



Skyship Company Limited & 3 others v Kenya Civil Aviation Authority; National Environment Management Authority & 2 others (Interested Parties) (Environment and Land Constitutional Petition E001 of 2023) [2024] KEELC 6523 (KLR) (8 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6523 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E001 OF 2023**

CG MBOGO, J

OCTOBER 8, 2024

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS UNDER ARTICLES
2(1)&(2),10,20(2)&(3),21(1),22(1)&(2),(C),27
(1)&(2),35,42,47,48,69,70,165(3) AND 258(1) OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF VIOLATION AND INFRINGEMENT OF THE
RIGHTS TO A CLEAN AND HEALTHY ENVIRONMENT, ACCESS
TO INFORMATION, FAIR ADMINISTRATIVE ACTION, ACCESS
TO JUSTICE, EQUAL TREATMENT & PROTECTION AND THE
RULE OF THE LAW OF THE PETITIONERS**

AND

**IN THE MATTER OF SECTIONS 7,9,38,40,57A(3), PART
VI,58(1), 80 AND 82 OF THE ENVIRONMENTAL
MANAGEMENT AND CO-ORDINATION ACT, 1999 (AS
AMENDED BY THE ENVIRONMENTAL MANAGEMENT AND
CO-ORDINATION (AMENDMENT) ACT NO. 5 OF 2015.**

AND

**IN THE MATTER OF SECTIONS 26,27,30,35,44& 65 OF THE
WILDLIFE CONSERVATION AND MANAGEMENT ACT NO. 47
OF 2013**



AND
IN THE MATTER OF SECTION 5 OF THE COUNTY
GOVERNMENTS ACT
AND
IN THE MATTER OF SECTIONS 2,5,6 AND PART III OF THE
FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015
AND
IN THE MATTER OF PARTS II (SECTIONS 4&7) &(SECTIONS
66 AND 69) OF THE CIVIL AVIATION ACT NO. 21 OF
2013,REGULATION 19(1)(C) OF THE CIVIL AVIATION
(OPERATION OF AIRCRAFT FOR COMMERCIAL AIR
TRANSPORT) REGULATIONS, 2018 & REGULATION 65 OF
THE CIVIL AVIATION (LICENSING OF AIR SERVICES)
REGULATIONS, 2018
AND
IN THE MATTER OF THE CONSTITUTION OF
KENYA(PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

SKYSHIP COMPANY LIMITED 1ST PETITIONER
AFRO ECO-ADVENTURES LIMITED 2ND PETITIONER
ADVENTURES ALOFT KENYA LIMITED 3RD PETITIONER
BALLOON SAFARIS LIMITED 4TH PETITIONER

AND

KENYA CIVIL AVIATION AUTHORITY RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY

NAROK COUNTY GOVERNMENT INTERESTED PARTY

ISHARA AIR BALLON SAFARIS LIMITED INTERESTED PARTY



JUDGMENT

1. The petitioners filed the petition dated 18th July, 2023 seeking the following orders: -
 1. A declaration that the petitioners rights enshrined in the Bill of Rights have been grossly violated and/or infringed by the respondent in the manner set out herein.
 2. An order of *certiorari* to move into this honourable court the decision of the respondent as published in Kenya Gazette Notice Number 6959 of 22nd May, 2023, and thereby quashing the same.
 3. An order of prohibition directed at the respondent either by themselves, through their servants and or officers acting on their instructions restraining them from issuing fresh licenses to operate aircraft in the Olkiombo/Pose area of the Maasai Mara National Reserve.
 4. Costs of the petition.
 5. Any other relief that the court may deem fit to grant in the circumstances of the petition.
2. The facts relied on in the petition is that on 5th October, 2022, the Chief Park Warden, Maasai Mara National Reserve invited all balloon operators for a consultative meeting on 13th October, 2022 to discuss issues related to compliance to operate and fly over Maasai Mara National Reserve, and identify a centralized takeoff and landing areas for all balloons to reduce the level of environmental degradation that is currently being experienced within the reserve amongst other issues. That following the consultative meeting held on 13th October, 2022 there was resolution that all the air balloon operators were to significantly scale down their activities especially around pose plains with the aim of conserving the eco system, and preventing further degradation of the environment.
3. Further, that on 28th October, 2022 by an advertisement in the Daily Nation, the 2nd interested party published a notice to air balloon operators to provide documentation for the purpose of establishing the number and status of tourist facilities in the reserve. That on 21st December, 2022 the respondent published in the Kenya Gazette the particulars of an application by the 3rd interested party for issuance of an Air Service License. That together with the 1st, 2nd petitioners and other stakeholders including the 2nd interested party, they made written representations objecting to the grant of the air service license, and a public hearing was conducted on 13th January, 2023 at the respondent's auditorium for purposes of determining the application by the 3rd interested party.
4. The petitioners further stated that the respondent upon conclusion of the public hearing, opted to defer its decision on whether to grant the Air Service License to the 3rd Interested Party with no communication on whether there had been a resolution to the issues that necessitated the said deferral. The petitioners stated that the respondent in coming up with the decision to grant the 3rd interested party with a license, failed to consider all the representations, relevant information and supporting documents.
5. The petitioners contended that in granting the air service license to the 3rd interested party, the respondent violated Article 10, 69 (1)(a), (e), (g), (h) and Article 69 (2) of the Constitution. Further, that the respondent without considering and incorporating the prescriptions set out in the Maasai Mara National Reserve Management Plan, contradicts the express provisions of Sections 26, 27, 30, 35 and 44 of the Wildlife Conservation and Management Act, Section 7 (1) (bb), (cc), and (5) of the



Civil Aviation Act, Regulation 19 (1) (c) of the Civil Aviation (Operation of Aircraft for Commercial Transport) Regulations 2018 and Regulation 19 of the Civil Aviation (Rules of Air) Regulations 2018.

