right to life, is strengthened by the fact that the petitioners have a long historical attachment to a section of the Chuka Forest. The history and claim by the Chuka Community are well detailed in the annextures marked "WM4".

15. THAT, the petitioners did all they could to engage all stakeholders, all with one joint agenda on how to conserve their only major Natural Resource, and transmute their individual stakes to Community stakes to benefit generations to come and conserve biodiversity. See annextures marked "WM5".

16. THAT, in the month of November 2013, the petitioners also petitioned the Tharaka Nithi County Assembly and yet to date no communication has been made to them. Attached hereto and marked "WM6" is a copy of the petition.

17. THAT, it is well noted that the complaint about degradation of an area that the Chuka Community lay a close stake to is consistent with the constitutional requirements yet the Respondents are tight-lipped about it.

18. THAT, the petitioners now view the electric fencing project as a pretence to assist the approved interested parties desiring to set up the tourist sites to the total exclusion of the petitioners and other members of the Chuka Community.

19. THAT, from the annextures marked "WM7", it is notable that the Forest Reserve in the area belonged to Meru South so much so protrudes into the land of the Chuka people. There is a 1st baseline which touches the current boundary as gazetted and a 2nd visible baseline which intrudes into the forest reserve about 12 Kms from the 1st baseline. The Supreme Council of Njuri Cheke Elders know the actual boundaries which this Honourable Court would appreciate more if there was a site visit.

20. THAT, from the annexture marked "WM8", it is clear that the respondents have very many constraints to forest Reserve Conservation. It is worth noting that electric fencing project is not top on the list on promoting conservation. Further it is worth nothing that fires and illegal logging is still noted as one of the key challenges of conservation amongst others.

21. THAT, further, a key constitutional challenge is the aspect of benefit sharing. Until this is solved, the constitutional right of the petitioners to benefit from the natural resources, will continue to be infringed and threatened.

22. THAT, notable on annexture marked "WM9" and "WM10", is that there is already a zone named a Community Intervention Zone, which to date the community does not benefit from. The respondents do admit that the cost and sharing mechanism is lacking.

23. THAT, therefore,the petitioners read this to mean, as is now the case in Chuka Forest, that projects deliberated in closed door meetings can be discussed, conceived and implemented without public participation which is a violation of the petitioners' constitutional right.

24. THAT, to secure the sustainability and conservation of the Chuka Forest, a protection and security programme is key. The 5th respondent admits that in terms of personnel, equipment, communication and surveillance, their capacity remains inadequate in all forest stations. The petitioners having noted this, mobilized their own community surveillance and trained 50 Community Forest Officers who were able to notify the members of the activities that were being carried out in the forest. This is how the members learnt of the massive degradation and took to the streets in January of 2013 See annexture marked "WM 11" and "WM12"

25. THAT, the two tourist sites Kiangondu Guest House and Tungu/Chungu River Lodges have also been approved to be located in the Chuka Forest, Meru South or Tharaka Nithi County. There has been no public participation in the conception of the same nor is there any information given to the public concerning the same. This is a contravention of the constitution and the same should be halted pending the hearing and determination of this petition.

26. THAT, petitioners are also praying for an order of injunction restraining the 5th Respondent from issuing any further licences of access to the Chuka Forest as such licences only degrade the forest resources further.

27. THAT the process of setting up the two tourist sites also should be halted until the petition has been heard and determined.

28. THAT, a conservatory order will enable the court to maintain the status quo so that it would still be possible that the rights and freedoms of the applicants will still be capable of protection and enforcement upon determination of the petition.

29. THAT, further unless conservatory orders are issued, the Respondents shall continue to engage in activities that are damaging to the environment, in specific reference to the Chuka Forest, a part of Mt. Kenya Forest, which activities will lead to forest depletion.

30. THAT, I swear this affidavit, in support of motion filed herewith.

31. THAT, what is deponed here is true to the best of my knowledge, belief and information.

The application dated 13th June, 2014 seeks the following orders:-

(a) THAT this application be certified as urgent.

(b) THAT service of this Motion be dispensed with in the first instance and the same be heard ex-parte.

(c) THAT an injunction do issue against KOKI TIMBER AND SAW MILLER, NJAMBA NJIRU TECHNIQUES, MUNJUS TIMBER & FURNITURE, MT. KENYA EAST ENVIRONMENT CONSERVATION ASSOCIATION, KAMWERU AUTO SHOP, being Licensees of the 5th respondent, or their agents from accessing the Chuka Forest to harvest any forest produce at all pending the hearing and determination of this application.

(d) THAT an injunction do issue against KOKI TIMBER AND SAW MILLER, NJAMBA NJIRU TECHNIQUES, MUNJUS TIMBER & FURNITURE, MT. KENYA EAST ENVIRONMENT CONSERVATION ASSOCIATION, KAMWERU AUTO SHOP, being Licensees of the 5th respondent, or their agents from accessing the Chuka Forest to harvest any forest produce at all pending the hearing and determination of this petition.

