



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 10 OF 2016

**IN THE MATTER OF: ARTICLES 2, 6, 10, 19, 20, 22, 23, 35, 40, 42, 60, 64, 69, 159, 162, 174, 176, 185, 186, 187, 232 AND 259 OF
THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 26, 27, 28, 40, 42, 47, 60, 64, 65, 70, 73, AND 232 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2006**

AND

IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011, SECTION 13

AND

**IN THE MATTER OF: ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT SECTIONS, 3, 7, 42, 50, 51, 54, 55,
58, 72, 111, 138 AND 114**

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012 SECTION 5, 6, 14, 15

BETWEEN

- 1. GEORGE KARISA FONDO**
- 2. MOHAMED AHMED THANI**
- 3. KENNEDY KALAMA NGALA**
- 4. JAMES NGALLA SHIDA**
- 5. JOSEPH KARISA MUNUBI**
- 6. SHIDA KITSAO**
- 7. OMAR NGONYO MBAURO**
- 8. KENNEDY PONDA NGUMBAO**
- 9. ABDALLA SAID ABDALLA**

10. KITSAO MWAVUOI NDAA
11. NURU IBRAHIM
12. HEMED ATHMAN
13. MARKO LUGWE
14. FRANCIS NGUMBAO
15. CRISPIN MANGI
16. PETER NGALA MWAGANDI
17. ROBERT MWAGANDI NGALA
18. KITSAO KADENGE NGOMBO
19. KACHE NDAA TUNE
20. RODGERS KAZUNGU KARABU.....PLAINTIFF

AND

1. SAID ALI OMAR
2. JOHSON HARE RUWA
3. PATRICK KAINGU CHARO
4. LARRY KAHASO NGUMBAU
5. LEMMY THOYA CHARO
6. KAHINDI KENGA RANDU
7. JAMAA NDUDHI
8. MWAKA NGAO MAKAZI
9. ELIZABETH NZINGO KAYEKA
10. CHRISTOPHER KARISA HARE
11. ALFRED TUNE NDAA
12. SALIM KATANA KILAHO
13. RANDU NZAI MWAJIRANI
14. INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE
15. THE COUNTY GOVERNMENT OF KILIFI
16. CABINET SECRETARY FOR ENVIRONMENT
NATURAL RESOURCES AND REGIONAL DEVELOPMENT AUTHORITIES
17. THE HON. ATTORNEY GENERAL
18. NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY.....RESPONDENTS

JUDGEMENT

Background

1. By this Petition dated and lodged herein on 10th June 2016, George Karisa Fondo and 19 other Petitioners pray for the following reliefs against the 18 Respondents herein: -

7.01.....

7.02 *A permanent order of injunction restraining the 1st to 13th Respondents, their servants and or agents from harvesting sand from Portion No. 128/Mambrui/Sabaki Settlement Squatter Scheme*

7.03.....

7.04 *A permanent order of injunction restraining the 1st to 13th Respondents, their servants and or agents or anyone of them from damaging the mud flats, the sand dunes, fresh water pools and marshes, brushy woodland, and the tidal land that presently forms the Sabaki River Estuary and its immediate environs.*

7.05 *The Honourable Court be pleased to issue a mandatory order of injunction directing the 15th Respondent to supply the Petitioners with certified records of the qualities of sand harvested and carted away by each of the vehicles listed in the Petitioners' letter dated 24/02/2016 and in addition thereto, any others that the Petitioner may have missed, but which have nonetheless collected sand from the petitioner's land, and the cess if any, collected by the 14th Respondent from them.*

7.06. *The Honourable Court be pleased to issue a Judicial Review order of mandamus directed upon the 1st to 13th and the 18th Respondents to prepare and file an Environmental Impact Assessment Report of the Sabaki River Estuary and its immediate environs within such time as the Honourable Court shall deem appropriate in the circumstances.*

7.07.....