6. The petitioners contended that the action by the respondent in ignoring and not responding to the request by the 1st, 2nd and 3rd petitioners to be furnished with reasons for its decision to grant the license, was in ignorance of the requirements of Sections 5 and 6 of the Fair Administrative Action Act and contrary to Article 35 and 47 of the Constitution. Further, that Article 70 (3) of the Constitution exempts an applicant who seeks to uphold the right to a clean and healthy environment under Article 42 from the requirement of demonstrating that he has incurred loss or suffered injury.
7. The petition was supported by the affidavit of Paramjeet Mhajan, the director of the 3rd petitioner sworn on even date. The averments as contained in the affidavit are similar to the facts relied on in the petition and there would be no need of rehashing the same.
8. The petition was opposed vide the replying affidavit of the 3rd interested party sworn on 21st November, 2023 by Pilot Sakaitere Naurori. The 3rd interested party deposed that on 8th January, 2018 it wrote to the 2nd interested party expressing interest to operate Hot Air Balloon within the Maasai Mara National Reserve which was approved on 19th February, 2018 with instructions to obtain all the necessary approvals before commencing the operation. Further, that as part of obtaining the necessary approvals, the 3rd interested party conducted an Environmental Impact Assessment Study, and prepared a report which was acknowledged by the 1st interested party on 23rd February, 2022. That on 8th April, 2022, the 1st interested party issued the 3rd interested party with EIA license No NEMA/EIA/PSL/18345 after it was satisfied that the operation of the proposed Hot Air Balloon did not pose any threat to the environment at the Maasai Mara National Reserve.
9. The 3rd interested party further deposed that the environmental concerns raised by the petitioners were addressed in the EIA project report and that any grievance, dispute or complaint on the issuance of EIA license for the proposed project must first be made to the National Environment Tribunal in the first instance before approaching this court. Further, that the petitioners have not lodged any appeal or complaint against the decision of the 1st interested party challenging the issuance of the EIA license as required under Section 129 of the Environmental Management & Coordination Act. The 3rd interested party further deposed that upon obtaining all the required approvals, an application was made to the respondent for the Air Service License and on 27th March, 2022 the 3rd interested party wrote to the respondent expressing its intention to operate Hot Air Balloon within Maasai Mara National Reserve and sought for authorization and license. Further, that the 3rd interested party submitted its application for Air Service License which was acknowledged on 4th October, 2022 and it was directed to submit executed license agreements for the aircrafts that would be used in the air service operation.
10. The 3rd interested party further deposed that it received a letter informing them of public participation meeting on 13th January, 2023 which the petitioners also attended and made representation. That the respondent after considering its application and the representations made by the public, approved their application for a period of one year effective from 18th May, 2023 which was communicated vide letter dated 19th May, 2023. It was deposed that the respondent has the power and discretion to determine whether or not to issue an Air Service License, and that any person who is aggrieved by a decision of the respondent in exercise of any power under the Civil Aviation Act must first lodge a complaint or grievance before the National Civil Aviation Administrative Review Tribunal. Further, that the issuance of EIA license and the Air Service License to the 3rd interested party followed due process, and was issued in accordance with the provisions of the law.



