



**Misty on the Moors Limited v T/A Fairmount Kenya Safari & 3 others (Environment and Land Appeal 19 of 2021) [2022] KEELC 15033 (KLR) (7 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15033 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND APPEAL 19 OF 2021  
AK BOR, J  
NOVEMBER 7, 2022**

**BETWEEN**

**MISTY ON THE MOORS LIMITED ..... APPELLANT**

**AND**

**MOUNT KENYA SAFARI CLUB LIMITED T/A FAIRMOUNT KENYA  
SAFARI ..... 1<sup>ST</sup> RESPONDENT  
K & K AMMAN LIMITED ..... 2<sup>ND</sup> RESPONDENT  
KENIMO S.A ..... 3<sup>RD</sup> RESPONDENT  
KENYA WILDLIFE SERVICE ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Appellant is the registered proprietor of the leasehold interest in land reference numbers 20646 and 20647. It filed Nanyuki Chief Magistrates' Environment and Land Court Case No 15 of 2020 claiming that the 1<sup>st</sup> Respondent had unlawfully erected two gates along the common public road and imposed illegal restrictions on the use of the road by the Appellant's licensees, shareholders, guests and employees thereby inhibiting access to the Appellant's property. It sought a declaration that the 1<sup>st</sup> Respondent's actions of erecting and maintaining gates along the common access road to its premises was unlawful and sought to have the 1<sup>st</sup> Respondent restrained from restricting the movement of its guests and agents. It also sought an order directing the 1<sup>st</sup> Respondent to remove the offending gates from the public access road.
2. Contemporaneously with the filing of the suit, the Appellant filed an application dated 2/04/2020 seeking a temporary injunction to restrain the 1<sup>st</sup> Respondent from closing, locking the gates erected along the public access road next to Nanyuki Waters and Sewerage Company Water Treatment Plant; blocking, restricting or in any way limiting the Appellant's employees, visitors or guests from accessing the public access road leading to the Appellant's property; or in any way purporting to regulate,



- control, limit restrict or block user and access of the public road pending hearing and determination of the application and the suit.
3. The court certified the matter urgent on 3/04/2022 and issued an *ex parte* temporary order of injunction. The court directed the Appellant to serve the application on the 1<sup>st</sup> Respondent for inter partes hearing on 16/4/2020. When the matter came up on April 16, 2020, the Appellant and the 1<sup>st</sup> Respondent recorded a consent extending the interim orders of injunction while setting timelines for the filing of affidavits. The court fixed the matter for directions on 20/5/2020.
  4. Before the application for injunction could be heard inter partes, the Appellant filed the application dated 12/5/2020 under certificate of urgency claiming that the 1<sup>st</sup> Respondent had disobeyed the court orders issued on 3/4/2020. The court found no urgency in the application for contempt and directed the Appellant to serve that application upon the 1<sup>st</sup> Respondent for inter partes hearing on 21/5/2020. On 20/5/2020 when the matter came up the court directed that the application for contempt of court orders would be heard on 29/5/2020. The interim orders were extended on various occasions when the matter came up in court.
  5. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents applied to join the proceedings as interested parties. In addition, they sought to have the temporary orders of injunction granted on 3/4/2020 set aside. The matter came up severally in court on diverse dates culminating in the decision given on 3/12/2020 *vide* which the court vacated the temporary orders of injunction it had given on 3/4/2020 for a temporary injunction restraining the 1<sup>st</sup> Respondent from closing or locking the gates erected along the public access road. It directed parties to take steps to fix the case for hearing.
  6. Being aggrieved by the ruling delivered on 3/12/2020, the Plaintiff brought this appeal. The main grounds are that:- the trial court misdirected itself on the law by delivering a ruling on an application on which it had not given directions; the application which was pending for ruling was the one dated 12/5/2020 and not the application dated 2/4/2020; the court failed to appreciate that the affidavits of Franco Paglieri and Odino Meshack were not sworn in support of the application dated 2/4/2020; the court erred by holding that the Appellant had not demonstrated a *prima facie* case with a probability of success; and the court erred by making a final determination at the interlocutory stage on the basis of the public interest in the matter.
  7. The Appellant sought to have the ruling delivered and orders made on 3/12/2020 set aside and the orders the court granted it on 3/4/2020 reinstated. Further, it sought to have the court give directions on the hearing of the applications dated May 12, 2020 and 2/04/2020. The last prayer which the Appellant sought was for this court to withdraw Nanyuki CMCC ELC No 15 of 2020 from the Magistrates' court and transfer it for trial by this court.
  8. The appeal was canvassed through written submissions. The Appellant commenced its arguments by stating that since in the ruling delivered on 3/12/2020 the trial court referred to the application dated 2/04/2020, then the court must be taken to have been exercising its discretion to grant a temporary injunction. The Appellant contended that the application dated 2/04/2020 never came up for hearing and that directions were never given on how that application was to be heard. It argued that none of the parties filed submissions regarding the application dated 2/4/2020. It submitted that the affidavits of Odino Meshack and Franco Paglieri were in support of the application for contempt of the court orders. It contended that contrary to the court's reference to the replying affidavit sworn by Philip Cauvier on 30/4/2020, no such affidavit was filed in court or served on them.
  9. The Appellant faulted the trial court for failing to give notice to the parties as to which application was coming up for ruling and how the application was to be heard. It contended that it was denied



