REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Case 9 of 2011

V/D BERG ROSES KENYA LIMITED.....1ST PETITIONER

PROJECT FLORA LEASE LIMITED.....2ND PETIITONER

VERSUS

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

P. S., MINISTRY OF WATER & IRRIGATION.....2ND RESPONDENT

WATER RESOURCES MANAGEMENT AUTHORITY.....3RD RESPONDENT

RULING

This application was argued on the same day as H.C. Petition No.10 of 2011 in which the ruling was delivered on 25th May, 2012. The two petitions were not consolidated although they are similar in every respect. However, due to oversight, this ruling was not delivered when that in H.C. Petition No. 10 was delivered.

Pursuant to the provisions of **Section 17** of the **Water Act, 2002** the Water Resources Manager Authority, the 3rd respondent, formulated the **Lake Naivasha Catchment Area Protection Order, 2011** for the protection of the lake's catchment area and to regulate or prohibit certain conduct or activities in relation to the protected area. The 2nd petitioner who is the registered owner of parcel of land known as LR 25263 formerly No. 10854/5 on which the 1st petitioner has settled, erected permanent structures and carries out horticultural farming, are opposed to the rules being made by the 3rd respondent and have petitioned this court under **Articles** (erroneously referred to as sections) **10(2) (a) (b),** and **40(1)** and **(2)** of the **Constitution.** Simultaneously with the petition, the petitioners have brought the instant chamber summons date 7th May, 2011 for:

"A conservatory order ……., restraining the respondents or other persons acting on their behalf from offering for consultation and/or gazetting the Lake Naivasha Catchment Area Protection Rules, 2011 as published or in any way interfering with the applicant's occupation and use of its legally acquired parcel of land LR 25263 formerly 10854/5, part of which is within the intended Lake Naivasha riparian land, pending the hearing and determination of this petition"

(Emphasis supplied)

The petitioners are aggrieved particularly with **Rule 10(1)** of the **Lake Naivasha Catchment Area Protection Order, 2011**, which provide as follows:

"10 (1) No person shall till or cultivate, clear indigenous trees or other vegetation, build permanent structures, develop or operate green houses or tunnels used to grow horticultural crops, dispose of effluent or wastewater without treatment, excavate soil or rock, plant exotic species or irrigate within Lake Naivasha and the feeder rivers' riparian land without the prior written approval of the authority"

It is the Petitioners' contention that the 3rd respondent, in making the above rule, has acted in contravention of the Constitution for the following reasons:

i) the rules have been published without prior consultation contrary to the provisions of **Article 10(2)(a)** and **(b)** of the **Constitution;**

ii) the said rules abrogate **Article 40(1) (1), (2)** and **(3)** of the **Constitution** as they fail to make provision for existing owners of property within the newly defined riparian land;

iii) the rules do not prescribe the acreage that is prohibited.

According to the petitioners, and in view of the foregoing, the effect of implementing the rules would be to render their occupation of the land in question illegal. They would also be arbitrarily deprived of its use.

Regarding the issue of consultation, the petitioners have argued that the 3rd respondent did not conduct consultation with property owners around Lake Naivasha; that by publishing the rules in the gazette before such consultation, the 3rd respondent violated the **Constitution** and **Sections 13** and **17** of the **Water Act.**

It is further argued that when the 3rd respondent purported to invite comments from the public it was *fait accompli* as the rules had been published through a secret process.

The Attorney General, (1st respondent) and the Permanent Secretary, Ministry of Water and Irrigation (the 2nd respondent) in an affidavit sworn on their behalf by Mr. John Rao Nyaoro, the Director of Water Resources Department, have deposed that the rules in question are mere proposals. The rules have been advertised with the intention of seeking comments and/or objections from members of the public. A stakeholders' consultation forum to consider the comments for proposes of incorporating them in the proposed rules was scheduled for 8th June 2011 but for this petition. The respondents further claim that the petitioners had themselves, through counsel, responded to a newspaper advertisement and submitted the very concerns now raised in this petition and had been assured in writing that those concerns would be discussed in the planned stakeholders forum to which the petitioners and their counsel would be invited to participate.

The 1st and 2nd respondents believe that the petition has not only been brought prematurely but is ill-advised and misconceived.