11. The 3rd interested party deposed that the petitioners have not exhausted the mandatory statutory remedies provided under the law, and that the petition is not motivated by environmental concerns, but malice to ward off competition in the Hot Air Balloon business as can be seen from the Board Resolution annexed to the application.
12. The respondent filed its reply to the petition through the affidavit of Emile Arao, Director General at the Kenya Civil Aviation Authority sworn on 14th March, 2024. The respondent deposed that the present application is not premised on allegations of denial, violation or threatened violation of the Bill of Rights, and that there is no basis for issuance of the conservatory orders sought. Further, that the 3rd interested party has not commenced operations, and consequently, there is no prejudice that would occur upon the petitioners if the conservatory orders are not granted. Also, that the 3rd interested party ought to pay for the license fee, where after a risk assessment is conducted before they can commence operations which is yet to be done.
13. The respondent further deposed that these proceedings were triggered by the publication of the gazette notice dated 22nd May, 2023 following the 3rd interested party's application on 21st December, 2022 which upon review, caused to be published in the Kenya Gazette. It was deposed that Regulation 25 (2) of the *Civil Aviation (Licensing of Air Services) Regulations, 2018* provides for representation in writing where in favour of, or against the application. Further, that the 1st, 2nd and 3rd petitioners lodged objections to the license application on various grounds; including, that the 2nd interested party had asked them to limit hot air balloon operation over conservancy areas, that the 3rd interested party operations would cause hazard to other air operators, and pose harm to the Mara ecosystem, and that the 3rd interested party had no technical experience in balloon operations. Further, that the 4th objection lodged by the 2nd interested party contended that no Environmental Impact Assessment Report and license had been issued by the National Environmental Management Authority to enable them make an informed decision.
14. The respondent further deposed that before the scheduled public hearing conducted on 13th January, 2023, the 4th petitioner withdrew its objections citing that the operations of the 3rd interested party will have minimal to no negative impact on the environment, or the reserve infrastructure. Further, it was deposed that during the public hearing conducted on 13th January, 2023, the petitioners made their respective submissions, and the respondent sought further information from the 3rd interested party that necessitated the deferral of its decision which was published through gazette notice No 2773 dated 23rd February, 2023 on 3rd March, 2023. Further, that the 3rd interested party responded to the concerns raised by the respondent by providing approvals from the National Environmental Management Authority and the 2nd interested party, and having considered all representations, relevant information and supporting documents, it was satisfied that the 3rd interested party had met the requirements of the regulations by the National Environmental Management Authority.
15. The respondent deposed that the 1st, 2nd and 3rd petitioners sought to be furnished with reasons for the issuance of the license, which reasons were issued vide the letters dated 14th July, 2023 which were dispatched through the email. Further, that the respondent complied with all the requirements of *Fair Administrative Action Act*, and that it was never invited to the consultative forum despite being the sole aviation regulator and issuer of Air Service License to all balloon operators in the Mara. Further, that the development of the Maasai Mara Management Plan did not bar the respondent from processing new applications, and at the time the application for issuance of Air Service License was made and the objections, the Maasai Mara National Reserve Management Plan 2023-2032 did not exist.



16. The respondent deposed that it has been solely regulating the Airstrip, and no risk arises with the operation of the 3rd interested party or any other balloon operations in the area. That if there was any risk with linear of aerospace between the airstrip and the air balloon operations, even the petitioners would not be operating their balloons. Further, that there was no requirement to suspend issuance of Air Service License to new applicants during the development of the Management Plan 2023-2032. The respondent further deposed that the management plan limiting the number of operators offering hot air balloon services is contra statute, and against the mandate of the respondent and the regulatory regime for issuance of Air Service License where there exists substantive law for purpose of environmental management and conservation.
17. The respondent further deposed that the NEMA letter dated 13th February, 2023 has never been served on the respondent, and it came to know of its existence once it was attached to the application and the petition. Further that the petitioners have not brought forth in this court an Environmental and Social Impact Assessment Report showing degradation of the environment and the gazette notice in issue enjoys the presumption of legality and constitutionality. Further, that there is no evidence that the grant of conservatory orders sought would enhance constitutional values and objects specific to the rights and freedoms in the Bill of rights. In addition, that the petition is disguised as a violation and infringement of the rights to a clean and healthy environment, access to information, fair administrative action when it actually seeks monopoly of only four balloon operators in Olkiombo area which is against the Competition Act.
18. In conclusion, the respondent deposed that an order prohibiting the respondent from issuing fresh licenses to operate aircraft in Olkiombo/pose area of the Maasai Mara National Reserve in eternity is illegal, and unconstitutional and this court has no jurisdiction to grant such orders.
19. The 2nd interested party filed its replying affidavit to the petition which was sworn on 10th April, 2024 by John Mayiani Tuya, the County Secretary. The 2nd interested party deposed that the petitioners rights as well as the general public right to a clean and healthy environment has been violated, and infringed by the respondent as there was a moratorium issued by the 2nd interested party to put a hold to the Environmental Impact Assessment applications including new balloon operations until the Maasai Mara Management Plan is endorsed, and approved by relevant stakeholders which would ensure environmental conservation and address the environmental concerns within the reserve. Further, that other entities sought similar approvals from the 2nd interested party but the same was declined due to serious environmental concerns.
20. The 2nd interested party deposed that pursuant to the meeting held on 13th October, 2022 with key stakeholders in the Maasai Mara Reserve, it was resolved that balloon operations be scaled down specifically around pose plains based on the serious environmental concerns raised. Also, the 2nd interested party distanced itself from the purported approval issued to the 3rd interested party on 19th February, 2018, and deposed that on 5th January, 2023, the County Executive Committee Member Trade, Cooperative Development, Tourism Development wrote to the respondent on the application by the 3rd interested party for an Air Service License. That the said letter was in objection to the application on the grounds of the ongoing development of the Maasai Mara Management Plan to regulate activities within the reserve.
21. The 2nd interested party further deposed that the pose plains is seriously overcrowded by other operators which poses safety, and environmental concerns, and it could not have approved the issuance of the license to the 3rd interested party which thus violated or threatened the constitutional provisions on the right to a clean and healthy environment as anchored in the Constitution. Further, that the danger posed by the issuance of the license deserves immediate remedial attention and/or redress by