- the right to be heard by the trial court and argued that the finding by the trial court that it failed to demonstrate a *prima facie* case with a probability of success could not stand because it was not heard on its application.
10. The Appellant contended that the trial court should first have addressed the application for contempt of its orders before dealing with the issue of whether or not to discharge the orders it granted on 3/4/2020 based on the application dated 2/4/2020. It pointed out that the application for contempt was fixed for hearing on 29/5/2020, 26/6/2020, 29/6/2020 and the court recorded the reasons why that application could not be heard on those dates. It clarified that from 26/6/2020, the 2<sup>nd</sup> to 4<sup>th</sup> Respondents filed applications seeking to be joined to the suit as interested parties and the court delivered rulings on those applications and on the preliminary objection taken up.
  11. The Appellant contended that upon dispensing with the preliminary objection and the applications for joinder, the next thing the court should have dealt with was the question of the disobedience of its orders. Instead, the court acted *suo moto* without inviting parties to address it on that motion. It relied on *Henry Njagi Muruaria v O Okello, District Commissioner Mbeere District & Another* [2014] eKLR on the point that when a court acts *suo moto* without inviting parties to make submissions on an issue, the right to be heard is violated.
  12. The Appellant submitted that in view of the trial court's inability to appreciate the various processes filed before it and give notice of the matters coming up for determination, this was a proper case for this court to take over the matter and exercise the powers sought in the memorandum of appeal. Further, it submitted that the trial court misapprehended the facts and took into account considerations which it should not have considered and that it therefore arrived at a decision which is wrong and in violation of the rules of natural justice.
  13. The 1<sup>st</sup> Respondent set out the background and facts of this case. It submitted that when this matter came up for mention on 17/6/2020 to take a ruling date for the application dated 12/5/2020, the Respondents sought more time to file their submissions. It referred to the ruling on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' application dated 25/6/2020. The 1<sup>st</sup> Respondent submitted that from the ruling of 12/8/2020, parties got directions to dispose of the Appellant's application dated 2/4/2020 through written submissions as the question of setting aside the injunctive orders issued on 3/4/2020 was addressed. Further, that when the court dealt with the 4<sup>th</sup> Respondent's application for joinder, it gave the same directions that it had given the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to the effect that it would deal with the prayer to set aside the injunctive orders it granted on 3/4/2020 at the time of addressing the application dated 2/4/2020.
  14. That following the directions which the court gave on 12/8/2020 for parties to file their submissions, all parties filed their submissions including the Appellant where it extensively addressed the issue of setting aside the orders granted on 3/4/2020. That in its submissions, the 1<sup>st</sup> Respondent specifically addressed the application dated 2/4/2020. The 1<sup>st</sup> Respondent contended that the ruling of 3/12/2020 emanated from the application dated 2/4/2020 and that for the Appellant to allege that the application dated 2/4/2020 was not heard would contravene the doctrine of *res judicata*.
  15. The 1<sup>st</sup> Respondent contended that since the injunctive orders had been lifted there was no need to address the issues raised in the application dated 12/5/2020 for otherwise it would be an academic exercise. It urged that looked against this background, it is apparent that the Appellant was aware of the court's directions regarding the application dated on 2/4/2020. Further, it argued that the Appellant did not raise any substantial question of law in the appeal.