7.08. *The Honourable Court be pleased to issue a Judicial Review Order of Mandamus directed upon the 14th and 18th Respondents requiring them to commence criminal proceedings against the 1st to 13th Respondents and any other person found to have participated in the deleterious and callous degradation of the Sabaki River Estuary and its immediate environs.*

7.09. *The Honourable Court be pleased to issue a Judicial Review Order of Mandamus directed upon the 14th to 18th Respondents requiring them to commence criminal proceedings against the 1st to 13th Respondents for failure to submit a Project Report to the 18th Respondent contrary to Section 58 of the Act and Regulations 7 and 8 of the EIA & A Regulations.*

7.10. *The Honourable Court be pleased to issue a Judicial Review Order of Mandamus directed upon the 14th Respondent requiring them to commence criminal proceedings against the Director General of the 18th Respondent Geoffrey Wahungu who has knowledge of the Commission of the Offences by the 1st to 13th Respondents and who did not exercise due diligence, efficiency and economy to ensure compliance with the Environmental Management and Co-ordination Act contrary to Section 144 as read together with Section 145 of the Act.*

7.11. *The Honourable Court be pleased to issue an Environmental Restoration Order against the Respondents jointly and severally or any one of them as shall be appropriate under Section 111 of the Environmental Management and Coordination Act.*

7.12. *In addition to and in the alternative to the foregoing, the Honourable Court be pleased to issue an Environmental Restoration order against the Respondents jointly and severally or anyone of them, as shall be appropriate, to at their own cost restore the environment to as near as it may be to its original state prior to their actions complained about.*

7.13. *The Honourable Court be pleased to issue a Judicial Review Order of Mandamus directed upon the 16th Respondent requiring the Cabinet Secretary, by notice in the Gazette to declare the Sabaki River Estuary and such of its environs as an appropriate study shall determine, to be a protected area, and impose such restrictions as she considers necessary, to protect the Sabaki River Estuary from environmental degradation as provided under Section 42(2) of the Environmental Management and Co-ordination Act.*

7.14. *In addition to and or in the alternative and without prejudice to the foregoing, the Honourable Court be pleased to issue a Judicial Review Order of Mandamus directed upon the 18th Respondent requiring them to produce an environmental management plan for the Sabaki River Estuary with a view to prevent and control degradation of the Sabaki River Estuary as provided under Regulation 26 of the Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009.*

7.15. *The Honourable Court be pleased to order an inquiry into both general and special damages and liberty to apply in any form be granted to the Petitioners.*

7.16. *All necessary and consequential directions and orders be made.*

7.17. The costs of and incidental be borne by the Respondents.

2. Those prayers arise from the Petitioners contention that they are the owners of various parcels of land located on the northern bank of the Sabaki River. They aver that sometime on or about 11th December 2016, they became aware that the 1st to 13th Respondents had without any colour of right trespassed onto their parcels of land, cleared large sections thereof and denuded it of all vegetation upon which they commenced sand harvesting activities thereon.

3. The Petitioners assert that when they thereafter met the 1st to 13th Respondents with a view to discuss the encroachment and illegal extraction of sand from their parcels of land, the said Respondents became unruly and with the help of about 100 youth who were employed in the said harvesting activities, they threatened to unleash violence upon the Petitioners. The Petitioners are hence apprehensive that the illegal extraction of sand and the accompanying degradation of the land shall continue to other portions of the Sabaki River Estuary thereby leading to an environmental disaster in the area.

4. The 1st to 13th Respondents were served with the Petition by way of an advertisement in the Daily Nation Newspaper of 30th June 2016. They did not however file any appearance or a response to the Petition. The County Government of Kilifi (the 15th Respondent) did not also enter appearance or file an answer to the Petition.

5. On the other hand, the Inspector General of the National Police Service, the Cabinet Secretary for Environment and Natural Resources and the Honourable the Attorney General who are respectively sued herein as the 14th, 16th and 17th Respondents have on 24th June 2016 filed Grounds of Opposition to the Petition stating as follows: -

i) That no rules or rights have been breached especially by the 14th, 16th and 17th Respondents.

ii) The Petitioners have no proper claim against the 14th, 16th and 17th Respondents.

iii) That the allegations raised are strictly improper against the aforesaid Respondents.

iv) That the Petitioners as landowners are well within their rights to utilize the available legal procedures and mechanisms steps(sic) sooner rather than later to occasion the arrests and prosecution of the 1st to 13th Respondents.

v) That as such the Petitioners are mistaken in their claims against the 14th, 16th and 17th Respondents as it is their primary duty to take requisite (action) to protect their land from invaders and trespassers.

vi) That the 14th, 16th and 17th Respondents condemn issues touching on trespass and illegal harvesting of sand by the 1st to 13th Respondents and reiterate that these are matters to be heard and decided upon conclusively by a Court of Law.

vii) That the 14th, 16th and 17th (Respondents) support fully the conservation and protection of natural resources and there is no proof of illegality and/or irregularity in the actions of the 14th, 16th and 17th Respondents.