For its part the 3rd respondent similarly maintains that the rules have not been published; that they do not violate the law; that they were drafted after consultation with various catchment area advisory committees within Lake Naivasha Catchment Area. It was premature, it is submitted, to challenge the rules as they could not be published before the scheduled stakeholders' consultative meeting.

The foregoing in brief constitutes the arguments by the parties.

I have duly considered those arguments, the skeletal submissions and authorities. I reiterate that the application seeks conservatory order in terms of **Article 23(3)(c)** of the **Constitution.**

In considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. The applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him.

See **Centre for Rights, Education and Awareness (CREAW) & 7 others** V. **The Hon. Attorney General**, Nairobi HC Pet. No 16/2011.

See also **Muslims for Human Rights (MUHURI) & 2 others** V. **The Attorney General & Judicial Service Commission,** Mombasa HCC Pet. No. 7 of 2011.

In the result, the burden is on the petitioners to demonstrate:

i) that constitutional requirements under **Article 10(2)(a)** have been breached by the respondents by publishing the rules in question without observing the requirements of democracy and participation of the people; that the process leading to the publication of the rules was discriminatory and not inclusive;

ii) that their rights and fundamental freedom to acquire and own property, to be protected from arbitrary deprivation such property without compensation or at all, have been violated.

It is not in dispute that the petitioners have proprietary rights on LR No. 25263 formerly No.10854/5 where the 1st petitioner carries out horticultural farming. Part of this property lies within the proposed Lake Naivasha riparian land and therefore the rules being challenged in this petition will have direct impact of the petitioners' existing and future activities on the property. Their main concern is that the rules redefine riparian land without prescribing the area or acreage prohibited. **Order10** of those rules also has no proviso regarding existing rights, including activities undertaken prior to the rules coming into force, which activities may have been undertaken in strict compliance with the principles of environmental protection.

In publishing the rules without affording the petitioners a hearing, it was submitted that they had no forum to articulate their grievance over the rules. **Article 10(2)(a)** of the **Constitution** provides that:

"(2) The national values and principles of governance include:

(a) patriotism, national unity, sharing and devolution of power, the value of law, democracy and participation of the people ……."

(Emphasis added)

The 3rd respondent in the exercise of its powers and functions as outlined in **Section 8** of the **Water Act, 2002**, is required, among other things,

"(i) To liaise with other bodies for the better regulation and management of water resources"

(Emphasis added)

Similarly the Minister, the 3rd respondent, and indeed all public bodies, in exercising any statutory power or performing any statutory function in relation to water resource, are required, by dint of **Section 13(3)** of the **Act**, to take into account and give effect to the area concerned.

Further **Section 107** aforesaid lays emphasis on public consultation and provides the form such

participation ought to take. The need for public participation before undertaking any activity that is likely to affect the people cannot be gainsaid in Kenya today.

It is today a constitutional principle based on the age-old principle of natural justice. There is no area that this principle has been emphasized more than in the area of property ownership. In **Rex** V. **Electricity Commissioners**, *Exparte* **London Electorate Joint Committee** [1924] 1KB 171 Bankes, LJ said:

"On principle and on authority it is in my opinion open to this court to hold, and I consider that it should hold, that powers so far-reaching, affecting as they do, individuals as well as property, are powers to be exercised judicially, and not ministerially or merely, to use the language of Palles C. B, as proceedings towards legislation."

The petitioners have repeatedly throughout their pleadings deposed that the rules have been "*published*" or "*made*". But is that assertion factually correct? The rules are being made pursuant to **Section 17(1)** of the **Act** which stipulates that:

"17(1) Where the Authority is satisfied that special measures are necessary for the protection of a catchment area or part thereof, it may, with the approval of the Minister, by order published in the Gazette, declare such an area to be protected area"

(Emphasis mine)

The publication envisaged is in the Gazette. The Gazette is defined in **Section 3** of the **Interpretation and General Provisions Act** to mean:

"…… the Kenya Gazette published by authority of the Government of Kenya and includes any supplement thereof"

What the petitioners rely on is not a gazette as explained above but a document headed as follows:

"LEGAL NOTICE NO. …….

THE WATER ACT (No.8 of 2002)

……

THE LAKE NAIVASHA CATCHMENT AREA PROTECTION ORDER, 2011"

This is what has been referred to in the pleadings as the Lake Naivasha Catchment Area Protection Rules (should be Order), 2011. That document runs to 13 orders (provisions) and two schedules. It is the 10th Order (provision) that has given rise to this petition. The document is not dated. The date it was made by the Chief Executive Officer is blank as is the date it was approved by the Minister. The document therefore does not qualify to be a gazette and its contents do not amount to publication as envisaged in **Section 17(1)** aforesaid. It is a draft, an intention.