(e) THAT the petitioner's Community Forest Officers be granted supervisory powers to monitor the activities within the forest and power to arrest and seize any forest products harvested from the Chuka Forest and the same be deposited at the Chuka Police Station pending the hearing and determination of this petition

(f) THAT Chuka PMCC No. 61 of 2014 be withdrawn from Chuka and the same be transferred to this Honourable Court.

(g) THAT upon transfer, the same be consolidated with this petition.

(h) THAT this honourable court do certify that this matter raises substantial questions of law and ought to be heard by an uneven number of judges.

(i) Costs of this application be borne by the Respondents.

It has the following grounds;

(i) The application is urgent

(ii) The above named licensees of the 5th respondent are on the ground harvesting the Chuka Forest produce for the last 3 days non-stop day and night.

(iii) The subject matter in Chuka PMCC No.61 of 2014 is the same as the subject matter in this petition.

(iv) There are weighty and substantive issues that leave lacunas.

It is supported by the Affidavit of Wendy Mutegi (op. Cit).

HIGHLIGHTING OF SUBMISSIONS

Submissions were highlighted on 11.11.2014.

1ST, 2ND AND THIRD PETITONERS

Mr. Kiambi holding brief for the 1st petitioner told the court that he was relying on the joint submissions filed by all the petitioners.

M/s Wendy Mutegi, for the 2nd and 3rd petitioners told the court that the petitioners raised the issue of violation of the fundamental rights of the petitioners. She submitted that all the pertinent issues had been included in her sworn affidavit dated 22.4.2013. She opined that most of the issues raised in that affidavit had not been responded to.

She submitted that the petitioner's historical claims going back to the 1960's had not been repudiated except for the general answer that the area they were concerned about was a gazetted forest.

M/s Wendy Mutegi stressed that the the petitioners had 2 main concerns:

1. Environmental protection.

2. Historical injustice against the Chuka Community regarding environmental protection.

Regarding Environmental Protection she submitted that there was a high rate of forest degradation and although the 6th respondent had submitted that it was its responsibility to license millers, there was no plan to replant trees. She also said that the Environment Impact Assessment Report did not include the Chuka part of the forest, which is in dispute. She told the court that there was no public participation regarding projects undertaken by the 5th, 6th and 9th respondents. She complained that although the 9th respondent had said that there had been public participation, the petitioners were apprehensive as the Chairman of the Community Association was involved in the fencing project and in illegal logging. She reiterated that the petitioners were not engaged by the concerned respondents before the projects they are challenging were initiated. She stressed that the aspect of informed knowledge was ignored.

Regarding historical injustices, M/s Wendy Mutegi submitted that the Chuka Community had a historical indigenous claim which could only be adjudicated by the National Land Commission. She told the court that she was relying on the Endorois Welfare Council Versus Kenya case (PS1) and on PS2 (an authority on indigenous rights at page 46 of her submissions) which is an Indonesian Case that held that indigenous rights must be recognized.

Miss Wendy Mugeti told the Court that Articles 42 and 69 of the Constitution should be read together to entitle every person to a clean and health environment and for the state to ensure proper exploitation, management and conservation of natural resources and to ensure equitable sharing of the accruing benefits.

1ST, 2ND, 3RD AND 7TH RESPONDENTS

The 1st issue Mr. Kiongo raised was about the legal status of the 1st and 2nd petitioners. He submitted that they had not provided documents to show that they were trusts and opines that they may be individuals hiding behind the claim of trusts.

He stated that Article 62 of the Constitution defined Public Land whereas Article 63 of the Constitution defined Community Land. He said that Mount Kenya forest was public land. He indicated that he would rely on the case of ***KEMAI & 9 OTHERS VERSUS AG & 3 OTHERS, KLR [E&L] 1, page 326*** which, inter alia held that forests were a common property to benefit the whole mankind, and in the present case, not just the Chuka Community.

He took issue with the orders sought in the application dated 22.4.2014 regarding conservation of the Chuka forest and said that there were specialized agencies such as the Kenya Forestry Service and the Kenya Wildlife Service which were mandated by express provisions of statutory law to perform conservatory duties and that the petitioners could not stop them from executing their legal mandates.

Mr. Kiongo alluded to Article 24 of the Constitution and said that it was clear that enjoyment of rights should not be to the detriment of other people's rights. He stressed that the forest was a national asset which belonged to all citizens and said that it was for this reason that it had

been gazetted so that it could be protected.

Mr. Kiongo argued that as article 66 of the Constitution mandated the government to regulate use and rights to land, Chuka forest was not an exception. He said that the petitioners had not demonstrated their rights which had been infringed upon.

Mr. Kiongo concluded by saying that Article 3 (1) of the Constitution obliged everyone to respect and protect the Constitution and this Constitutional requirement binds the petitioners who should allow statuary bodies such as the Kenya Forestry Service and the Kenya Wildlife Service to perform their legally mandated functions.