6. Similarly, the National Environmental Management Authority (NEMA) sued herein as the 18th Respondent did file a response to the Petition. In a Replying Affidavit sworn by its Head of Environmental Inspection Wachira Kobe and filed herein on 24th June 2016, the 18th Respondent denies that it has failed to act as required by law. On the contrary, they aver that they have not licensed the sand harvesting activities as they have not received any documentation from the 1st to 13th Respondents that would require them to start an Environmental Impact Assessment(EIA) licensing process and the sand harvesting site is operating illegally.

7. The 18th Respondent however concedes that sometime in January 2016, they received a complaint from members of the public concerning illegal sand harvesting activities on the banks of the River Sabaki. The 18th Respondent asserts that upon receipt of the complaint, they organized a site visit to the area through the County Government of Kilifi (the 15th Respondent) but when they got there a group of rowdy youths who were engaged on the site denied them entry.

8. The 18th Respondent further avers that they organized another site visit with the help of the 15th Respondent and members of the National Police Service on 5th February 2016 during which occasion they observed that unlicensed sand harvesting was going on in the area in total disregard of EIA regulations and sand harvesting guidelines. It is their case that they support the Petition as the grant of the orders sought would go a long way in protecting and safeguarding the environment.

The Petitioners Case

9. At the trial herein, the Petitioners called a total of four witnesses in support of their case. None of the Respondents called any witnesses.

10. PW1- George Karisa Fondo is the 1st Petitioner, a businessman and a resident of Sabaki Mamburi. He told the Court his Co-Petitioners had authorized him to act on their behalf and that he accordingly swore an affidavit in support of the Petition. He further told the Court they had brought this action for their private and individual benefits and also for the benefit of the public living in the Sabaki Village.

11. PW1 testified that the Petitioners are beneficiaries of the land adjudication undertaken in an area abutting the Sabaki River by the Ministry of Lands. That exercise commenced in the early 1990s with Letters of Offer being issued to them in the year 2010. PW1 told the

Court his Letter of Offer is dated 31st May 2010 and that on 17th September 2010, he had paid the sum of Kshs 14,530/- for the outright purchase of the land from the Settlement Fund Trustees(SFT). He is yet to be issued with a title deed.

12. PW1 further testified that the 2nd to 21st Petitioners also benefited from the aforesaid adjudication and that some of them had been issued with freehold titles to their respective portions of land. PW1 further told the Court that part of their parcels of land abut the River Sabaki and that as a result, they suffer and or gain from the ambulatory nature of the river.

13. PW1 further testified that the Sabaki River Estuary is designated as an important Bird and Biodiversity Area(IBA) and was thus an area of the earth with the greatest significance for the conservation of the world's birds. He told the Court the mud flats, the sand dunes, fresh water pools and marshes, brushy woodland, and vast tidal estuary at the mouth of Kenya's second-longest river made up what was known as the Sabaki River Estuary. He further told the Court the residents of Sabaki Village utilize the waters by accessing it for domestic consumption and watering of their animals. The Petitioners and their families therefore depended on the health of the Sabaki River.

14. PW1 told the Court that on 11th December 2016, he became aware that the 1st to 13th Respondents had without any colour of right trespassed into his land, cleared a large section thereof and denuded it of all vegetation before commencing sand-harvesting activities thereon. When PW1 sought to discuss the encroachment of his land and the illegal activities that were on-going, the 1st to 13th Respondents who had in tow a group in excess of 100 youth employed as excavators on the site became unruly and threatened personal violence against PW1.

15. PW1 testified that he was alarmed by the turn of events and he accordingly reported the matter to the 14th Respondent's representatives in Malindi and Marereni, the local sub-chief and the County Commissioner Marafa. Although they all expressed sympathy with PW1 and exasperation against those who had illegally occupied his land, no immediate action was taken to stop the destruction of the land and the resultant environmental damage.

16. PW1 told the Court that the 1st to 13th Respondents and their agents have excavated a massive open cast quarry in his land from where they have scooped millions of tons of sand. The 2nd to 21st Petitioners are now apprehensive that once the said Respondents exhaust the sand from PW1's parcel of land, they will continue their illegal activities in the neighbouring parcels thereby occasioning an environmental disaster.