Secondly, it is not clear what is being challenged in this application as well as in the petition. Is it the Lake Naivasha Catchment Area Protection Order, 2011or is it the Lake Naivasha Groundwater Conservation Area Order, 2011? Both the petition and the application have used the two interchangeably yet they are two separate documents. The former is made under **Section 17** of **The Water Act** while the latter under **Section 44** of the **Act**. The petitioners could not have meant the latter as the same has only upto **Order 6**. The latter is concerned with underground water resources namely boreholes around the catchment area and not the lake water.

The respondents have maintained that there were extensive consultations with stakeholders before the rules were developed. In the replying affidavit of the 1st and 2nd respondents, are annexed the evidence of such consultations. Before a meeting held at Jaza Resort, Naivasha on 23rd September, 2010 attended by

over thirty (30) stakeholders representing various groups, there had been prior consultations with many other stakeholders as exhibited in the numerous e-mails exchanged.

The consultations with various Catchment Area Advisory Committees were conducted before and after the rules were drafted. These are statutory committees provided for under **Section 16** of the **Act** and represent among others, the farmers, pastoralists and the business community within the catchment area.

It is also clear from the pleadings and from what I have said above that this petition and the application were brought when the process of consultation was still on-going. It is apparent that on 21st April, 2011, in the Daily Nation newspaper, the Director of Water Resources posted an advertisement inviting the public for comments. The advertisement is headed:

"REPUBLIC OF KENYA

MINISTRY OF WATER AND IRRIGATION

PUBLIC CONSULTATION ON WATER RULES FOR LAKE NAIVASHA CATCHMENT."

It states in part that

"You may obtain more information as well as copies of the rules and give your comments not later than 25th May, 2011 at the offices listed below……..."

It is significant to note that in response to this advertisement the petitioners detailed their advocates, who by a letter dated 21st May, 2011 submitted a detailed memorandum to the 3rd respondent, raising matters substantially the same as those raised in this application and in the petition.

In response, the 1st respondent wrote, *inter alia,* in a letter dated 31st May, 2011 as follows:

"……. I wish to thank you for your comments (------) and would like to inform you that final meeting will soon be called to share all the comments received on the document under reference. You as well as your client will be informed and invited to participate in this meeting."

Such a meeting was scheduled for 8th June, 2011 by which time, the petitioners had brought this matter to court.

From such clear and candid intentions and conduct, how can the respondents be accused of not consulting or of acting in secrecy? After all, the Act is explicit that the publication of the rules can only be undertaken after the approval by the Minister.

There is no difference between this process and the process that preceded the promulgation of the Constitution; with two levels of consultation; to collect views from the public, collate those views, draft and thereafter consult again before publishing. It is impractical to expect each and every person effected to be consulted. Not all adult Kenyans participated in the pre-promulgation of the constitution process but it was passed and is today applicable to all the fourty million plus population.

The petitioners were consulted, have given their views but instead of attending a forum for all stakeholders, have come to court to stop the very consultation they have accused the respondents for failing to conduct. It is premature to say at this stage that **Order 10** is in contravention of the Constitution or not. It is simply an expression of intention that does not amount to an imminent threat of violation of the petitioners' right to property.

In conclusion, as we experience an influx of applications and constitutional references in our courts, thanks to a comprehensive Bill of Rights, we must never forget the supremacy and sanctity of the

Constitution. That is why the following statement by the Privy Council in **Kemrajh Harrikissoon** V. **Attorney General of Trinidad and Tobago**, (1979) 3WLR 63 is an important guide to litigants and counsel in Kenya at this time in the history of this country:

"The notion that whenever there is a failure by an organ of the government or a public authority or a public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individual by chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as general substitute of the normal proceedings for invoking judicial control of administrative action……. the mere allegation that a human right or fundamental freedom of the applicant has been or likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the court process as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action……..……..."

For the reasons given, I decline to grant conservatory orders and dismiss the chamber summons dated 7th May, 2011 with costs.

Dated, Signed and Delivered at Nakuru this 15th day of June, 2012.

W. OUKO
JUDGE