



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E 255 OF 2020

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22 (1) OF
THE CONSTITUTION OF KENYA (2010)**

AND

**IN THE MATTER OF THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOM UNDER
ARTICLES 1, 2, 3, 10, 60, 62, 63, 64, 65, 66, 69, 70 AND 71 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE RAMSAR CONVENTION ON WETLANDS
OF INTERNATIONAL IMPORTANCE 1975**

AND

**IN THE MATTER OF THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED
SPECIES OF WILD FAUNA AND FLORA, 1975**

AND

**IN THE MATTER OF THE CONVENTION ON THE CONSERVATION OF MIGRATORY
SPECIES OF WILD ANIMALS, 1979**

BETWEEN

ABDULAHI ALI ABDI.....1ST PETITIONER

ABDIKADIR IBRAHIM SHURIE.....2ND PETITIONER

VERSUS

CS, MINISTRY OF LANDS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

NATIONAL LAND COMMISSION3RD RESPONDENT

COUNTY GOVERNMENT OF GARISSA.....4TH RESPONDENT

NORTHERN RANGELAND TRUST (NRT)5TH RESPONDENT

KENYA WILDLIFE SERVICE (KWS).....6TH RESPONDENT

HUSSEIN HASSAN BASHIR, THE BOARD CHAIR,

AHMED BARE HASSAN BEING, FINANCE CHAIR AND

OMAR KOSSAR ABDI, GRAZING MANAGER sued as

officials and on behalf of ISHAQBINI HIROLA

COMMUNITY CONSERVANCY.....7TH RESPONDENT

RULING

PETITION

1. The Petitioners through a Petition dated 21st August 2020, filed on 24th August 2020 pray for:-

a) A declaration that the Respondents are duty bound to compensate the community in Hara, Korisa and Kotile location of Masalai ward of Ijara Sub County Garissa County for the annexation of the land and expansion for establishment of Ishaqbini Hirola Conservancy or Hirola community conservancy from inception to date.

b) Compensation for community loss for the use of the existing Ishaqbini Hirola Conservancy Land assessment by Court of such compensation inter alia as follows:-

a) The transaction costs of participating in community conservation activities.

b) Income-generating activities foregone

c) Food-generating activities foregone

d) Agricultural activities foregone

e) Domestic activities foregone

f) Other productive activities foregone

g) Community heritage, religious sites, traditional activities foregone

h) Loss of employment from available extractive and grazing grounds

i) Costs related to all other economic activities

j) Loss of opportunity costs

k) Retainance of hunting rights and concession fees and half of animal licence.

c) A declaration that the Respondents are duty bound to the general public and the community in Hara, Korisa and Kotile location of Masailai ward of Ijara Sub county Garissa County to make public the report on the death of the two extremely rare white giraffes at Ishaqbini Hirola Conservancy.

d) A declaration that the Respondents are duty bound to compensate the community in Hara, Korisa and Kotile location of Masailai ward of Ijara Sub County Garissa County for the death of two extremely rare white giraffes at Ishaqbini Hirola Conservancy and as herein detailed.

e) This Honourable Court be pleased to assess the damages and or compensation payable to the community in Hara, Korisa and Kotile location of Masailai ward of Ijara Sub county in Garissa County by the Respondents for the death of the two extremely rare white giraffes as herein detailed and at the Ishaqbini Hirola Conservancy and the same be order and to be paid to the community through the 4th Respondent for trust management.

f) A declaration that the Respondents are duty bound to exhume the carcasses or remains of the two extremely rare white giraffes that died as better particularized herein and at Ishaqbini Hirola Conservancy and give those remains to the community in Hara, Korisa and Kotile location of Masalai ward of Ijara Sub County Garissa County in order to enable the community give a decent

send off and burial to the said animals and also create a memorial park and statue to commemorate them.

g) A declaration that the Respondents are duty bound to compensate the community in Hara, Korisa and Kotile location of Masalai ward of Ijara Sub County Garissa County for the death of two extremely rare white giraffes as detailed herein.

h) A declaration that the expansion of Hirola Sanctuary and the annexation of further or other land mass belonging to the community in Hara, Korisa and Kotile location of Masalai Ward of Ijara Sub County Garissa County or any part thereof for the purpose herein detailed and for the expansion of the Ishaqbini Hirola Conservancy is illegal and unconstitutional.

i) An order of prohibition to issue prohibiting any annexation of community land against the Community allegedly to expand the Ishaqbini Hirola Conservancy and Hirola Community conservancy sanctuary in Hara, Korisa and Kotile location of Masalai ward of Ijara Sub County Garissa County or any part thereof.

j) An order prohibiting against the Respondent and any officers of the Government of Kenya from interfering with the community land around or designated for expansion of Ishaqbini Hirola conservancy and or Hirola Sanctuary or land in Hara, Korisa and Kotile location of Masalai ward of Ijara sub county Garissa County or any part thereof or at all.

k) The 7th Respondent be prohibited from acting or in any way carrying themselves as representatives of the Hirola Sanctuary community and or community land owners or representatives in Hara, Korisa and Kotile location of Masalai ward of Ijara Sub county Garissa County.

l) Such further or other orders as are appropriate for the effective administration of justice be issued.

m) Any other relief that this Honourable Court deems fit and proper to grant.

n) Costs of this Petition be provided for.