17. PW1 told the Court that inspite of their knowledge of the illegal excavation being carried out on his land, Police Officers (members of the 14th Respondent) manning a road block a few metres away have done nothing to stop the activities while the County Government of Kilifi (the 15th Respondent) continues to collect cess from the lorries transporting sand from the land thereby giving their tacit approval and encouragement to the illegal activities.

18. PW1 further told the Court he had requested the 15th Respondent to supply quantities of sand that was carted away by a number of vehicles but the 15th Respondent has failed to provide the information. PW1 told the Court the said lorries had damaged the roads leading to their parcels of land and that the loud noise from the heavy vehicles have caused great environmental degradation to the detriment of the Petitioners. PW1 further told the Court the 14th to 18th Respondents had failed and or neglected to enforce the law as required thereby exposing the Petitioners to damage and loss.

19. On cross- examination, PW1 told the Court that he had since been issued with a title deed for his parcel of land and that he was present when demarcation of the land was done. He told the Court he had not put a fence on his land and that every resident of the area was aware of their boundaries. He conceded that when he filed a complaint with the Police, the 1st to 13th Respondents were brought to Court and were fined and told not to go back to the land.

20. PW2- Isaiah Mbaja Oboke is an Expert Property Valuer and a resident of Kilifi. He told the Court he was approached by the Petitioners in this case and that he visited the site where he found sand being mined. PW2 told the Court water was seeping through from the ground and that the land was completely destroyed. He reduced his observations into a Report which was filed herein on 3rd October 2018.

21. PW1 further told the Court he tried to establish how much sand had been mined from the land and the value thereof. PW2 told the Court that he was of the view that the total amount harvested was worth Kshs 45,910,000/-. PW2 further told the Court he charged a sum of Kshs 100,000/- to the Petitioners for the services rendered.

22. PW3- Rodgers Kazungu Karabu is the 20th Plaintiff herein and a resident of Sabaki River Delta. He told the Court he was born on the Delta and that he had lived on the land for the past 75 years. He further told the Court the other Petitioners were known to him as they are his neighbours.

23. PW3 testified that they had sued the Respondents for their illegal mining activities on their parcels of land. He told the Court they had not given the Respondents permission to mine sand from their parcels of land. The Respondents were selling the sand to owners of lorries who collected the sand and carried it to the Sabaki bridge where the lorry owners paid cess to the County Government of Kilifi. Those lorries were also generating huge amounts of dust and the children of the residents were always coughing. The noisy lorries operated day and night and the residents were unable to sleep.

24. PW3 further told the Court that as the residents have no piped water, they used the water from the sand dunes that were now being destroyed and reduced. The water had since changed colour and become salty while the birds which used to attract tourists to the land have since migrated following the destruction of their habitat.

25. PW4- Samuel Shida Kitsao is a farmer and resident of Sabaki Bridge. He told the Court he had lived on the land for over 40 years. PW4

testified that the Sabaki River Estuary was formerly a very beautiful and appealing place. However, around 2015 the Respondents started harvesting sand and have now destroyed the land. They assaulted PW4 when he protested their actions.

Analysis and Determination

26. I have perused and considered the Petition and the response thereto. I have similarly considered the testimonies of the Petitioners' witnesses, the evidence adduced at the trial as well as the detailed rival submissions and authorities placed before me by the Learned Counsels for the parties.

27. The Petitioners herein bring this suit in their capacity as landowners and residents of the Sabaki Squatter Settlement Scheme as established in the northern banks of the Sabaki River Estuary. They told this Court they had brought this Petition for their private and individual benefits as well as for the benefit of the public living within the Sabaki Village.

28. As I understood it, the crux of the Petition is that the 1st to 13th Respondents had illegally and wrongfully invaded the Petitioners parcels of land said to abut the Sabaki River, cleared a large section thereof of any vegetation and commenced illegal sand harvesting or mining activities thereon. It is the Petitioners case that despite the illegal activities on the part of the 1st to 13th Respondents, the 14th to 18th Respondents who are Government agencies clothed with certain constitutional and statutory mandates have abdicated their responsibilities and have failed to stop the destruction of their said parcels of land and the resultant degradation of the environment.

29. While voicing their support for environmental conservation, the 14th to 18th Respondents however denied that they had abdicated their constitutional and lawful mandates as stated by the Petitioners. It was particularly the 14th, 16th and 17th Respondents' case that the Petitioners rights had not been breached in any manner and that they had no claim whatsoever that could be sustained against the Respondents. The 1st to 13th Respondents neither entered appearance nor filed an answer to the Petition nor did the 15th Respondent.