5TH RESPONDENT

Mr. Kathungu for the 5th Respondent told the court that the 5th respondent opposed the two applications and wished to associate itself with the submissions of the 1st, 3rd and 7th respondents. It also relied on the two affidavits sworn on 27.5.2014 and 21.6.2014 by one Joseph Wakiaga. It was also relying on its main submissions filed in court on 5.9.2014 and on the supplementary submissions filed on 10.11.2014.

Mr. Kathungu told the Court that the 5th Respondent issued licences in accordance with the Forests Act, 2005 and the Forest Harvesting Rules, 2009. He informed the Court that licenses were issued with regard to planted trees and not indigenous trees. He pointed out that the Deputy Registrar's Report shows that the area complained of is only 2 % of the Mount Kenya Forest and that there was nothing called Chuka Forest.

He submitted that there cannot be people called community Forest Officers as purported by the petitioners. He said that the Forests Act has provisions regarding how the Community can participate in the preservation of forests and in accordance with those provisions there was a registered Community Association.

Regarding the application dated 13th June, 2014 seeking the transfer of Chuka PMCC 61 of 2014 to this Court, Mr. Kathungu submitted that this prayer had no merit as his client's PO was upheld by the Principal Magistrate Chuka that she had no jurisdiction in that matter. As such the suit was a nullity *ab initio*, and if the plaintiffs in the Chuka suit wanted to be enjoined in this matter, they were duty bound to initiate proper measures. Mr. Kathungu said that he would rely on the case of Peter Makanga Versus G. W. Gichuhi, HCC Misc No. 62 of 2004, Embu that held that position and since the magistrate at Chuka ruled that she did not have jurisdiction, the case at Chuka was a nullity and for that reason the suit can not be transferred to this Court. Regarding the Constitution of a bench of uneven numbers to hear this petition, Mr. Gathungu submitted that there was nothing too weighty that a single judge cannot hear.

Mr. Kathungu said that he was associating himself with the submissions made by Mr. Kiongo for the 1st, 2nd, 3rd and 7th respondents to the effect that the petitioners had not proffered evidence that they were registered entities entitled to locus standi.

6TH RESPONDENT

Mr. Kariuki for the 6th Respondent told the court that the two applications were opposed through a Replying Affidavit dated 23.7.2014. He said that the 6th respondent relied on the contents of the affidavit supporting the submissions filed on 11.9.2014.

Mr. Kariuki associated himself with the submissions of the 1st, 2nd, 3rd, 7th and 5th respondents.

He requested the Court to be alive to the principle of proportionality as applied in the case of Kenya Pipeline Company Limited Versus Stanley Munga Githunguri [2011] eKLR which held that where conflicting interests are disproportionate, the Court must endeavour to achieve a proper balance by leaning in favour of proportionality. This case, among others, had been proffered at page 18 of his submissions.

Mr. Kariuki invited the Court to consider the importance of the fencing project which was meant to minimize human/animal conflicts. He lamented that his client was being sued left, right and center when animals invaded farms. He proffered that this project was intended to benefit the community, including the petitioners, if indeed they lived in the area where the project was taking place.

Mr. Kariuki opined that the orders sought by the petitioners could not be determined at the Interlocutory Stage. He also submitted that the report of this Court's Deputy Registrar, prepared after the Scene Visit, had clearly shown that the forest had not been degraded.

Counsel submitted that the Impact Assessment Report had not been challenged in accordance with Section 129 (2) of the Environmental Management and Coordination Act. He submitted that in view of the petitioners failure to follow the procedure for lodging an appeal, they should not come to court after they had disregarded the laid down procedure.

8TH RESPONDENT

Mr. Mwenda for the 8th respondent opposed the application. He said that the petitioners had not established that they deserved the orders of injunction prayed for. He felt that the petitioners had not established any of the principles enunciated by the case of **Giella Vs. Cassman Brown (1973) EA 358**.

He contended that they had not established a *prima facie* case but had only quoted Articles of the Constitution without detailing the violations of their Constitutional Rights. He opined, that by simply asking the court to sort out their violated rights, without specifics, the Court would have no way of establishing if the petitioners had a prima facie case.

Mr. Mwenda associated himself with Mr. Kiongo for the attorney general for the 1st, 2nd, 3rd and 7th respondents and challenged the

capacity of the petitioners to file this petition. He submitted that though the 1st and 2nd petitioners purported to be legal persons, they had produced no document to prove so. He opined that a court of law could not issue orders in favour of a body whose legal status it was not sure of.

Mr. Mwenda had continued to submit that the petitioners had not demonstrated that they would suffer irreparable loss if the orders they sought were not granted. He told the court that the petitioners had obtained exparte orders through misrepresentation of facts which misrepresentation is demonstrated by the Deputy Registrar's report.