- the court pursuant to the provisions of Article 70 of the Constitution, and it is in the best interest of the public, and as a direct result of the violation or further threatened violation of the Constitution that the orders sought by the petitioners are granted.
22. The petition was canvassed by way of written submissions. The petitioners filed their written submissions dated 22nd July, 2024 where they raised four issues for determination as listed below: -
- a. Whether the action by the respondent in publishing Kenya Gazette Notice Number 6959 of 22nd May, 2023 without coordinating with the relevant government agencies like the 1st and 2nd interested parties herein was contrary to and in violation of the Constitution of Kenya;
 - b. Whether the action by the respondent in publishing Kenya Gazette Notice Number 6959 of 22nd May, 2023 without considering representations from industry players like the petitioners herein was contrary to and in violation of the Constitution of Kenya;
 - c. Whether the action by the respondent in publishing Kenya Gazette Notice Number 6959 of 22nd May, 2023 without considering the prescriptions set out in the Maasai Mara National Reserve Management Plan contradicts express provisions of Sections 26, 27, 30, 35 and 44 of the Wildlife Conservation and Management Act, Section 7 (1)(bb), and (5) of the Civil Aviation Act No 21 of 2013, Regulation 19 (1)(c) of the Civil Aviation (Operation of Aircraft for Commercial Transport) Regulations 2018 and Regulation 19 of the Civil Aviation (Rules of Air) Regulations 2018, and by extension, violated the sacred provisions of the Constitution of Kenya.
 - d. Whether the action by the respondent in ignoring and not responding to the request by the petitioners to be furnished with reasons for its decision to grant the Air Service License to the 3rd interested party in spite of the glaring environmental concerns was in ignorance of Sections 5 and 6 of the Fair Administrative Actions Act and necessarily contrary to Articles 35 and 47 of the Constitution.
23. On the first issue, the petitioners submitted that Article 69 (2) of the Constitution of Kenya is unequivocal 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 development and use of natural resources. Further, that on matters environment, the law recognizes the 1st Interested party as the “principal instrument of government in the implementation of all policies relating to the environment” with functions deliberately bestowed upon it under Section 9 of the Environment Management and Conservation Act, 1999 (as amended by the Environmental Management and Coordination (Amendment) Act No 5 of 2015 (hereinafter EMCA).
24. The petitioners further submitted that the respondent concedes that prior to the gazette ment granting the Air Service License to the 3rd interested party, it had unilaterally opted to defer the decision to grant the said License on 23rd February, 2023, pending the submission of the requisite approvals by the 1st and 2nd interested parties. More emphasis was the “Approval and No objection to Ishara Air Balloon” purportedly issued by the 2nd interested party and in respect of which the respondent has placed reliance at paragraph 19 of its replying affidavit as the exhibit marked “EA 7 (b)”. Further, that the 3rd interested party has in the same vein placed as evidence before this court the very same document at paragraph 5 of its replying affidavit and marked it exhibit IA-1, and all the parties agreed that such “Approval and No Objection” is fundamental to the process of obtaining further approvals and licenses including the granting of the Air Service license by the respondent.



25. The petitioners further submitted that indeed the respondent has not presented any evidence to allude to any co-ordination efforts of any kind with the 1st and 2nd interested parties to confirm the authenticity of the “purported approvals or licences” issued to the 3rd interested party. Further, that if the respondent had done as by law required, it would have realized that there was a suspension of any new developments within the Masai Mara National Reserve affecting all developments licensed earlier but not initiated on the ground, and the respondent would have flagged the purported “Approval and No Objection” issued by the 2nd interested party to an entity by the name “Ishara Air Balloon” which is an entity separate and distinct from the 3rd interested party herein “Ishara Air Balloon Safaris Limited”. They submitted that the respondent’s action of gazetting the Air Service Licence without making any attempt to liaise and coordinate with not only the 1st interested party but also the 2nd interested party in ignorance of their respective important roles regarding the environment, violated Article 69 of the [*Constitution*](#).
26. On the second issue, the petitioners submitted that Article 42 of the [*Constitution*](#) grants them the right to a clean and healthy environment, which right encompasses the right to have the environment protected for the benefit of the present and future generations through legislative and other measures, and to have obligations of the State and its organs relating to the environment fulfilled. They submitted that together with the 2nd interested party, they each presented objections to the granting of the impugned Air Service License. They relied in the case of [*Kigwe Complex Ltd v Jeremiah Githigo Iregi & 8 others*](#) [2015] eKLR.
27. On the third issue, the petitioners submitted that fundamental to this petition is that the respondent herein failed to take into consideration the prescriptions of the Masai Mara National Reserve Management Plan as expressly required by law which Plan explicitly underscores the importance of deliberate measures to safeguard the environment in relation to ballooning activities. Further, they submitted that these prescriptions ought to have been within the reasonable contemplation and knowledge of the respondent at the time of deciding to grant the Air Service License to the 3rd interested party in exercise of its mandate per Section 7(1) (a) of the [*Civil Aviation Act*](#), Cap 394.
28. Further, they submitted that the [*Wildlife Conservation and Management Act*](#) (WCMA) is explicit at Section 26 that in matters concerning the conservation, protection and management of the environment, the Act is aligned with the provisions of the Environmental Management and Coordination Act (EMCA). Further, that Section 27 of the [*WCMA*](#) stipulates that: -
- “No user rights or other license or permit granted under this Act shall exempt a person from complying with any other written law concerning the conservation and protection of the environment.”
29. Further, that Section 30 of the [*WCMA*](#) expressly prohibits any activity that is likely to have adverse effects on the environment, and Section 44 of the [*WCMA*](#) imposes a strict requirement that makes it mandatory for every national park, marine protected area, wildlife conservancy and sanctuary to be managed in accordance with a management plan. The petitioners submitted that any action including the granting of the air service license to the 3rd interested party, yet the management plan specifically prohibits on environmental considerations is ultra vires, and an upfront to the law as it conflicts with the provisions of Articles 2, 10 and 47 of the [*Constitution*](#) resulting in a violation and/or infringement of the rights of the Petitioners guaranteed in Article 42. They relied on the case of [*Wemali v Rhombus Concrete Ltd; National Environment Management Authority \(Interested Party\)*](#) (Environment and Land Constitutional Petition E046 of 2021) [2024] KEELE 1808 (KLR) and submitted that while the impugned Air Service License expired on 17th May, 2024, as captured in this honourable court’s ruling



