



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 248 OF 2013**  
**CONSOLIDATED WITH**  
**PETITIONS 249, 250, 251, 252, 253 AND 299 OF 2013**

**BETWEEN**

**AL-NAS COMPANY LIMITED ..... 1<sup>ST</sup> PETITIONER**  
**KURANZE GROUP RANCH ..... 2<sup>ND</sup> PETITIONER**  
**ABDI W. BISLE ..... 3<sup>RD</sup> PETITIONER**  
**HUSSEIN JELLE ..... 4<sup>TH</sup> PETITIONER**  
**MOHAMED OSMAN MAOW ..... 5<sup>TH</sup> PETITIONER**  
**YUSUF ABDI ..... 6<sup>TH</sup> PETITIONER**  
**FATUMA ABDI ..... 7<sup>TH</sup> PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**  
**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**  
**THE DIRECTOR,**  
**KENYA WILDLIFE SERVICES.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before me today is an application by way of Chamber Summons brought on behalf of the petitioners dated 11<sup>th</sup> June 2013 seeking the following orders;
1. *That the honourable Court be pleased to order that the 2<sup>nd</sup> Respondent, Inspector General, David*

- Kimaiyo and the 3<sup>rd</sup> respondent's Director, William Kibet Kiprono, be arrested and or detained in civil jail for a term not exceeding six (6) months.*
2. *That the Honourable Court be pleased to order that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents each be fined an amount not less than Kenya Shillings Five Hundred Million (500,000,000/=) for disobedience of the Court orders.*
  3. *That the Honourable Court be pleased to order the respondents to pay general damages to the petitioners together with interest for the losses incurred by the petitioners so far.*
  4. *That the Honourable Court be pleased to order the respondents to pay Kenya Shillings Nine Hundred Million (Kshs.900,000,000/=) to the petitioners as special damages together with interest.*
  5. *That this Honourable Court be pleased to issue such other orders appropriate to uphold its dignity and the Rule of Law.*
  6. *That the respondents do pay the costs of this application.*
2. The application is grounded on two affidavits sworn by Noor Mohamed Hassan and Huri Ibrahim Aden on 11<sup>th</sup> June 2013 and 9<sup>th</sup> July 2013 respectively.
  3. The application arises from a conservatory order I issued on 13<sup>th</sup> June 2013 on the following terms; *“That pending the hearing of the application a conservatory order be and is hereby issued restraining the Respondents, their employees, servants, organs or agents, howsoever from evicting/ removing/ relocating/evacuating/vacating, the Petitioner, the Petitioner’s herd or business or in any way interfering with the Petitioners quiet possession, occupation and stay in Voi or its peaceful enjoyment of its lease on property known as Washumbu Ranch.”* The order, which applied to all the petitioners, was extended pending the hearing and determination of the petition or until further orders on 17<sup>th</sup> May 2013.
  4. According to the petitioners, the orders have been violated despite service and actual knowledge of the order as the respondents’, that is the Kenya Police Service and the Kenya Wildlife Service (“KWS”), their servants, agents have been using choppers/aircraft to chase/harass, threaten, the petitioners to move out of the ranches with the respective herds. In support of their case I heard the testimony of three witnesses regarding the situation on the ranches.
  5. The application was opposed by the respondents through the replying affidavits of Robert Kitur, the Deputy Provincial Police Officer Coast Region and Mr Julius Kimani, the Deputy Director – Security of Kenya Wildlife Service. Both of them gave evidence and were cross examined. There was also the affidavit of David Kimaiyo, the Inspector General of Police dated 27<sup>th</sup> June 2013. They all denied that the order was breached.
  6. I have considered the testimony of the witnesses and the oral submissions by counsel for and against the application and I take the following view of the matter. An application for contempt is quasi-criminal in nature and this means that a strict regime of rules applies to ensure that the liberty of the citizen is not taken away without application of due process. The respondents raised several procedural objections to the application but I think one issue is necessary to dispose of the application.
  7. The burden of proof in contempt cases is said to be higher than proof on a balance of probabilities but below beyond reasonable doubt required in criminal cases (See ***Mutiika v Baharini Farm Ltd [1985] KLR 227.***) In order to understand this case, the relationship between the parties must be understood.
  8. The petitioners own ranches in the areas surrounding the Tsavo East and Tsavo West National Parks. Some ranches border the Parks while some are not contiguous with the Parks. What is not in dispute is the Parks and ranches are part of the same ecosystem and wild animals traverse the ranches which separate the two parks. This means that the KWS, which is charged with the responsibility of maintaining parks and controlling or protecting wildlife outside the parks has to

patrol the ranches where wildlife roam.

9. The dispute as I see it pertains to the grazing of cattle in National Parks which is not permitted and which the KWS is duty bound to control. On the other side are the ranchers with their cattle herds that may either deliberately or surreptitiously enter into the parks. This of course leaves room for conflict and doubt as to when and where the order was breached by KWS or the Police and whether such breach was in the course of their ordinary duties or in breach of the order. I cannot use the coercive power of the court to restrain what is in effect a statutory duty by KWS. The nature of the ordinary duties by KWS leaves a lot of room for what would be seen as a breach of the order and without clear and convincing evidence of breach I am unable to convict the respondents.

10. In the circumstances, I decline to commit the respondents for contempt as prayed and I dismiss the Chamber Summons dated 11<sup>th</sup> June 2013.

11. But this is not the end of the matter, it is apparent that the respondents, that is, the KWS in conjunction with other security agencies, intend to mount a large scale operation to ensure that there are no cattle herders in the park and that unauthorised persons and those with illegal weapons are flushed out of the Parks. This is within the purview of the respondents' responsibilities. On the other hand, the petitioners as ranchers are entitled to enjoy the property rights subject to such limitations that are within the law and Constitution. I believe that this is a matter that can be resolved and I direct the parties to appear before the court on 12<sup>th</sup> August 2013.

**DELIVERED** and **DATED** at **NAIROBI** this 5<sup>th</sup> day of August 2013.

**D.S. MAJANJA**

**JUDGE**

Mr Muganda instructed by Sagana Biriq and Company Advocates for the petitioners.

Mr Wamotsa instructed by the State Law Office for the 1<sup>st</sup> and 2<sup>nd</sup> respondent and with him Mr Moimbo and Ms Mwangi.

Ms Wachira instructed by Ombonya and Company Advocates for 3<sup>rd</sup> respondent. AA