Mr. Mwenda continued to submit that the balance of convenience tilted in favour of denying the orders sought as the 5th and 6th respondents were constitutionally mandated to manage the suit forest which is forest land recognized under Article 62 (1) of the Constitution. He said that the balance of convenience was in favour of those constitutionally and legally mandated to handle forest matters. As such community guards was a formation lacking in structure, legality and legitimacy.

Mr. Mwenda pointed out that though the petitioners had accused the 8th respondent of trying to establish two tourist sites at Tundu river and Kiangondu, and that this would lead to degradation of the forest, when the Deputy Registrar visited the forest, the petitioners did not show the parties any cleared site. He proffered that orders could not be sought through imaginations but could only be granted through tangible evidence.

9TH RESPONDENT

Miss Lubano for the 9th respondent told the court that her client was opposed to the application dated 22.4.2014 as Rhino Ark, her client, was the one most affected by the injunctive orders issued exparte in this application. She said that she was relying on the Replying Affidavit sworn by one Christian Lambretch and the written submissions filed on 11.9.2014. She was also relying on the supplementary submissions filed on 11.11.2014.

She explained that the purpose of the fencing project was two fold:

1. To protect the community and its crops from wildlife.

2. To help in conserving the forest.

She opined that these two aims were in congruence with the petitioners' stated aims.

With regard to public participation, she submitted that Christian' affidavit at pages 353 to 379 demonstrated evidence of public participation meetings held on 12, 13th and 14th November, 2008. A list of members of the community and photographs are annexed. The said affidavit has a letter from the 2nd petitioner confirming their attendance and asking questions. Miss Lubano pointed out that the letter was important as the petitioners had claimed that they were not consulted. She further says that the concerns of the petitioners were taken into account as there is a letter showing that the 9th respondent wrote to those concerned asking them to address the issues raised.

Miss Lubano told the court that further evidence of public participation can be found at pages 382-397 of the affidavits showing Minutes of 12 Community Barazas. On page 12 there is a Notice in the Daily Nation Newspaper on 18.6.2009 advertising the fencing project and seeking public comments. She, therefore, contended that there was no breach to the right to public participation.

On the issue of access to the forest by the community, Miss Lubano said that the fence was not intended to prevent the petitioners and others to access the forest to undertake lawful activities. She pointed out that at page 196 of Christian's affidavit, he had set out where access gates are to be placed. She submitted that the Deputy Registrar's Report had shown that there were access points for the community to carry out lawful activities.

She told the court that her client's authority was the case of **Kemai & 9 Others Versus AG And 3 Others, KLR (E & L) 326.**

Regarding the right to a clean and healthy environment Miss Lubano told the Court that sufficient mitigation measures had been set out to address any negative impacts. She told the court that all projects had some sort of impact on the environment and opined that what was important was to undertake apposite mitigations measures. She told the court that such measures were contained at pages 232 to 236 of Christian's affidavit.

Miss Lubano told the court that the allegation by the petitioners that an Environmental Impact Assessment [EIA] had not been conducted was untrue. She referred the Court to page 287 of Christian's affidavit. She told the court that the Environmental Impact Report clearly said that the proposed project covered 397 kilometers. She said that the area the petitioners were complaining about was a section of only 50 kilometers.

Miss Lubano then turned to the issue of Community participation. She said that Section 39 (1), 46 (1) and 47 (1) of the Forests Act provided for legal structures for community participation and submitted that the petitioners had not exhausted the available legal mechanisms.

On the claim that the petitioners were an indigenous people who derived their source of livelihood form Chuka Forest, the 9th respondent submitted that the petitioners, if their sole source of livelihood had depended on the Chuka Forest, had changed their original lifestyles. Miss Lubano said that they had not demonstrated that the forest was their sole source of livelihood.

Miss Lubano further submitted that the claim by the petitioners that Chuka Forest was their community land was immature as the National

Land Commission had the mandate to deal with issues concerning community land once the apposite legislation had been promulgated. Miss Lubano referred the court to the case of **JOSEPH LETUYA AND 20 OTHERS VS THE AG & 5 OTHERS – ELC CIVILSUIT NO. 821 of 2012 (OS) NAIROBI** which had addressed this issue.

Miss Lubano in her final submission said that in assessing the question of if or not the petitioners would suffer irreparable damage, the court should move in accordance with Article 24 of the Constitution so that the petitioners would not be allowed to prejudice the rights of others. She said that if the electric fence project is stopped, this will be detrimental to the interests of the community neighboring the forest. Animals would attack people. There would be illegal logging. The right to life, as a constitutional imperative would be compromised. Protection of property would be endangered. She opined that these rights were guaranteed by the Constitution. She referred to the case of **Mboroki Versus Chief Conservator of Forests – Misc. Application No. 27 of 2002** as supporting this position.

Miss Lubano urged the court to take the public interest view into perspective and consideration and allow the fencing project to be implemented.