PRELIMINARY OBJECTION

2. In response to the Petitioners Petition the 1st, 2nd and 4th Respondents filed a preliminary objection to the effect that this Court lacks jurisdiction to hear and determine this Petition on the following grounds:-

a) That the Petitioners' claim is a non-starter and bad in law as the issues raised are largely pertaining an alleged community land located in Garissa and ought to be raised before the Environment and Lands Court in Garissa.

b) That by virtue of the provisions of Article 162(2)(b) of the Constitution as read together with Section 4 and 13(2)(b) of the Environment and Land Court Act, 2011, this is a matter that should be entertained by the Environment and Land Court and not the Constitutional and Human Rights Court. In this instance, this Honourable court lacks jurisdiction.

c) That by virtue of the grounds above the present proceedings are incompetent and a blatant abuse of the Court's processes and therefore ought to be dismissed.

3. The Counsel for the 5th and 7th Respondents supports the 1st, 2nd and 4th Respondents preliminary objection.

4. The Principal question of law that arises from the Preliminary Objection is for determination in which court between the Environment and Land Court (ELC) and High Court has jurisdiction over the issues raised in the instant Petition.

GRAVERMEN OF THE PETITION

5. Clear perusal of the Petition reveal that the subject matter of the Petition is a parcel of community land situated in Ijara, Garissa County. It is stated that the community that own the land have since the year 2007, availed and dedicated it for the conservation of the critically endangered Hirola, a species of antelope. The Petitioner therefore seek to halt the intended allocation of more community Land for expansion of the Hirola conservancy and the Hirola Sanctuary. This is clear from the 11 substantive prayers in the Petition.

6. On plain reading of the prayers, the 1st, 2nd, 4th, 5th and 7th Respondents contend that the Petition gives rise to three question, each of which relate to land thus:-

i) Setting aside for conservation of wildlife and wildlife habitant, which is a question of environmental protection.

ii) Decision relating to use, and their effect on community rights, which are question of use, title and tenure.

iii) Authority to make decisions on behalf of the community relating to use of the land which is also question of land administration and management.

7. It is of great importance to state what "**Land**" is defined under **Article 260 of the Constitution**. The Constitution defines "**Land**" broadly to include...the surface of the earth and the subsurface rock, any body of water on or under the surface of the earth, and natural resources completely contained on or under the surface of the earth." The air space above the surface.

8. It is also proper to consider definition of “*Natural resources*” which are defined to include sunlight, forests, biodiversity and genetic resources rocks, minerals and other sources of energy.

9. The Court of Appeal had on occasion to define “land use” in the case of *Co-operative Bank of Kenya Limited v. Patrick Kangethe Njuguna & 5 Others (2017) eKLR* at paragraph 34 as the economic and cultural activities practiced on the land. The Court went on to state for there to be land use – “*the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and / or ground below it according to the purpose for which the law is adapted.*”

10. The 1st, 2nd, 4th, 5th and 7th Respondents’ aver that, as a matter of law, the substrum of the instant Petition is land use and enjoyment and as such urge the Petition is therefore plainly and incontestably a land matter simpliciter.

PETITIONER CASE

11. The Petitioners are opposed to the Respondents preliminary objection contending that this court has jurisdiction to hear and determine the petition herein. They seek reliance on **Article 165(1) of the Constitution**, urging the jurisdiction is donated by **Article 165(3) of the Constitution** which provides:-

“(3) *Subject to clause (5), the High Court shall have –*

a) unlimited original jurisdiction in criminal and civil matters;

b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –

i) the question whether any law is inconsistent with or in contravention of this Constitution;

ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv) a question relating to conflict of laws under Article 191; and

e) any other jurisdiction, original or appellate, conferred on it by legislation;”

12. Having considered the Respondents’ preliminary objection and the Petitioner’s Petition and response thereto, the issue for consideration, in my view in the Preliminary Objection is one thus:-

a) Whether this Court has jurisdiction to hear and determine this matter, and if not so which is the proper court?