- of 21st May, 2024, by operation of Regulation 35(1) (b) of the *Civil Aviation (Licensing of Air Services) Regulations of 2018*, the 3rd interested party is at liberty to make an application for renewal of the Air Service License before the expiry of the said license. Further, that the effect of such an application is that the existing license shall remain in force until such application has been determined by the respondent. In this way, the threat identified on the environment and for which the management plan seeks to mitigate remains real and imminent.
30. On the fourth issue, the petitioners submitted that the respondent not only failed to coordinate with the 1st and 2nd interested parties, but it also refused to consider relevant objections and representations made by the petitioners and the 2nd interested party. Further, that the respondent completely ignored the prescriptions of the Masai Mara National Reserve Management Plan despite its unambiguous legal status in law pertaining to the conservation and protection of the environment of the Masai Mara National Reserve. They submitted that the respondent has not furnished the petitioners with any of the called for information at all in contravention of Article 35, 10 and 47 of the *Constitution*. To buttress on this submission, the petitioners relied on the case of *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated) [2023] KESC 40 (KLR).
31. The 3rd interested party filed its written submissions dated 9th August, 2024 where it raised two issues for determination as listed below: -
- i. Whether this honourable court should quash Kenya Gazette Notice Number 6959 of 22nd May, 2023 that granted the 3rd interested party an air service license.
 - ii. Whether this honourable court should prohibit the issuance of fresh licenses to operate aircraft in the Olkiombo/pose area of the Maasai Mara National Reserve.
32. On the first issue, the 3rd interested party while relying on the case of *Edarus Salim Husein & 6 others v Shariffia Binti Salim & 3 others* [2022] eKLR submitted that not every allegation warrants the filing of a constitutional petition until every available legal recourse provided for by the law has been exhausted. The 3rd interested party went on to submit on the process which was followed up until the grant of the air service licence. Further, it was submitted that following the extensive Environmental Impact Assessment Study, the 1st interested party proceeded to grant the 3rd interested party with a license having been satisfied by the study that was conducted by its own experts. Further, that prior to the respondent's public participation forum, the petitioners submitted their objections to the respondent which forms part of public participation, and that everyone involved in this suit presented their views and opinions for and against the grant of the air service licence. Reliance was placed in the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR.
33. The 3rd interested party further submitted that they were unaware of an existing appeal before the National Civil Aviation Administrative Review Tribunal which was filed on 22nd June, 2023, and which is an affront to the equity maxim that he who seeks equity must come with clean hands. To buttress on this submission, the 3rd interested party relied on the cases of *Mohammed Shally Sese (Shah Sese) v Fulson Company Limited & another* [2006] eKLR and *Alice Kanana v Hannington M'Tkinyua* [2016] eKLR. Further, they submitted that the petitioners have not proved a single violation of their constitutional right to a clean and healthy environment, and instead, they seek judicial review orders of *certiorari* and prohibition to challenge administrative decisions made by the respondent. To further buttress on this submission, the 3rd interested party relied on the cases of *Kenya Union of Post Primary Education Teachers v Cabinet Secretary for Health & 3 others* [2022] eKLR, *Anarita Karimi Njeru v*



Republic [1979] eKLR and Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.