10TH RESPONDENT

Mr. Kimondo Mubia for the 10th respondent opposed the 2 applications. He said that the Nyayo Tea Zones Development Corporation relied on the Replying Affidavit sworn by William Togum on 27.10.2014 and filed on 29.10.2014. It also relied on the written submissions filed on 11.11.2014.

Mr. Kimondo complained that at the outset, joinder of his client was misconceived as there were no reliefs sought against it. He opined that his client's participation in this application and petition was peripheral.

Mr. Kimondo proffered to Court that the 10th Respondent's mandate derived from Legal Notice No. 30 of 2002 through which it was incorporated. He said that the functions and mandate of the corporation were set out in paragraph 3 thereof and, inter alia, the 10th Respondent was required to preserve forests as well as serve as a buffer zone against encroachment of forests by intruders.

He complained that nowhere in the petition and supporting affidavit had the petitioners raised any issues against the 10th respondent and opined that the petitioners should be praising the 10th Respondent for assisting in the preservation of the forest.

Mr. Kimondo told the court that he associated himself with the sentiments of the 1st, 2nd, 3rd and 7th respondents to the effect that specialized agencies such as the Kenya Wildlife Service, the Kenya Forestry Service and the Nyayo Tea Zones Corporation should not be hobbled from executing their legally mandated responsibilities.

Mr. Kimondo finally submitted that the petitioners had not satisfied the threshold demanded by the Case of Giella Versus Cassman Brown (1973) EA 358 for grant of the orders sought. He opined that the petitioners had not demonstrated any probability of success and that they would suffer irreparable damages. He also submitted that the balance of convenience tilted against the petitioners as there were specialised agencies mandated to handle forest matters. He said that the 2nd and 3rd petitioners had not produced any documents to show that they had any capacity to sue.

He made a laconic statement to the effect that if the Petitioner's finally won their petition, damages would be an adequate remedy.

11TH RESPONDENT

Miss Lubano for the National Environmental Management Authority (NEMA) told the Court that NEMA opposed the two applications. She said that the Interlocutory applications dated 22nd April, 2014 and 13th June, 2014 sought no orders or relief against NEMA although the applications touched on matters in the public interest, and for that reason, NEMA wished to contribute accordingly.

She said that NEMA issued an Environmental Impact Licence No.0004768 on 21st December, 2009 to the 6th respondent for purposes of erecting an electric fence on 50 Kms of the intended 397 Kms on a pilot basis. The electric fence was to serve as a wildlife barrier for purposes mainly of reducing human/widlife conflict. This licence, Miss Lubano explained, had several general, construction, operational, notification and decommissioning conditions. The conditions are produced in the replying affidavit of NEMA sworn on 10th July, 2014.

She said that NEMA was of the view that the Electric Project being undertaken by the 9th Respondent was crucial to the protection and conservation of Mount Kenya Forest. She said that there was no gazetted forest called Chuka Forest, and for that reason the order sought relating to a non-existent forest cannot issue. She submitted that the application was hotchpotch and must fail. Regarding the application dated 13th June, 2014, Miss Lubano submitted that Mt. Kenya was a state forest which according to section 5 of the Forests Act, 2005 is under the Management of the Kenya Forest Service which develops management plans for all state forests as between it and the Community Forest Associations.

Miss Lubano went on to state that the existence and management of state forests should be distinguished from those of Local Authority Forests. She affirmed that Mt. Kenya Forest was a state forest and it was, therefore, ridiculous to ask the court to order that community forest officers be granted supervisory powers over it. She rhetorically wanted to know who those community forest officers were. She termed them amorphous and said that the prayers sought were illegal and must fail.

Miss Lubano concluded by urging that prayers (e) in both applications dated 22nd April, 2014 and 13th June, 2014 be dismissed with costs.

IST INTERESTED PARTIES

Miss Mutinda for the 1st Interested Parties told the Court that she was relying on the replying affidavits dated 30.7.2014. She told the Court that the Interested Parties were responding to the Petitioners' Application dated 22.4.2014. She explained that the Interested Parties were the immediate neighbours of Chuka Forest and that the orders sought by the petitioners directly affected them as the petitioners seek to stop the 9th respondent's fencing project. She said that the Interested Parties were extensively consulted by the local leaders and the 9th respondent and that they all positively embraced the fencing project which would arrest the human/wildlife conflict. Miss Mutinda explained that the Interested Parties' affidavits explained in detail what they had to endure in damages wrought upon them by wild animals. She said that the Interested Parties associated themselves with the submissions of the 6th and 9th respondents. She referred the court to the case of **KARUA Versus RADIO AFRICA HCC NO. 288 OF 2004** which held that fundamental rights are not absolute and are subject to the rights and freedoms of others. She submitted that if the prayers sought are granted as prayed, they would contravene the constitutional rights of the Interested Parties which should not be disregarded.