30. The Petition is expressed to be brought under various provisions of the Constitution, among them Articles 42 and 70 thereof. In this respect Article 42 of the Constitution provides as follows: -

“42. Every person has the right to a clean and healthy environment, which includes the right-

a) To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

b) To have obligations relating to the environment fulfilled under Article 70.

31. On the other hand, the said Article 70 provides thus: -

“70 (1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect of the same matter.

(2) On application under Clause (1), the Court may make any order, or give any directions it considers appropriate-

a) To prevent, stop or discontinue any act or omission that is harmful to the environment;

b) To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or

c) To provide compensation for any victim of a violation of the right to a clean and healthy environment.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

32. Those provisions in Article 70 of the Constitution have indeed been replicated under Section 3 of the Environmental Management and Co-ordination Act (EMCA) which provides at subsection 5 thereof as follows: -

“(5) in exercising the jurisdiction conferred upon it under subsection 3 the (...) Court shall be guided by the following principles of sustainable development: -

a) The principles 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 co-operation in the management of environmental resources shared by two or more states;

d) *The principle of inter-generational and intra-generational equity;*

e) *The polluter pays principle; and*

f) *The precautionary principle.*

33. As was stated in *Joseph Leboo & 2 Others –vs- Director Kenya Forest Services & Another (2013) eKLR*:

“A reading of Articles 42 and 70 of the Constitution above, makes it clear, that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.”

34. The waiver of the requirement to demonstrate locus standi in a suit relating to the protection of the environment is of course, necessitated by the recognition that the protection of the environment is not only for the benefit of the present generation but also for the generations to come. As a result, this Court is enjoined under Section 18 of the Environment and Land Court Act and Section 3(5) of the EMCA aforesaid, to be guided by the principle of intergenerational equity while dealing with environmental disputes.

35. Section 2 of the EMCA in this respect defines intergenerational equity as follows:

“Intergenerational equity” means that the present generation should ensure that in exercising its rights to beneficial use of the environment, the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.”

36. According to the Petitioners, the Sabaki River Estuary is designated as an important Bird and Biodiversity Area (IBA). The estuary is made of mud flats, sand dunes, fresh water pools and marshes, brushy woodland and a vast tidal estuary. It is their case that the residents of the area utilize the water by accessing it for domestic consumption and for watering their animals.

37. The Petitioners therefore contend that their livelihood depends on the health of the Sabaki River which is now threatened by massive degradation as a result of the activities of the 1st to 13th Respondents and the failure of the 14th to 18th Respondents to take appropriate measures to enforce the law and protect their rights to a clean and healthy environment.

38. Indeed, none of the Respondents herein contested the claim by the Petitioners that there were on-going illegal sand harvesting activities in the suit premises and or that the effects thereof were deleterious and harmful to the environment. In a Replying Affidavit sworn and filed herein by its Head of Environmental Inspection, the National Environmental Management Authority (NEMA) –the 18th Respondent) indeed confirms that its team visited the site in the company of the Police and the 15th Respondent on 5th February 2016 and that they observed massive unlicensed sand harvesting was taking place in the area.

39. As it were it cannot be denied that rivers all over the world are today under immense pressure due to various kinds of anthropogenic activities among them indiscriminate extraction of sand and gravel which many at times is disastrous to the river’s ecosystem. Uncontrolled sand harvesting activities may lead to land degradation, low availability of and poor quality of water in the affected rivers.

40. In recognition of such harmful consequences, Article 69 (1)(a) of the Constitution requires the state which is represented herein by the 14th to 18th Respondents to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources as well as to ensure the equitable sharing of the accruing benefits.

41. In this respect and to its credit, the 18th Respondent has come up with the National Sand Harvesting Guidelines, 2007 which require every County where sand harvesting activities take place to establish a Technical Sand Harvesting Committee. That Committee is under the Guidelines mandated to ensure that sand dams and gabions are constructed in designated sand harvesting sites; that lorries are using designated access roads only to access the sites and that the said sites are rehabilitated appropriately.

42. As it were, the 15th Respondent did not file any response to the Petition and none of the other Respondents provided any evidence that the said Guidelines had been complied with and/or implemented within Kilifi County. What was clear however was the fact that the 1st to 13th Respondents operated an unlicensed sand harvesting site and that the 18th Respondent had neither licensed the same nor carried out an environmental impact assessment of the activities being carried out on the site.