34. On the second issue, the 3rd interested party submitted that the petitioners are free to apply for fresh licenses and seek all the required approvals as well as undergo thorough scrutiny under public participation. They submitted that prohibition would be counterproductive because no applicant will be allowed to obtain any air service licenses to operate any aircraft in the Olkiombo and pose areas of the Maasai Mara National Reserve.
35. The respondent filed its written submissions dated 30th July, 2024 where it raised the following issues for determination: -
1. Whether the respondent complied with Section 5 of the Fair Administrative Action Act.
 2. Whether the petitioner has established a case for denial of, infringement, violation or threat of the rights or fundamental freedom under the Bill of rights in particular under Articles 10,69 (1)(a), (e), (g), (h) and 69 (2) and 42, and 70 of the Constitution.
 3. Whether the Maasai Mara National Reserve Management Plan 2023-2032 applied retrospectively to such an extent or to such a time as to cover any action that could be deemed to affect the right to clean and healthy environment.
 4. Whether the respondent complied with Civil Aviation (Operation of Aircraft for commercial air transport) Regulations, 2018.
 5. Whether the petitioner is entitled to the orders sought.
36. On the first issue, the respondent submitted that its submission of information upon request by the 2nd interested party for the development of the Maasai Mara Management Plan did not impede its processing of new air service licence applications.
37. On the second issue, the respondent submitted that the petitioners have not shown the extent of the alleged violations they would suffer or the potential environmental degradation that could occur, and it would be illogical to issue such orders when the petitioners themselves are operating hot air balloon services within the reserve. Further, that the license issued to the 3rd interested party has neither been revoked, nor challenged in court. The respondent further submitted that upon gazettment of the license on 18th May, 2023, the 3rd interested party did not commence operations and upon lapse of the same on 18th May, 2024, there is no imminent threat of degradation. Further, that upon lapse of the said period, the gazette notice ceased any continuing legal effect concerning the license.
38. On the third issue, the respondent submitted that at the time of both the application and the issuance of the air service license, and the objection period, the Maasai Mara National Reserve Management Plan had not been ratified, and the respondent could not comply with guidelines that had not been ratified. They submitted that there is no provision under the regulations that expressly provides that the regulations should apply retrospectively. Reliance was placed in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR. The respondent further submitted that management plans serves as administrative documents to offer guidance for resource management, and it is subordinate to the statutes in the legal hierarchy. Further, that the limitations imposed by the Maasai Mara National Reserve Management Plan 2023-2032 on the number of operators offering hot air balloon services are deemed contradictory to statute, and contravene the mandate of the respondent and the regulatory framework for issuing Air Service Licenses.



39. On the fourth issue, the respondent submitted that Olkiombo airstrip has been operational for many years facilitating both aircraft and hot air balloons, and there exists no discernible risks associated with the operations of the 3rd interested party or any other hot air balloons in the area. The respondent submitted that the petition fails to establish a violation of constitutional rights. Further, that the 3rd interested party never initiated operations and the license lapsed, thus there exists no actual threat of environmental harm.
40. On the fifth issue, the respondent submitted that the court must weigh with care the alleged breach against the doctrine of presumption of constitutionality of statutes. That in the petition before this court, the petitioners have failed to demonstrate the alleged violation of environmental rights, and that they have also failed to discharge the apprehension that the threat at Olkiombo/Pose area exists.
41. The 2nd interested party filed its written submissions dated 5th August, 2024. It raised four issues for determination as outlined below: -
- i. Whether the respondent failed to take into consideration the Maasai Mara Management Plan thus violating the Constitution of Kenya and other relevant statutory legislation.
 - ii. Risk said to be posed to the environment.
 - iii. Whether the respondent failure to coordinate with the relevant government agencies and stakeholders was contrary to and in violation of the Constitution of Kenya and other relevant statutory legislation.
 - iv. Whether the respondent in ignoring and failing to furnish the petitioners with reasons to grant the impugned license was in violation of the Constitution and other relevant statutory legislation.
42. On the first issue, the 2nd interested party submitted that this court asserted itself on the issue of jurisdiction vide the ruling delivered on 19th December, 2023, and that the petitioners are entitled to the enforcement of their fundamental rights through this court where a breach is alleged to have occurred, is continuing, or likely to occur. That key of consideration is the development of the Maasai Mara Management Plan 2023, which was gazetted on 1st March, 2023. The 2nd interested party submitted that the respondent ignored all the environmental concerns raised prior to the development of the management plan and even after the adoption of the said plan.
43. On the second issue, the 2nd interested party submitted that the respondent cannot run away from the serious environmental concerns raised by the petitioners, and the evidence presented before this court points towards the respondent's failure to appreciate and consider the steps that were being taken by the 2nd interested party in order to preserve and conserve the environment at the Maasai Mara Game Reserve by scaling down hot air balloon operations. The 2nd respondent relied on the case of Moffat Kamau & 9 others v Actors Kenya Ltd & 9 others [2016] eKLR.
44. On the third issue, the 2nd interested party while relying on the case of Odando & another (Suing on their Own Behalf and as the Registered Officials of Ufanisi Centre) v National Environmental Management Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) (Constitutional Petition 43 of 2019) [2021] KEELC 2235 (KLR) (15 July 2021) (Judgment) submitted that the respondent being a state actor mandated to issue licenses to parties is called upon to consider the other laws on environmental conservation and to collaborate with other stake actors when making its decision.



45. On the fourth issue, the 2nd interested party submitted that the respondent being a state organ, they have a constitutional obligation to provide information to its citizens as of right under the provisions of Article 35 (1) (a) of the Constitution. It was further submitted that this is a constitutional requirement which the respondent cannot escape. They submitted that in failing to furnish the petitioners with reasons to grant the impugned license, the respondent violated the said article.
46. I have considered all the pleadings, the documents in support of the averments raised by the parties, the written submissions as well as the authorities cited. In my view, the issues which arise for determination are as follows: -
- a. Whether the respondent violated the provisions of the Constitution as raised by the petitioners.
 - b. Whether the petitioners are entitled to the orders sought.
47. The right to a clean and healthy environment is enshrined under Article 42 of the Constitution which states;
- “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”.
48. Equally, Section 3 of the Environmental Management and Coordination Act, Cap 387 provides that: -
- “(1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment.
 - (2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.”
49. The petition herein was triggered by the decision of the respondent to grant the 3rd interested party with an air service license vide the gazette notice dated 22nd May, 2023. The petitioners contended that in a consultative meeting held on 13th October, 2022, and while discussing issues related to compliance to operate and fly over Maasai Mara National Reserve, amongst other issues, there was resolution that all the air balloon operators were to significantly scale down their activities especially around pose plain with the aim of conserving the eco system, and preventing further degradation of the environment.
50. Further, that on 28th October, 2022, by an advertisement in the Daily Nation, the 2nd respondent published a notice to air balloon operators to provide documentation for the purpose of establishing the number and status of tourist facilities in the reserve. That on 21st December, 2022 the respondent published in the Kenya Gazette the particulars of an application by the 3rd interested party for issuance of an Air Service License. That together with the 1st, 2nd petitioners and other stakeholders including the 2nd interested party, they made written representations objecting to the grant of the air service license, and a public hearing was conducted on 13th January, 2023 at the respondent’s auditorium for purposes of determining the application by the 3rd interested party.