2ND INTERESTED PARTIES

Mr. Muthamia said that he was representing the following saw millers:

Koki Timber and Saw Miller,

Njamba Njiru Techniques,

Munjus Timber and Furniture and

Kamweru Auto Shop

He said that the exparte injunctive orders in this matter were issued against his clients. He said that the Timber Saw Millers relied upon the Replying Affidavits sworn by one Isaac Riungu and Alfred Kobia Thiringi dated 15.9.2014.

He opined that the Deputy Registrars Report had shown that his clients had not destroyed the Chuka Forest as alleged by the Petitioners. He dubbed the Petitioners' claims as falsehoods and urged that their application be dismissed with costs to the saw millers.

The Deputy Registrar's report concerning the parties' visit to the Locus in Quo is reproduced here below (with no erasure or changes whatsoever):

> **REPORT OF VISIT OF LOCUS IN QUO AT CHOGORIA FOREST STATION AND AERIAL VIEW OF MT KENYA FOREST COVER AROUND THARAKA NITHI COUNTY AND PART OF EMBU COUNTY**
>
> 02.10.2014
>
> Coram: D. O. Onyango, Deputy Registrar
>
> Kirimania - court clerk
>
> Wendy Mutegi – Petitioner
>
> Gitonga Mbogo – Petitioner
>
> Ngai Mutwoboro - Petitioner
>
> Ashford Riungu Adv. for 1st Petitioner
>
> Joe Kathungu Adv. for 5th Respondent
>
> Emmanuel Kieti Adv. for 1st , 2nd, 3rd and 7th Respondents
>
> Manases Kariuki Adv. for 6th Respondent
>
> Noela Lubano Adv. for 9th Respondent
>
> George W. Wabwire – KWS
>
> Simon Gitau – KWS
>
> Samuel Ihure - KFS
>
> James N. Yatiat - KFS

Bundi Muthama Adv. for interested parties

Wakitha Joseph - KFS

Murango Mwenda - Adv. for 8th Respondent

Japheth Kithuchi – Chairperson Chogoria CFA

The above quorum assembled at a ground within Chogoria Forest Station for a brief at around 11 a.m. The group was divided into five persons each as the captain led a capacity of six including the pilot. Thereafter the groups were taken around the Mr. Kenya forest covering Tharaka Nithi County and Embu. Each flight session took between 25 minutes and 30 minutes. The Deputy Registrar was in two of the sessions.

During the flight sessions around the forest, I made the following observations:-

Over 90% of the forest cover consist of interlocking canopy of indigenous trees both within the Tharaka Nithi side of the forest and Embu Forest.

There are pockets of what the Kenya Forest Service Officers call "plantation forest" within the indigenous forest. The plantation forests in my assessment constitute less than 2% of the forest cover.

From an aerial view, there is no distinction whatsoever of the forest cover between the Tharaka Nithi County section of the forest and Embu County Section. From an aerial view of the forest cover, there is no sign of settlement within the forest either previously or at present. This finding is reinforced by the observation that by and large there is a close canopy of indigenous forest cover. The forest cover in my assessment is well maintained save for few signs of logging within the forest.

I was shown sections of electric fence covering part of Maara constituency near Chogoria Forest Station. I also saw portions of the electric fence near Thuchi River of the portion of Runyenjes constituency from an aerial view. The forest cover on portion of Chuka/Igambang'ombe constituency is not fenced.

I was also taken through a ground inspection of the electric fence and gates near Chogoria Forest Station. The electric fence is erected mostly between the Nyayo Tea Zones and closed canopy of the forest save for a section near Chogoria Forest Station where the electric fence has covered a portion of the Nyayo Tea zone. In this section, I saw a temporary gate measuring about 1 meter wide which leads to the Nyayo Tea Zone and into the forest.

At the Chogoria Forest Station there is a 6 meters wide gate that leads into the forest. The gate was described by the forest officers as a management gate or vehicle gate. I observed that it was being used by both the forest officers and members of the public including construction trucks which are involved in upgrading of a road into the forest.

I also observed that the electric fence is not on the boundary of the forest. I saw a beacon during the ground inspection which clearly show that the electric fence is not on the boundary. I observed that in clearing the areas where the electric fence was erected big trees were not cut down.

I saw signs erected at points within the fence warning of the danger of the electric fence. 60% of the post used to erect the electric fence are mostly made of plastic. The other 40% are made of gum trees. On the lower portion of the fence are of wire mesh of tight lock which I established is to prevent small animals from getting out of the forest.

The site visit ended at 3.45 p.m.

D. O. ONYANGO

DEPUTY REGISTRAR

DETERMINATION

The petitioners seek 14 reliefs as enumerated in paragraphs 40 to 42 of the Petition. Some of them relate to fundamental rights and freedoms of the petitioners as enshrined in Articles 35, 42 and 44 of the Constitution. The petitioners, also , inter alia, want a declaration that the Respondents have contravened Article 10 of the Constitution that deals with National Values and Governance.