43. Arising from the foregoing, it was clear to me that the harvesting of the sand in the Sabaki River Estuary was not, prima facie, being done in a sustainable manner as envisaged under Article 69 (1) of the Constitution.

44. According to the Petitioners, they had reported the illegal activities of the 1st to 13th Respondents and their predicament to various officers representing the 14th to 18th Respondents. However, while the officers from the 14th, 15th, 16th, 17th and 18th Respondents visited the Estuary and issued various notices, the officers took no further steps to cause the arrest and prosecution of the 1st to 13 Respondents who were responsible for the trespass, illegal excavation and carting away of sand from the suitland.

45. The Petitioners told the Court that the 1st to 13th Respondents, their agents or servants had excavated a massive open cast quarry in the suitland from where they have scooped millions of tons of sand for transportation and sale elsewhere. Relying on a Report filed herein on 3rd October 2018, the Petitioners estimated the value of the sand mined as at the time the report was prepared at Kshs 45,910,000/-. They urged the Court to order the Respondents to compensate them for the said loss and to award them general damages to be assessed by the Court.

46. While it was easy to discern the basis for the claim against the 1st to 13th Respondents however, I think it behoves this Court at this juncture to carefully scrutinize the claim against the 14th to 18th Respondents with a view to ascertaining if indeed they failed in their responsibilities to warrant their being condemned to compensate the Petitioners as sought.

47. As it were, the Petitioners case against the Inspector General of the Police (the 14th Respondent) is that his officers stationed at a roadblock a few meters from the turn off leading to the Petitioners land had given tacit approval and encouragement to the illegal activities by failing to arrest and bring to book the 1st to 13th Respondents. There was however nothing placed before me to show that the said officers had any prior knowledge of the illegal sand harvesting before it commenced and/or that any official report was made to the Police and that they failed to act on the complaint.

48. As Mativo J stated in **Leonard Otieno –vs- Airtel Kenya Ltd (2018) eKLR**: -

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of Constitutional rights is not, a mere technicality; rather, it is essential for a proper consideration of constitutional issues. Decisions on violation of Constitutional rights cannot be based upon the unsupported hypothesis.”

49. The properties in question are private properties belonging to various individuals along the Sabaki River Estuary. From their own Statements herein, the Petitioners had only recently been adjudicated the said properties and it was not clear to this Court if the Petitioners had taken any steps to occupy and or safeguard the same prior to the invasion by the 1st to 13 Respondents. Considering the duty of the Police in such instances in **Agricultural Development Corporation –vs- Harjit Pandhal Singh & Another (2019) eKLR**, the Court of Appeal observed thus: -

“The general Constitutional and statutory duty of the Government or Police to provide security to an individual citizen or his property only crystalizes in special individualized circumstances such as where a citizen has made an individual arrangement with the Police, or some form of privity exists or where from the known individual circumstances, it is reasonable for the Police to provide protection for the person or his property. Otherwise, imposing a limitless legal duty to the Government to provide security to every citizen and his property in every circumstance would not only open floodgates of litigation against the Government but would also be detrimental to the public interest and impracticable in the context of this Country.”

50. At some point in the course of the trial herein, it became necessary that this Court directs the Officer Commanding Station (OCS) Marereni to enforce the observance of certain interlocutory orders that had been issued at the commencement of these proceedings. Accordingly, on 20th February 2017, the OCS- CI Justus Kiboi appeared before this Court and explained that the sand harvesters are in masses and that their activities required constant surveillance. The Officer further told the Court that given the volatile situation on the ground at the time, the Police had found it necessary to team up in a multi-agency unit in order to bring the situation under control.

51. I think in the circumstances of this case, it was incumbent upon the Petitioners to demonstrate that the Police and other agents of the State had been negligent in the performance of their duties and or that they had breached any of their statutory or constitutional duties. Considering a similar Petition in **Joseph Boro Ngera Trading as Ngera Fancy Farm –vs- Attorney General (2019) eKLR**, Ngugi J observed (and I concur) as follows: -

“As regarding the post-election violence, the Petitioner does not make any allegations that the Police knew in advance about the attacks and failed to prevent them. For both the pre-2007 invasions of his farm and the post-election invasion, the Petitioner does not make any claim that the Police or any other Government agents were involved in the attacks. Rather, the Petitioner finds the failure by the Government to act to protect him to have been negligent.