51. That as a result of the respondent's actions, the petitioners contended that in granting the air service license to the 3rd interested party, the respondent violated Article 10, 69 (1)(a), (e), (g), (h) and Article 69 (2) of the Constitution. Further, that the respondent without considering and incorporating the prescriptions set out in the Maasai Mara National Reserve Management Plan, contradicted the express provisions of Sections 26, 27, 30, 35 and 44 of the Wildlife Conservation and Management Act, Section 7 (1) (bb), (cc), and (5) of the Civil Aviation Act, Regulation 19 (1) (c) of the Civil Aviation (Operation of Aircraft for Commercial Transport) Regulations 2018 and Regulation 19 of the Civil Aviation (Rules of Air) Regulations 2018. In addition, the petitioners contended that the action by the respondent in ignoring and not responding to the request by the 1st, 2nd and 3rd petitioners to be furnished with reasons for its decision to grant the license, was in ignorance of the requirements of Sections 5 and 6 of the Fair Administrative Action Act and contrary to Article 35 and 47 of the Constitution. The petitioners' claims were supported by the 2nd interested party who in the replying affidavit stated that there was need to scale down hot air balloon operations owing to the need to further conserve and preserve the eco system at the Maasai Mara National Reserve. The 2nd interested party further contended that the 3rd interested party has not provided an Environmental Impact Assessment Study Report, and license to show that they can proceed with its operations. The 2nd interested party also distanced itself from the approval dated 19th February, 2018.
52. I have perused the documents in support of the petitioners claims. The petitioners herein wrote to the respondent pursuant to Section 9 (1) of the Civil Aviation Act in objection to the application for Air Service License to the 3rd interested party. In an undated letter to the respondent by the 1st petitioner which appears to have been received on 6th January, 2023, the 1st petitioner stated that it had been approached by the 2nd interested party and numerous conservancies requesting them to limit hot air balloon operations over the conservancy areas in order to reduce pressure and stress from wildlife in the area. Further, that they noted with concern that while they are asked to reduce operations and limit their growth, other companies are requesting permission to start a new operation. The letter further reads that the greater management plan does not allow for commencement of new balloon operation in the greater mara area, and to the best of their knowledge, the 3rd interested party has not applied for permission from the 2nd interested party for takeoff or landing in the requested area of operation.
53. The 2nd petitioner in their letter dated 5th January, 2023 noted hazards to air operators in accordance with the Kenya Civil Aviation Regulations and International Rule of Law. In this letter, the 2nd petitioner raised serious issues which are of public concern regarding the operations of hot air balloon, more so on the need to reduce the number of balloons operating in the area per day to conserve the eco-system. The 3rd petitioner in its letter dated 4th January, 2023 noted that the 3rd interested party has no experience in aviation and specifically in balloon safaris. Further, that there are currently 5 different balloon operators operating in the same area who adequately cater for any demand for balloon safaris from that area, and that a new operator adds no value. The 3rd petitioner also noted that an additional operator makes the Mara more congested, adds unrequired pressure to the Mara eco system and reduces the client experience for all tourists visiting the Maasai Mara and there is no positive value the applicant brings through their application.
54. The 2nd interested party also wrote to the respondent vide the letter dated 5th January, 2023 informing the respondent of its process in developing the Maasai Mara Management Plan. The 2nd interested party noted that Pose Plains is overcrowded by other operators, and a new operator will not be permitted to operate within Maasai Mara area. Further, that there was no environmental impact assessment report and license issued by National Environmental Management Authority to help the respondent make an informed decision in issuance of letter of no objection.