16. The 1<sup>st</sup> Respondent pointed out that the Appellant asserted in the application dated 2/4/2020 that gates had been erected on a public road and sought orders to stop the 1<sup>st</sup> Respondent from closing the gates. It contended that the Appellant was granted *ex parte* orders on 3/4/2020 despite the fact that in its application it failed to demonstrate how the road in question was a public road. It emphasised that the Appellant did not meet the conditions for the grant of injunctive relief.
17. It went further to elaborate that after several security incidents affecting residents in the area, it was agreed to have the gates in place for the common good and security of all residents including the public and tourists who visit Mt Kenya Safari Club. Further, that since the land through which the road passes was inhabited by wild animals which roam freely, it was necessary, in the public interest and safety of the residents to have manned gates to ensure that no animals escaped and harmed members of the public as the 4<sup>th</sup> Respondent articulated in its response.
18. The 1<sup>st</sup> Respondent submitted that the court was not aware of these facts at the time it granted injunctive orders to the Appellant on 3/4/2020. It pointed out that in the impugned ruling the Learned Magistrate noted that the Appellant failed to establish that it would suffer irreparable harm which could not be compensated by an award of damages. The 1<sup>st</sup> Respondent contended that if anything, it was the risk the Respondents were exposed to following the award of the *ex parte* orders that could not be compensated by an award of damages. It was emphatic that the court was not aware of the threat of wild animals and insecurity at the time it gave the orders on 3/4/2020.
19. The 1<sup>st</sup> Respondent pointed out that the right to obtain an interlocutory injunction was merely ancillary and incidental to the pre-existing cause of action and is granted to preserve the *status quo* pending ascertainment by the court of the rights of the parties. It urged that it was well within the mandate of the court to vacate the orders which it had issued to the Appellant and cited Order 40 Rule 7 of the [Civil Procedure Rules](#) which empowers the court to discharge, vary or set aside an order of injunction on an application being made by a party dissatisfied by that order. The 1<sup>st</sup> Respondent urged the court to uphold the determination of the trial court in its ruling of 3/12/2020 and set down the matter for hearing of the main suit.
20. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the trial court notified the parties on two occasions that the ruling it would deliver would encompass the Appellant's application dated 2/4/2020 and the applications by the 2<sup>nd</sup> and 4<sup>th</sup> Respondents to have the *ex-parte* orders issued on 3/4/2020 set aside. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cited a passage from the ruling of 12/8/2020 where the court indicated that it would render itself on the prayer for setting aside the orders of 3/4/2020 when it dealt with the application dated 2/4/2020 and that the court directed parties to file their submissions.
21. They added that the Appellant failed to comply with the court's directive to file submissions on its own application. Further, that on 14/9/2020 while dealing with the 4<sup>th</sup> Respondent's application for joinder, the court stated that a ruling on the impugned interim injunctive orders would be delivered when the court gave its decision on the main application dated 2/4/2020. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents attached a copy of the ruling delivered on October 14, 2020 which the Appellant omitted from the record of appeal. The Respondents argued that the Appellant was given an opportunity to file its submissions *vide* the court's rulings of 4/8/2020 and October 14, 2020. It stated that the Interested Parties filed their written submissions and the Appellant filed submissions dated August 30, 2020 on the application for setting aside the court orders given on 3/4/2020. They urged that it was misleading for the Appellant to allude that the court erred and referred to the parties' submissions.
22. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the record showed that when the court gave its directions on 12/8/2020 and on October 14, 2020, the Appellant did not raise the issue of pending applications