This ruling however is confined to the 2 applications dated 22nd April 2014 and 13th June, 2014 respectively.

The respondent's have raised issues regarding the legal capacities of the petitioners to institute this petition. Whereas various Constitutional and legal provisions have donated rights to individuals with regard to environmental issues, those individuals may be legal or natural persons. For legal persons, it is necessary for them to be registered through a legally mandated process. They cannot be inchoate or amorphous persons. Indeed no such persons are capable of existence.

It will, therefore, be necessary for the petitioners, before the petition is heard to provide the documents which demonstrate their legal status. I

repeat, before the hearing of the petition.

I will at the outset deal with the motion dated 13th June, 2014. On 17.6.2014 the applicants came to this court under a certificate of urgency and told the court that the urgency of their application was based upon the destruction taking place at the Kiamuriuki Section of Chuka Forest. The applicant's counsel told the Court that they had obtained injunctive relief against mentioned saw millers in Chuka PMCC 61 of 2014. It was explained that the magistrate had found that she had no jurisdiction and had purported to transfer the suit to this court. When this happened, on that night many lorries and people moved into the forest and the forest was wantonly destroyed. The applicants told the court that if appropriate injunctive orders were not granted, there would ensue irreparable loss to the environment. In accordance with the precautionary principle as provided for by Section 3 of the Environmental Management and Cordi nation Act and Section 18 of the Environment and Land Court Act this court granted injunctive orders against named respondents.

On 23rd June, 2014 prayer (e) was granted. Prayer c which had been granted on 17.6.2014 was reissued. In totality, it is clear that the issues in Chuka PMCC No. 61 of 2014 had been consolidated with the issues raised by this petition. The issues being raised in this application had also been subsumed by the issues raised in the application dated 22.4.2014.

As a result of this development, prayers a, b, and c of the application are spent. My determination regarding the application dated 22.4.2014 will have effectively have handled all the prayers in the application except prayer h asking the court to certify that it raises substantial questions of law and that it ought to be heard by an uneven number of judges. I decline to grant this prayer at this interlocutory stage. Should the Court find it necessary that the petitioner be heard by an uneven number of judges, the court will move appropriately at the opportune moment.

Costs in this application will be costs in the cause which will be determined after the hearing of the petition when the question as to whether the application in this petition and the petition itself raise public interest litigation matters.

I will now turn to the application dated 22.4.2014. Prayers a, b, c and f are spent. Prayer e was partly granted and a conservatory order was issued preserving the Chuka forest in its status quo pending the hearing and determination of this application. The part preserving the status quo pending the hearing of the petition will be determined by this ruling. The prayers that remain to be determined are the following:

> **(a) <u>THAT</u> an injunction do issue against the 5th Respondent, or their agents from issuing licenses of access to the Chuka Forest pending the hearing and determination of this petition.**
>
> **(b) <u>THAT</u> a conservatory order do issue preserving the Chuka Forest in its status quo pending the hearing of the petition.**

Having carefully gone through the averments and the proceedings of the parties and after having considered the Report of this Court's Deputy Registrar, I find that issues such as historical injustices and the claim of "***Magundu Ma Chuka"*** as Community land and other reliefs sought in paragraphs 40 to 52 of the petition cannot be canvassed at this interlocutory stage. However, on the evidence provided by the parties I make the following observations and findings:

> ***1. The application dated 22.4.2014 seeks orders against the 5th respondent only.***
>
> ***2. It is clear that the community forest officers granted temporary supervisory power to monitor the activities within the forest and to have power to arrest and seize any forest products harvested from the Chuka Forest have no defined legal status. This court has no jurisdiction to clothe them with any legal authority. As the Supreme Court of Kenya in the case of Samuel Kamau Macharia & Another Versus Kenya Commercial Bank and 2 others opined***
>
> ***"A Courts jurisdiction follows from either the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law"***
>
> ***3. This application is not directed at the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th, 9th, 10th and 11th Respondents although some of them are mentioned in the supporting affidavit of Wendy Mutegi sworn on 22nd April, 2014.***
>
> ***4. There is evidence that the Chuka Community was involved in public participation activities undertaken by the 9th respondent with regard to the fencing project. The interested parties have unequivocally averred that there was public participation. After juxtapositioning the 2 diametrically opposed assertions, I find that there is overwhelming evidence of public participation.***
>
> ***5. It is not controverted that the 5th defendant issues licenses with regard to planted trees and not indigenous trees, in accordance with the provisions of the Forests Act 2005. It is also not controverted that the 5th respondent is legally mandated to protect and to conserve forests and to handle all matters pertaining thereto without abusing its powers and without contravening the law. Similarly, the Kenya Wildlife Service has its specialist mandate which this Court can not oust except for good reasons such as misuse of their powers and non observance of the law.***
>
> ***6. The Forests Act has provisions regarding participation of the community in the preservation of forests. It is not controverted that there is a Community Association in the Chuka area.***
>
> ***7. It is not controverted that the fencing project is intended to preserve the forest and to mitigate animal/human conflict.***
>
> ***8. From the evidence adduced by the parties, I find that the apposite Impact Assessment Report had been prepared by NEMA.***

9. In considering the granting of the orders of injunction, one need not reinvent the wheel. The Court of appeal in Mbuthia Versus Jimba Credit Corporation and Another [1988]KLR1 stated as follows:

"The Correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits."