13. The 1st, 2nd, 4th, 5th and 7th Respondents contend the issues raised are largely pertaining on alleged community land located in Garissa and ought to be raised before the Environment and Land Court in Garissa. It is further urged that by virtue of the provisions of **Article 162(2) (b) the Constitution** as read together with **Section 4 and 13(2) of the Environment and Land Court, Act 2011**, this is a matter that should be entertained by the Environment and Land Court and not the Constitutional and Human Rights Court. It is therefore Respondents’ arguments that the Honourable Court lacks jurisdiction and therefore the present proceedings are incompetent and a blatant abuse of the Court’s process and should be dismissed.

14. The Petitioners argue that the Constitutional Court should be liberal in the manner it goes round dispensing justice and should look at the substance rather than technicality. The Petitioner sought reliance in the decision in the case of *Nation Media Group Limited vs. Attorney General (2007) IEA 261*. I note the decision relied upon by the Petitioners was before the Promulgation of the *New Constitution 2010* and may not be relevant as regards the provisions which now deal with jurisdiction of the Courts under the new *Constitution 2010*.

15. The Petitioners further sought reliance on **Article 165(3) of Constitution** urging that the Constitution confers on this Court very wide powers in terms of jurisdiction to deal with any matter that falls within its jurisdiction. It is Petitioners contention that under that **Article 165(3) (e)** the Court can exercise any other jurisdiction, original or appellate as may be, conferred on it by legislation. In terms of **Article 165(3) (d) (ii)**, the Court has jurisdiction to determine the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the constitution. **Article 23(1)** also states that the court has jurisdiction to hear and determine applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. This jurisdiction I find has to be exercised in accordance with **Article 165 of the Constitution. Article 23(3) of the Constitution** undoubtedly confirms the extent of the width of the jurisdiction of this court to grant appropriate relief.

16. The Petitioner further contend that the prayers sought in the Petition from this Court are purely constitutional in nature. Each and every violation has been detailed out in the petition and how the same has affected an entire community and how such can be remedied by this honourable court. Other prayers herein seek declaratory orders which the Petitioners aver that this Honourable court has the powers and jurisdiction to granted. It is Petitioners caser that the prayers that are not constitutional in nature are so unique and specific to the rare giraffe, which is part of wildlife and as such it is not proper for the Respondents to generalize them as land matters. The Petitioners state that this court is better placed to determine all the issues stated in the Petition.

17. The Petitioners further state that this Court has jurisdiction as the case is in respect of violation of constitutional rights and that there is no remedy that court cannot grant. They sought to rely on the decision of **Supreme Court (Mutunga, CJ, as he then was) in Jasbir Singh Rai & 3 others V. Tarlochan Singh Rai Estate & 4 Others** where the Court stated:-

“...The Kenyan Constitution has given the High court the exclusive jurisdiction to deal with matters of violations of fundamental rights (Article 23 as read with Article 165 of the constitution). The High Court, on this point has correctly pronounced itself in a judgment by Justices Nambuye and Aroni, in Protus Buliba Shikuku v. R. Constitutional Reference No. 3 of 2011, [2012] eKLR.

18. The Petitioners further referred to a decision made before promulgation of the **Constitution 2010** in the case of **Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board Nairobi HMC No. 89 of 1969 [1970 EA 631; [1971] EA 289** that;-

“Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later Sections of Chapter V. The word “person” is defined in Section 123 as including “anybody of persons corporate or unincorporated. Thus, a company is a “person” within the meaning of Chapter V of the Constitution which is headed “Protection of Fundamental Rights and freedoms of the Individual” and would be entitled to all the rights and freedoms given to a “person” which it is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a “person” and is, from its nature, capable of being enjoyed by a “corporation” then a “corporation” can claim it although it is included in the list of rights and freedoms of the individual.” The word “individual” like the word “person”, does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word “individual”. “Individual” seems to be any legal person who is not the general public.”

19. On territorial jurisdiction the Petitioners relied on the case of **Peter Muiruri v Credit Bank Limited and Others (Civil Appeal No. 23 of 2003)** the court of Appeal stated;-

“There is no provision in the Constitution which establishes what Nyamu J. referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as “Constitutional and Judicial Review” Division. It is not an independent Court but merely a division of the High Court. The wording of Section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court.... The Hon. the Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a constitutional court as opposed to creating a division of the High Court The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them. ...(emphasis)

20. The Petitioners in conclusion submitted that any provisions purporting to limit the jurisdiction of the High Court must itself derive its validity from the constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effects the provisions of the Act.