- or that it had not yet filed its submissions. They argued that those being issues of procedure, they ought to have been raised before the magistrate. In any event, the Respondents contended that it is the duty of a party to take a date for its application and that the Appellant failed to demonstrate that it took steps to fix a date for the applications it claims were pending. They contended that no basis had been made for this court to overturn the decision of the trial court on the 2<sup>nd</sup> to 4<sup>th</sup> Respondents' applications for setting aside of the ex parte orders granted to the Appellant. They urged that the only issue which the court ought to consider is whether the Learned Magistrate properly exercised her discretion in setting aside the orders of 3/4/2020.
23. They maintained that the court had an unfettered discretion to discharge, vary or set aside an injunction order if the ends of justice so demanded. They relied on the decision in *St Patrick's Hill School Limited v Bank of Africa Kenya Limited* (2018) eKLR. They submitted that the court properly exercised its discretion when it balanced the Appellant's complaint on the difficulty of being processed when going through the gates against the risks posed by the human wildlife conflict. They pointed out that the court in its ruling noted that the Appellant was not denied entry through the gates but was only complaining about the restriction on movements.
  24. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents concluded that this court's powers were circumscribed by Section 78 of the *Civil Procedure Act* and Order 42 Rules 31 and 32 of the *Civil Procedure Rules*. They argued that its power did not extend to directing the fixing and hearing of interlocutory applications before magistrates' court which is the exclusive mandate of the trial courts. Further, that this court did not have power to take over conduct of a matter pending before a trial court.
  25. The 4<sup>th</sup> Respondent gave an account of what transpired in the proceedings before the Magistrate's court. It argued that the ruling delivered on 12/8/2020 on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' application gave directions on how the application dated 2/4/2020 would be heard. Further, that since the application dated 12/5/2020 depended on whether the interim injunctive orders would be lifted or not, the court rightly considered the applications seeking to set aside the injunctive orders.
  26. The 4<sup>th</sup> Respondent submitted that during the proceedings of 2/9/2020 all parties including the Appellants confirmed to the court that they had filed their submissions. That the court therefore examined the applications and the submissions before it and concluded that the main issue for determination was whether or not to lift the interim orders issued on 3/4/2020. It argued that after the court set aside the orders issued on 3/4/2020 there was no need for it to entertain the application for contempt against the 1<sup>st</sup> Respondent which was already moot. The 4<sup>th</sup> Respondent relied on the decision in *Ability Therapy Place Limited v Charles Kibandi Kaguoya & Another* (2021) eKLR on what amounts to a moot case. The 4<sup>th</sup> Respondent contended that the Appellant's application was time- barred under Section 34 of the *Contempt of Court Act* and concluded that what the Appellant ought to do is to comply with the court orders and set down the suit for hearing.
  27. The issues for determination are: firstly whether the court gave directions on the hearing of the application dated 2/4/2020; secondly, were the parties aware of the application in respect of which the court was to deliver its ruling? Thirdly, did the court wrongfully exercise its discretion in arriving at the decision to discharge the orders it had given on 3/4/2020? and lastly, should this court take over and hear the suit pending before the Chief Magistrates Court?
  28. To determine the issues arising from this appeal, it is helpful to chronologically set out the sequence of events and relevant portions of the proceedings conducted before the Learned Chief Magistrate.
  29. According to the typed proceedings, the Appellant's advocate informed the court on 20/5/2020 that he had been served with a replying affidavit and wished to file a supplementary affidavit as well as written



submissions. The court gave directions for parties to file and exchange written submissions and granted leave for the filing of the supplementary affidavit. The matter was to be mentioned on 17/6/2020 for a ruling date and the interim orders were extended until then.

30. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed applications seeking to be joined to the proceedings as Interested Parties and to have the temporary orders of injunction granted on 3/4/2020 lifted. The court allowed those applications to the extent of the joinder to the proceedings but did not lift the injunctive orders. This is evident from the rulings delivered on August 12, 2020.
31. In the ruling delivered on 12/8/2020 on the application for joinder by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the lifting of the interim orders of injunction, the court gave the following directions:

“Prayer 3 of this application is the applicant’s prayer that the injunctive orders issued by the honourable court on April 3, 2020 be set aside, varied or vacated. On 3<sup>rd</sup> of April, 2020, this court issued orders which are still in force. This court has considered this prayer and directs that since the Plaintiff’s application is pending hearing and determination, let then the plaintiff, defendants and interested parties herein file their submissions regarding the same within 7 days so that the court can make a ruling on it. This will allow the defendant to file their submissions in relation to the impugned order and solve both this application and the initial application that led to issuance of the orders of April 3, 2023.

Orders accordingly.”