I agree with Mr. Mwenda for the 8th respondent in its submissions (Op. cit) that the petitioners had not satisfied the principles for grant of injunction as enunciated by the case of Giella Vs Cassman Brown (op. cit)

10. Many claims by the petitioners regarding degradation of the forest such as the claim that Tharaka County Government was establishing two tourist sites at Tundu river and Kiangondu have not been substantiated by way of evidence. It has also not been shown how the establishment of such sites would lead to degradation of the forest.

11. The 9th respondent, in addition to having established that there had been extensive public participation with regard to the fencing project demonstrated that the community had been accorded various access points to enable its members to carry out lawful activities.

12. Regarding the right to a clean and healthy environment, the 9th respondent was aware that all projects had some sort of impact upon the environment and had demonstrated the mitigation measures it was undertaking to minimize environmental degradation

13. The 9th respondent correctly pointed out that in so far as the petitioners were entitled to enjoyment of their fundamental rights, they should not,in accordance with Article 24 of the constitution, prejudice the rights of others such as the right to life and protection of property. I agree with Miss Lubano for the 9th respondent that the fencing project would help in protecting the forest by minimizing illegal logging, preventing attacks on members of the community by animals and arresting destruction of crops and property.

14. As I have already noted, the prayers in this application are only directed at the 5th Respondent, the Kenya Forestry Service. I agree with Mr. Kimondo that the petitioners have not raised any issues against the 10th despondent, the Nyayo Tea Zones Development Corporation.

15. All the authorities proffered by the parties in support of their respective positions are good law in the right circumstances. Such circumstances can not be established at this interlocutory stage. The disputed facts the authorities aim to support will be canvassed during the hearing of the petition.

The petitioners moved to this court after feeling that their entitlement regarding a clean and healthy environment and to the protection and the conservation of part of Mount Kenya forest next to where they live, rightly or wrongly, had been contravened. In its preamble, the Constitution of Kenya acknowledges that the people of Kenya are: **"Respectful of the Environment, which is our heritage and (*are*) determined to sustain it for the benefit of future generations."** Article 69 of the Constitution requires the state to ensure that the environment is safeguarded and decrees state obligations in respect of the environment. It also decrees that every person has a duty to co-operate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable and use of natural resources.

I am cognizant and alive to the principles set out in Section 3 (5) of the Environmental Management and Co-ordination Act which should guide this court in the exercise of its jurisdiction. These are:

(a) the principle of public participation in the development of policies, plans and processes for the management of the environment;

(b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;

(c) the principle of international cooperation in the management of environmental resources shared by two or more states;

(d) the principles of intergenerational and intragenerational equity;

(e) the polluter pays principle;

(f) the precautionary principle.

These guiding principles are restated by section 18 of the Environment and Land Court Act.

In obeisance to the precautionary principle, this court granted some interlocutory orders as prayed by the petitioners in their applications dated 22nd April, 2014 and 13th June, 2014. Having heard the parties interpartes, I issue the following orders with regard to the applications dated 22nd April, 2014 and 13th June, 2013:

1. Interim orders granted with respect to the applications dated 22nd April, 2014 and 13th June, 2014 are vacated forthwith.

2. Parties in the application dated 13th June, 2013, are allowed to consolidate their issues with the issues raised in this petition, subject only to the establishment of their legal status.

Although the application dated 22nd April, 2014 was directed only at the 5th respondent, I find it necessary, in accordance with the guiding principles enunciated by section 18 of the Environment and Land Court Act, and, specifically in accordance with the precautionary principle and also in line with Article 69 of the constitution, to direct as follows:

1. The 5th and 6th Respondents should carry out their statutory mandates strictly in accordance with the law and ensure protection and conservation of Mount Kenya Forest, including its Chuka segment.

2. The 5th, 6th, and 9th respondents should ensure that there are adequate access points to the forest, which access points will allow members of the community to undertake lawful activities in the forest.

As this petition is in the nature of public interest litigation, costs will not be determined at the interlocutory stage.

It is so ordered.

Delivered in Open Court at Meru this 18th day of December, 2014 in the presence of:

Cc. Daniel/Lilian

Riungu for Petitioner

Wendy Mutegi for 3rd Petitioner

2nd Petitioner's Representatives

Manases Kariuki for 6th Respondent

Miss Lubano for 10th Respondent

Mutinda for 1st Interested Party

Muthamia for 2nd Interested Party

P. M. NJOROGE

JUDGE