



IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO.34 OF 2010

MUTAKA OLE MPOOYA.....PETITIONER
VERSUS
MASAI MARA NORTH CONSERVANCY LIMITED.....1ST RESPONDENT
KENYA TOURISM FEDERATION.....2ND RESPONDENT

RULING

The petitioner, Mutaka Ole Mpooya has filed this petition against the respondents, Masai Mara North Conservancy Limited and Kenya Tourism Federation claiming that his constitutional rights over his parcel of land No.MARA/KOIYAKI/DAGURUGURUET/280 (the suit property) are being or threatened to be breached by the respondents. He has identified those rights and the breaches or threatened breaches as follows:

- i) that, in violation of **sections 70(c), 75 and 76 of the former Constitution** and without the petitioner's consent the respondents have entered upon the suit property and are using it for their own commercial benefit and denying the petitioner the benefit of an owner;
- ii) that the respondents are as a result of the (i) above claiming the right to manage the suit property;
- iii) that the respondents in contravention of **section 80 of the former Constitution** seek to obstruct an association of land owners in the area, Leopard Gorge Conservancy Limited, from carrying out its objectives .
- iv) that the respondents are in breach of **section 81 of the former Constitution** by seeking, in the Tribunal Appeal No.NET./40/2009, orders that would effectively stop the petitioner from undertaking any development on the suit property;
- v) that the respondents are holding the petitioner in slavery or servitude and subjecting him to inhuman and degrading treatment contrary to **sections 73 and 74 of the former Constitution** by doing the acts complained of in the previous paragraphs, and finally;
- vi) that **sections 70, 77 and 82 of the former Constitution** have been violated by the respondents' forceful entry and exploitation of the suit property.

The uncontroverted facts are that:

- i) the petitioner is the registered proprietor of the suit property which is located close to the famous Masai Mara Game Reserve;

- ii) that the petitioner together with six other land owners listed in paragraph 37 of the petitioner's affidavit in support dated 26th February, 2010, formed a company known as Masai Mara Leopard Gorge Conservancy;
- iii) that the petitioner and the other 6 land owners leased all the 7 parcels to that company;
- iv) that there is pending determination National Environment Tribunal Appeal No. NET.40/2009 filed by the 1st respondent against the Director General of National Environmental Management Authority (NEMA) and Wasafiri Camp Limited, with Masai Mara Leopard Gorge Conservancy Limited as the interested party.

The 1st respondent has denied all the allegations in the petition, specifically that it has entered or done any of the acts complained of on the suit property. The petition was filed simultaneously with chamber summons for conservatory orders. While the chamber summons was pending *interpartes* hearing the respondents have filed two notices of preliminary objection based on the following three points:

- i) that the petitioner served the petition upon the 1st respondent out of time and hence the court has no jurisdiction to entertain the petition;
- ii) that the petitioner has no *locus standi* to bring the petition;
- iii) that the petition does not raise any constitutional issue.

Counsel for the parties filed written submissions. Counsel for the respondent argued in support of the first ground that the petition was served upon the 1st respondent 12 days after the filing of the petition in violation of the Gicheru Rules, 2006.

Secondly, it was submitted that the petitioner having leased to Masai Mara Leopard Gorge Conservancy Limited the suit land he has no *locus Standi* to file this petition for the enforcement of rights and freedom to use the suit property.

Finally, it was submitted for the petitioner that the issues raised in the petition as violations of constitutional rights are matters of tort to be dealt with by a civil court.

The respondent on his part while admitting the delay in serving the petition explained that the delay was caused by the order of the court that directed that "*no action*" be taken in the Nairobi case.

Regarding the objection on *locus standi*, it was submitted that the former constitution guaranteed the petitioner the right to protection of the privacy of his property and from deprivation of his property without compensation; that as the registered proprietor he has reversionary interest in the property for life after the expiry of the lease; that the petition raises constitutional issues which can only be determined after a hearing.

I have considered the foregoing rival submissions as well as the authorities cited by the parties' counsel. It is now trite learning that a preliminary objection must only raise pure point(s) of law which cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The objection must also be capable of disposing of the matter before the court. See **Mukisa Biscuit Manufacturing Company Limited Vs. West End Distributors Limited** (1984) KLR 584. The objection herein raises 3 points, namely:

- i) that the petition was served outside the period prescribed by the Gicheru Rules, 2006;
- ii) that the petitioner lacks *locus standi* to bring the petition and;
- iii) that the court lacks jurisdiction to entertain the petition for the reasons that no constitutional

issue is being raised in the petition.

Starting with the issue of service, under the High Court's enforcement jurisdiction, the provision of **Rule 15** of the **Gicheru Rules, 2006** is explicit that:

“15. The petition shall, in a criminal case, be served on the Attorney General and in a civil case, on the respondent, within seven days of filing.”

Section 84(1) of the **former Constitution** guaranteed, without any limitation as to time, any person whose rights under **section 70 to 83** (inclusive) was being or was about to be contravened to apply to the High Court for redress. That Constitutional guarantee could not be taken away by rules of procedure. Secondly, a preliminary objection, as I have noted earlier must be capable of disposing of the suit.

The complaint raised in the objection relates only to the 1st respondent yet there are two respondents. The objection if sustained will not dispose of the suit. Finally, with the promulgation of the Constitution which emphasizes substantial justice as opposed to undue regard to procedural technicalities, with the enactment of the overriding principle in the Civil Procedure Act and with the overhaul of the Civil Procedure Rules, the philosophy and the court's approach to the resolution of disputes have fundamentally changed. No doubt rules of procedure are important for the smooth management of the civil litigation process. Indeed there may well be instances when the violation of rules of procedure may result in the pleadings being struck out. The question that must be asked is whether the aggrieved party has suffered any prejudice and whether an award of costs can compensate the party. The failure to serve the petition upon the 1st respondent within 7 days was not prejudicial and the delay was not inordinate – being only 5 days.

Does the petitioner lack *locus standi* to bring this petition?

I have already observed that the petitioner is the registered proprietor of the suit property. Although it is leased along with others to Masai Mara Leopard Gorge Conservancy Limited, the petitioner retains reversionary interest in the property at the end of the lease.

In the spirit of the Bill of Rights under the Constitution, **Article 40**, a person cannot be deprived of his property arbitrarily or be limited or restricted in the enjoyment of his property. The former constitution under which the petition is brought similarly protects those rights. The petitioner has alleged that the respondents have, are or about to infringe those rights. This court is enjoined to investigate those allegations and cannot by summary procedure determine them. That holding will also answer the last question, whether the petition raises constitutional issues, suffice to emphasise and reiterate that the petitioner has made serious allegations in the petition, namely that the respondents have forcefully entered the suit property and restricted the petitioner's use thereof; that the respondents are using the suit property for their own commercial benefit.

Learned counsel for the petitioner has invoked **section 84(1)** of the **former Constitution** for proposition that the availability of any other relief does not preclude any person who alleges violation of fundamental rights from seeking redress under the Constitution. I agree.

For all the reasons, the objection is overruled with costs to the petitioner.

Dated, Delivered and Signed at Nakuru this 17th day of June, 2011.

W. OUKO
JUDGE