55. An analysis of the petitioners claims which were also supported by the 2nd interested party show that indeed, the petitioners were dissatisfied with the grant of the Air Service Licence to the 3rd interested party. Environmental risks as well as the suitability of the 3rd interested party to operate the business within the Maasai Mara were submitted for consideration to the respondent. Where a party is displeased with action or inaction of the respondent, there is a mechanism provided for settling such disputes.
56. Section 7 of the *Civil Aviation Act* provides for the functions of the Authority. Key among them is Section 7 (1) (a) which provides that the Authority shall be responsible for the licensing of air services. In addition, the Kenya Civil Aviation Authority has powers bestowed upon it under Section 8 which states: -
- “(1) The authority shall have all the powers necessary for the proper performance of its functions under this Act.
 - (2) Without prejudice to the generality of subsection (1), the authority shall have power to—
 - (a) determine, set out and levy rates, charges, dues or fees for any services performed by the authority, or for use by any person of the facilities provided by the authority or for the grant, renewal or validation of a licence permit or certificate, subject to the approval of the Cabinet Secretary;...”
57. In that case, the first port of call would be for the petitioners and the 2nd interested party to present their dissatisfaction by lodging an appeal with the body mandated to hear and determine disputes relating to issuance of the licence to the 3rd interested party. Section 69 (a) of the *Civil Aviation Act*, Cap 394 provides: -
- “The Tribunal shall have the jurisdiction to hear and determine complaints or appeals arising from—
 - a. any refusal to grant a licence, a certificate or any other authorisation by the Authority or transfer of a licence under this Act or regulations made thereunder;...”
58. From the above provisions of the law, it is clear that this court does not have the instant jurisdiction to determine the issues challenging the grant of the air service licence to the 3rd interested party. Instead, this court would only assume appellate jurisdiction once properly moved as provided under Section 77 of the Act.
59. In opposing the petition, the 3rd interested party contended that it conducted an Environmental Impact Assessment Study, and prepared a report which was acknowledged by the 1st interested party on 23rd February, 2022. That on 8th April, 2022, the 1st interested party issued the 3rd interested party with EIA license No NEMA/EIA/PSL/18345 after it was satisfied that the operation of the proposed Hot Air Balloon did not pose any threat to the environment at the Maasai Mara National Reserve. The 3rd interested party contended that the environmental concerns raised by the petitioners were addressed in the EIA project report and that any grievance, dispute or complaint on the issuance of EIA license for the proposed project must first be made to the National Environment Tribunal in the first instance before approaching this court, as required under Section 129 of the Environmental Management &



Coordination Act. The 3rd interested party argued that there is no basis for issuance of the conservatory orders sought. Further, that it has not commenced operations, and consequently, there is no prejudice that would occur upon the petitioners if the conservatory orders are not granted. Also, that the 3rd interested party ought to pay for the license fee, where after a risk assessment is conducted before they can commence operations which is yet to be done. I have looked at the EIA report dated 23rd December, 2022, the same is not legible for the court to have a proper read. However, in recommending the 3rd interested party's project, it was recommended as follows,

“...the project be allowed to go ahead with the implementation provided the outlined mitigation measures are adhered to major concerns should nevertheless be focused towards minimizing the occurrence of impacts that would degrade the general environment. This will however be overcome through close follow-up and implementation of the recommended Environmental Management and Monitoring Plans (EMPs).”

60. I do note that the 2nd interested party distanced itself from the claim made by the 3rd interested party concerning its approval by the 2nd interested party to operate its business dated 19th February, 2018. In response to this claim, the respondent contended that during the public hearing conducted on 13th January, 2023, the petitioners made their respective submissions, and the respondent sought further information from the 3rd interested party that necessitated the deferral of its decision which was published through gazette notice No 2773 dated 23rd February, 2023 published on 3rd March, 2023. Further, that the 3rd interested party responded to the concerns raised by the respondent by providing approvals from the National Environmental Management Authority and the 2nd interested party. The 3rd interested party annexed a copy of the EIA licence dated 8th April, 2022, the same has not been challenged. On this issue, there exists a body mandated by law to determine dispute relating to issuance of the EIA licence, which is the National Environment Tribunal. Section 129 (1) (a) and (e) of the *Environmental Management and Coordination Act*, Cap 387 provides: -

- “(1) Any person who is aggrieved by—
- (a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;.....
 - (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.”

61. The issue that I am left to deal with is on access to information. The petitioners argued that after the grant of the licence to the 3rd interested party, they sought reasons for the same which they were not supplied with, and which is a violation of their right to access to information enshrined under Article 35 of the *Constitution*. The respondent on the other hand maintained that the 1st, 2nd and 3rd petitioners sought to be furnished with reasons for the issuance of the license, which reasons were issued vide the letters dated 14th July, 2023 which were dispatched through the email.

62. I have perused the record herein and the petitioners indeed wrote to the respondent seeking information on the reasons to grant the licence. From the documents relied on by the respondent, it appears that in responding to the requests by the petitioners, the respondent vide the letters dated



14th July, 2023, supplied its reasons. The same were dispatched via post as per the annexure EA-8 (d) appearing in the respondent's bundle of documents.

63. Article 35 of the Constitution provides: -

- “(1) Every citizen has a right of access to:
- (a) Information held by the state,
 - (b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.”
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
- (3) The State shall publish and publicize any important information affecting the nation.”

64. It is therefore clear that information held by the state is accessible by citizens and that information is available on request. This means is that once an individual places a request to access information, the information should be availed to the citizen without delay. In my view, the petitioners have not sufficiently proved that there was violation of Article 35 denying them access to information.

65. Arising from the above, this court finds no merit in the petition dated 18th July, 2023, the same is hereby dismissed. Each party to bear its own costs. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 8TH DAY OF OCTOBER, 2024.

HON. MBOGO C.G.

JUDGE

08/10/2024.

In the presence of: -

Mr. Meyoki Pere – C. A