32. The court notes from the typed proceedings that on 1/07/2020 the Learned Magistrate directed that the contempt application would be heard on 29/7/2020 and she extended the interim orders until then. The matter came up on 8/7/2020 for the hearing of the application dated 25/6/2020. The Appellant’s advocate sought more time to file a further affidavit. Parties made arguments regarding the striking out of the affidavit filed by Mr Ataka and the court indicated that the ruling would be delivered on 10/7/2020 and directed parties to file their submissions.
33. A preliminary objection regarding the jurisdiction of the court to handle the matter was raised and the court delivered its ruling on October 14, 2020 and dismissed the objection. When the Learned Magistrate read the ruling on the preliminary objection and Mr Ataka sought stay of proceedings pending appeal, Mr Mwangi opposed the application and told the court there was the application dated February 20, 2020 (sic) and the application for contempt dated May 12, 2020 pending for hearing. He sought directions on the disposal of the two applications. Mr Ataka sought time to file a replying affidavit in response to the Appellant’s application. The court declined to stay proceedings to avoid further delay in the determination of the case and gave the 1<sup>st</sup> interested party 7 days to file its replying affidavit. The Appellant was granted leave to file a supplementary affidavit within 3 days of service as well as its submissions. The court indicated that it would deliver its ruling on November 11, 2020 and extended the interim orders to November 11, 2020.
34. The typed proceedings show that the court delivered the ruling on 3/12/2020 and owing to the Covid 19 pandemic coupled with the instructions given by the Honourable CJ, the ruling was e-mailed to all the parties.
35. Looking at the impugned ruling delivered on 3/12/2020, the Learned Magistrate reproduced the prayers sought by the Appellant in its application dated 2/4/2020, the grounds on which the application was made and the highlights of the contents of the affidavit of Pelly Sally Anne supporting the application. She added the salient averments of the supplementary affidavit of Odino Meshark Ombajoe who averred that he used the public road to access the Appellant’s premises where he worked as a mechanic. The trial court then went on to summarise the grounds on which the 1<sup>st</sup> Respondent



opposed the application based on the Replying Affidavit of Philip Cauvier dated 30/4/2020. Next, the court delved into the application by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties dated 27/7/2020 seeking to be joined to the proceedings and the setting aside of the orders the court made on 3/4/2020. The court mentioned that Karl Ammar stated in the supporting affidavit that the gates were erected on the access road at the behest of owners of property for security purposes. In the next paragraph the court referred to the application dated 28/7/2020 filed by the 4<sup>th</sup> Respondent seeking joinder to the proceedings and lifting of the interim orders of injunction given on 3/4/2020 citing the threat of human and wildlife conflict that would ensue if the interim injunctive orders were not set aside.

36. The trial court then stated that the application was heard through written submissions and succinctly stated the issue for determination as being whether or not the interim orders issued on 3/4/2020 should be lifted. The court went ahead to analyse the conditions to be satisfied for the grant of interim orders and whether those prerequisites had been met by the Appellant. In its analysis, the court weighed the Appellant's complaint on the difficulty of being processed when going through the gates on the access road, against the 4<sup>th</sup> Respondent's contention that the removal of the gates would trigger human wildlife conflict which may lead to loss of lives. The court determined that public safety and security superseded the Appellant's restriction after noting that the Appellant's visitors had not been denied entry at the gates being manned on the public access road.
37. When the trial court delivered its ruling on 12/8/2020 on the application for joinder by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the lifting of the interim orders of injunction, it gave directions that the Appellant's application for injunction dated 2/4/2020 would be heard simultaneously with the applications for the setting aside of temporary orders of injunction the court granted on 3/4/2020.
38. Based on the proceedings of October 14, 2020 the court is satisfied that the Learned Magistrate gave directions on the hearing of the Appellant's application dated 2/4/2020 and for the filing of submissions. Mr Mwangi Advocate is on record as having pointed out to the court on October 14, 2020 that they had applications dated 20/2/2020 (sic) for injunction and the one dated 12/5/2020 for contempt of the court's orders pending hearing and determination. The Appellant was given an opportunity to file its submissions vide the court's rulings of 4/8/2020 and October 14, 2020.
39. There is no record of the Appellant's advocate specifically moving the court to fix a hearing date for its application for contempt after the 2<sup>nd</sup> to 4<sup>th</sup> Respondents applied to join the proceedings as interested parties. It would seem that that application was pushed to the back burner. However, from the proceedings it is clear that the Appellant's advocates routinely asked for the extension of the interim orders of injunction and when they lapsed he sought their reinstatement on October 14, 2020.
40. In this court's view, parties were aware of the applications in respect of which the Learned Magistrate was to deliver the ruling on November 11, 2020, which was actually delivered on 3/12/2020. On October 14, 2020 Mr. Mwangi asked the court to give directions on his two applications so as not to be seen to be wasting time. The court agreed with Mr Mwangi's submission and declined to stay the proceedings. The court directed Mr Ataka to file and serve his replying affidavit within 7 days and the Appellant was granted leave to file its supplementary affidavit within 3 days of service of the replying affidavit as well as the submissions. The Appellant's advocate could have sought clarification from the court on October 14, 2020 as to which application the court was to deliver its ruling on.
41. The court has a discretion to grant a temporary injunction where it is proved by affidavit or otherwise that any property is in danger of being wasted, damaged or alienated by a party to the suit to restrain such acts. A plaintiff may also apply to the court for a temporary injunction to restrain a defendant from committing injury of any kind and the court may grant such injunction on certain specified conditions. Those powers are conferred upon the court by Order 40 Rules 1 and 2 of the [Civil](#)