21. The jurisdiction of various Superior Courts are well stated in **Constitution of Kenya 2010. Articles 162(2)(b) of the Constitution 2010** empowered parliament to establish; inter alia; a Court with same status as the High Court to explicitly hear and determine disputes relating to the environment, and the use; occupation of the title to land. It is on that basis that the parliament enacted the **Environment and Land Court Act of 2011 (the “ELC Act”)** which established the **Environment and Land Court (ELC)**.

22. The jurisdiction of ELC Court is specifically set out under **Section 13(2) of the ELC Act**, which provides jurisdiction of ELC Court to hear and determine disputes related to:-

- a) *Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*
- b) *Relating to compulsory acquisition of land;*
- c) *Relating to land administration and management;*
- d) *Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable*

interests in land; and

e) Any other dispute relating to environment and land.

23. The lack of jurisdiction of the High Court is expressly provided for under **Article 165(5)(b) of the Constitution** which provide that; “the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the Courts contemplated in **Article 162 (2) of the Constitution of Kenya**.”

Articles 162(2) of the Constitution provides:-

“162(2). Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

a) employment and labour relations; and

b) the environment and the use and occupation of, and title to, land.”

24. **Article 162(2)(b) and Section 13(2) of the ELC Act** confer exclusive jurisdiction to ELC in respect of disputes relating to environment and the use, occupation of and title to Land. The High Court jurisdiction is explicitly ousted under **Article 165(5)(b) of the Constitution**, although both are Courts of Juridical status. The High Court therefore cannot hear and determine disputes within Environment and Land Court’s jurisdiction.

25. The disputes as regard jurisdiction of the ELC and High Court was settled by supreme court in the case of **Republic v. Karisa Chengo & 2 Others (2017) eKLR** where it was held that parity in hierarchy between the High Court, the ELC and the Employment and Labour Relations Court (ELRC) does not imply that either the ELC or ELRC are the High Court and vice versa. The Supreme Court stated thus:-

“As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

“...The Constitution though does not define the word ‘status’. The intentions of the framers of the Constitution in that regard are obvious given the choice of...words they used; that the three Courts (High court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the high court in performance of its judicial function, in its specialised jurisdiction but they are not the High court. ‘

26. The Supreme Court further went on to fortify the settled question of jurisdiction in the case of **Samuel Kamau Macharia & another v. Kenya Commercial Bank Ltd & 2 others (2012) eKLR** where it was held:-

“...a court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or any other written law. The Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.’

27. Further it noted that it is not only the High Court, that is the sole refuge for any or all disputes where there are allegation of violation of constitutional rights or violation of the Constitution. This was dealt in the case of **Pepe Limited V. Kenya Railways Corporation & 3 others**. The ELC’s jurisdiction extends to hearing claims of violation of constitutional rights and fundamental freedoms relating to the environment and land, where Justice Angote held that:-

“Indeed, from the above definition of an “interest in the use of enjoyment of land,” and from the provisions of Section 13(2) of the Environment and Land Court Act, this Court can still deal with the claims relating to the use of land which are purely commercial in nature – including Leases and Tenancy Agreements – as long as the substratum of the claim is the “use” and “occupation” of the land. That is what the Petition that is before me is all about. To the extent that the Petition raises issues of denial, violation, infringement and threat of the Petitioner’s constitutional rights and freedoms in relation to the occupation and use of L. R. No. 337/196, it is this court, and not the High Court, that has the requisite jurisdiction to deal with those issues.”
(Emphasis added)

28. As pointed out herein above the entire Petition raises matters reserved exclusively by **Article 162 (2) (b)** read with **Section 13 of the ELC Act**, on jurisdiction of the ELC. **Article 165 (5) (b)** precludes High Court from entertaining this Petition even if the High Court and ELC are of equal juridical status. I therefore find the proper court that should hear and determine this Petition is ELC Court and not High Court.

29. The lack of jurisdiction has been settled in a number of authorities and more specifically in the case of **Owners of Motor Vessel “Lillian S” v Caltex Oil (kenya) ltd [1989] eKLR**, the Court of Appeal held that:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

30. **In view of my finding herein above, I am satisfied that the 1st, 2nd and 4th preliminary objection is meritorious. The petition was filed before the High Court which does not have jurisdiction to entertain the Petition given that ELC’s exclusive jurisdiction on all issues raised in the Petition, I find the entire Petition to be null and void ab initio; incurably incompetent and as such cannot be sanctified by**

transfer to the ELC or be salvaged in any other way. The Petition herein was filed in public interest and I find that it will be proper to award no costs. I therefore struck out the petition for lack of jurisdiction and order each party to bear its own costs.

Dated, Signed and Delivered at Nairobi on this 4th day of March, 2021.

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J. A. MAKAU

JUDGE