Applying the test laid down in the Charles Muriithi & 2 Others –vs- Attorney General (2015) eKLR case, I am not persuaded that the facts revealed in the Petitioner’s case can be properly comprehended within any of the exceptions laid down in the Charles Muriithi case. In the first place, none of the instances of invasion complained of were perpetrated by state agents. Secondly, there is no reasonable sense in which it can be said that the Police or state agents put the Petitioner in any situation which was more dangerous than he would otherwise have been. Thirdly, in the circumstances of this case, it would be inappropriate to conclude that a special relationship had been created between the Petitioner and the Police as a result of which the petitioner had been assured of Police protection. Indeed, the opposite appears to be true. In this case, the correspondence between the Petitioner and the Police shows that the Police, while aware of the security situation, were grappling to find safe protective solutions to the Petitioner.”

52. Similarly, in the mater before me, there was no allegation, other than the fact that the Police manned a nearby road-block that they knew in advance about the invasion of the 1st to 13th Respondents into the Petitioners properties and or that they were involved or complicit in the illegal activities therein. It was indeed evident from these proceedings that the Petitioners knew and had identified the 1st to 13th Respondents as the real perpetrators of the illegal activities in their properties. In this context, I am in further concurrence with Ngugi J in the **Joseph Boro Ngera Case (Supra)** where the Learned Judge opined as follows: -

“In the present case, there is one other aspect that is worthy of mention. For the instances of invasion which occurred before the Post-Election violence, it appears from the affidavit that the Petitioner knew the perpetrators of the illegal farm(invasion). If so, then the proper course would have been to sue the perpetrators directly rather than sue the State. The State would only be liable, in such a case, if it failed to provide a just mechanism for the adjudication of the claim.”

53. Accordingly, and while I concur that the State has a Constitutional obligation with regard to the protection and conservation of the environment as submitted by the Petitioners, it is my considered view that the State more so as represented herein by the 14th, 16th and 17th Respondents cannot be held liable for the unlawful invasion perpetrated by the 1st to 13th Respondents in the circumstances herein. The perpetrators were not agents of the State and the Petitioners themselves have not placed anything before me to demonstrate any measures if any that they took to protect the parcels of land allocated to themselves by the State from trespassers such as the 1st to 13th Respondents.

54. It was further the Petitioners case that the County Government of Kilifi (the 15th Respondent) had continued to levy and collect cess from the lorries that were transporting the illegally harvested sand and that by doing so the 15th Respondent had unlawfully given its tacit approval and encouragement to the illegal activities. While the 15th Respondent did not enter appearance and or respond to the Petition, nothing was placed before this Court to demonstrate that 15th Respondent had collected any cess from the site.

55. From the bundle of documents placed before me by the Petitioners, I was unable to find any evidence of any cess levied by the 15th Respondent at the site or anywhere else for that matter. From a Copy of a letter dated 24th February 2016, written by the Petitioners' former Advocates, Stephen Macharia Kimani and addressed to the 15th Respondent, it was evident that the parties had been engaged in some correspondence over the 1st Petitioner's parcel of land. The said letter reads in the relevant portion as follows: -

“RE: Wrongful Sand Harvesting from Plot Mambui/Sabaki Settlement Scheme/128

The above matter and your letter of 30/12/2015 and mine of 20/1/2016 refer.

Please find enclosed herewith a list of motor vehicles which have wrongfully and illegally been used in harvesting and carting away sand from Plot Number Mambui/Sabaki Settlement Scheme/128 and kindly but urgently let me have certified records of quantities of sand harvested and carted away by each vehicle, and the cess, if any, paid to your government for every load carted away from the land aforesaid.

This request is made under the Norwich Pharmacal Company (1974) principle. It is intended to use the data to seek damages for conspiracy to injure and occasion loss, as well as trespass and wrongful harvesting of sand, and the ensuing unjust enrichment of the sand harvesters and truck owners.

Should you fail to make discovery as sought within the next seven (7) days to enable the land owner to identify and know whom to sue and what to sue for, my firm instructions are to institute appropriate discovery proceedings at your peril as to costs and other consequences.”

56. The said letter then goes ahead to provide a long list of motor vehicles said to have been “seen” on the said Plot No. 128 Mambui Settlement Scheme between 28th January 2016 and 6th February 2016. My reading of the said letter informs me that it was in response to a request from the 15th Respondent to be provided with a List of the vehicles said to have extracted sand from the parcel of land.