Procedure Rules and that is the power which the Learned Magistrate exercised when she granted the Appellant the *ex parte* injunctive orders on 3/4/2020.

42. Order 40 Rule 7 gives the court the discretion to discharge, vary or set aside an order for injunction on an application being made by a party dissatisfied with such an order. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents applied to be joined to the proceedings and for the discharge of the temporary orders of injunction granted to the Appellant on 3/4/2020. The applications for joinder were allowed and the trial court deferred the issue of the setting aside of the temporary injunction to the time when it would deal with the application dated 2/4/2020. The court handled the applications for setting aside simultaneously with the Appellant's application for injunction and delivered a composite ruling on 3/12/2020.
43. The Learned Magistrate cannot be faulted for dealing with the Appellant's application for a temporary injunction simultaneously with the applications by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' applications seeking to set aside the *ex parte* injunctive orders issued to the Appellant on 3/4/2020. That was the efficient and prudent manner to dispose of the rival applications seeking the maintenance of the interim orders of injunction granted on 3/4/2020 until the suit was heard and determined and the application seeking to have the interim orders of injunction granted *ex parte* on 3/4/2020 set aside altogether.
44. In considering whether to grant or decline to grant temporary orders of injunction the court has to weigh the arguments put forth by the parties. The Learned Magistrate considered the contention by the Respondents that opening the gates on the access road posed the threat of human and wildlife conflict which could possibly lead to loss of life and observed that the Appellant and its agents had not been denied access to the Appellant's property. The Appellant has not demonstrated that the Learned Magistrate wrongly exercised her discretion when she found that it did not meet the conditions for the grant of an interlocutory injunction.
45. The court does not agree with the Appellant's contention that the Learned Magistrate made a final determination at the interlocutory stage on the basis of the public interest in the matter. That court had to take into account the threat posed by the human wildlife conflict as a matter of public safety when determining whether or not to discharge the temporary injunction it had granted to the Appellant without having heard the Respondents.
46. Section 78 of the Civil Procedure Act gives the parameters within which a court hearing an appeal can act. The court sitting on appeal may determine the case finally, remand the case, frame issues and refer them for trial, take or require additional evidence to be taken or order a new trial. Those parameters do not include transferring a matter that is pending before the Magistrate's court to the Environment and Land Court for hearing and disposal as the Appellant sought.
47. The court agrees with the submission of the Respondents' that it would serve the interest of justice if the Appellant were to set down its suit for hearing before the Learned Chief Magistrate.
48. The appeal lacks merit and is dismissed with costs to the Respondents.

**DELIVERED VIRTUALLY AT NANYUKI THIS 7<sup>TH</sup> DAY OF NOVEMBER 2022.**

**KOSSY BOR**

**JUDGE**

**In the presence of:**

Mr. T. Mbaaro holding brief for Mr. M. Muthoni for the Appellant

Mr. L. Njeru holding brief for Ms. S. Chitechi for the 1<sup>st</sup> Respondent



Ms. M. Ochieng holding brief for Mr. V. Ataka for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Ms. H. Njoki holding brief for Ms. W. Murimi for the 4<sup>th</sup> Respondent

**Ms. Stella Gakii- Court Assistant**