57. I say so because neither the letter dated 30th December 2015 from the 15th Respondent nor the Petitioners Advocates letter dated 20th January 2016 have been exhibited in these proceedings to enable the Court to discern the clear contents thereof. Whatever the case, it was evident from the tone of the letter that the question as to whether or not the 15th Respondent had collected any cess from the listed lorries remained at best speculative some four months before this Petition was filed. It was infact not clear to me who had ‘seen’ the lorries and made a record of the listed vehicles.

58. It is now the Petitioners' case that the letter dated 24th February 2016 was a legitimate request made under Article 35(1) (a) and (b) of the Constitution and that the 15th Respondent has wrongfully failed to provide the said information. As it were, the Norwich Pharmacal principles cited in the Petitioners' letter apply where an innocent third party has information relating to unlawful conduct and in such circumstances, the Court is enjoined to compel such third party to assist the person suffering damage by giving them that information. There was again however nothing placed before me to demonstrate that the 15th Respondent was possessed of such information.

59. In regard to their claim for compensation, the Petitioners have urged this Court to award them the sum of Kshs 45,910,000/- as compensation for their loss and the damage caused to their properties. In asking for the said compensation, the Petitioners rely on a Valuation Report dated 30th July 2018 as prepared by one Isaiah Mbaja Oboke(PW2).

60. In the said Report, PW2 who trades in the name of Mbaja & Associates states on the portion headed “Valuation consideration” as follows to arrive at his figure of Kshs 45,910,000/-

“We value the sand mined as follows according to the statistics of excavation measurements carries out (sic) depth and with its approximated that 70 tonnes to 80 tonnes was mined every day in the year 2016 and 2017:- 365 days by two giving us 720 days. The fair market (price) per 12 tonne is 6000.00/=. Approximately 72 tonnes were sold every 24 hrs of 730 days.”

61. I have looked at the said Report. It does not give the source of the figures used by PW2 and it is not clear how he came to the conclusion on the number of tonnes of sand mined per day or even how he ascertained what he describes as the fair market price for a ton of sand. This Court as it were is enjoined to examine the expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented.

62. The Court cannot just allow an expert to present his conclusion without presenting the analytical process by which the conclusion has been reached. In the matter before me, there is no evidence to support the alleged quantity of sand mined, the alleged number of days of mining and the stated sum of Kshs 45,910,000/-.

63. Testifying before this Court, PW2 described himself as an expert property valuer and told the Court he was a registered property valuer and a graduate in Land Economics and Statistics. He was certainly neither a quantity surveyor nor an expert in environmental impact assessment. While his Report is titled "Valuation Report of Sabaki Marereni Illegal Sand Mining and Extent of Destruction of Environment," this Court was not persuaded that he was skilled enough in the area of mining of sand or matters environment to be guided by his opinion.

Conclusion

64. In the result, this Petition only partially succeeds. In their prayers before the Court, the Petitioners have sought at least 14 orders to issue against the Respondents herein. I have looked at the prayers vis-à-vis the evidence presented before this Court. Arising from my findings as outlined above, this Court makes the following orders: -

i) A permanent order of injunction is hereby issued restraining the 1st to 13th Respondents, their servants and or agents from harvesting sand from Land Portion No. 128/Mambrui Sabaki Squatter Settlement Scheme.

ii) A permanent order of injunction is hereby issued restraining the 1st to 13th Respondents, their servants and/or agent or anyone of them from damaging the mud flats, the sand dunes, fresh water pools and marshes, brushy woodland, and the tidal land that presently forms the Sabaki River Estuary and its immediate environs.

iii) A Judicial Review Order of mandamus is hereby issued directed upon the 1st to 13th as well as the 18th Respondents to prepare and file an Environmental Impact Assessment Report on the effects of the Sand Mining activities on the Sabaki River Estuary and its immediate environs within six (6) calendar months from the date hereof.

iv) An Environmental Restoration Order is hereby issued against the 1st to 13th Respondents jointly and severally to, at their own cost restore the environment to as near as it may be to its original state prior to their actions complained of herein.

v) An order of Judicial Review is hereby issued directed at the 18th Respondent requiring them to produce environmental management plan for the Sabaki River Estuary with a view to prevent and control degradation of the Sabaki River Estuary as provided under Regulation 26 of the Environmental Management and Coordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009.

vi) The costs of and incidental to this Petition shall be borne by the 1st to 13th Respondents.

Dated, signed and delivered at Malindi this 19th day of February, 2021.

J.O. OLOLA

JUDGE