



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

PETITION NO. 05 OF 2019

MIKULULO RANCHING

(DIRECTED AGRICULTURAL) CO. LTD PETITIONER

-VERSUS-

KENYA WILDLIFE SERVICE.....1ST RESPONDENT

DAVID SHELDRIK TRUST..... 2ND RESPONDENT

BIGLIFE FOUNDATION 3RD RESPONDENT

KENYA AGRICULTURAL & LIVESTOCK

RESEARCH ORGANIZATION.....4TH RESPONDENT

JUDGEMENT

1. The Petitioner filed this suit on 26th June, 2019 vide Petition dated 25th June, 2019. It prays for judgment against the Respondents for:

a) This Honourable Court do make a declaration that the planned erecting of a live electric fence by the Respondents without allowing the Petitioner's members access road to their property was illegal, unconstitutional and tantamount to an infringement of the Petitioner's right to use its property as enshrined in Article 40 of the Constitution and contravened the Petitioner's right to fair administrative action that is lawful and procedurally fair as enshrined in Article 47 (1) of the Constitution.

b) An order by way of review to call before the court and quash the decisions issued by the 1st and 4th Respondents to grant authority for the construction of the said electric fence which would otherwise limit the Petitioner's access to its land.

c) A permanent injunction do issue restraining the Respondents from proceeding with the erection of the electric fence until the electric fence is redesigned to allow the Petitioner's members and all other affected stakeholders access roads to their property.

d) This Honourable Court do order that the costs of this petition be borne by the Respondents in any event.

2. In support of the Petition is the affidavit of Wilson Nduulu Kiangi sworn on 25th June, 2019 where the affiant has deposed therein that he is the Chairman of the Petitioner which owns approximately 42,000 acres of land under LR. No. 24362 Survey Plan No. 226827. That the Petitioner's land borders KWS-Chyulu Hills National Park to the south and KARI to the East from Wikiamba to Kiboko. That the Petitioner's land has been the subject of litigation through Machakos ELC Case No. 475 of 1995 wherein a judgment was made in favour of the Petitioner on 22nd February, 2019.

3. It has been deposed further that the 2nd and 3rd Respondents are the proposed donors of an electric fence which shall cover 60km from Wikiamba to Kiboko and the net effect shall be to deny the members of the Petitioner the right to access their land. That members of the Petitioner have used the access road since the 1970s and now that access road is under threat of closure. That the said access road had been given out to the Petitioner after consultations with the relevant stakeholders. That the Petitioner's members interests were not taken into consideration after public participation over the planned fencing between 4th June 2019 and 8th June 2019. Lastly, that the intended closure of the access road will jeopardize their constitutional right to access and use their property and it will also circumvent the judgment that was delivered in their favour.

4. The 2nd Respondent filed a replying affidavit in opposition to the petition. It was sworn by the Director of the 2nd Respondent, Robert Carr-Hartley on 25th July, 2019. The affiant deposed that the 2nd Respondent had been commissioned to erect a 45km electric perimeter fence around Chyulu Hills National Park starting at Wikiamba to Kirinyeti in Makindu sub-county in order to remedy human-wildlife conflict in addition to conserving the diverse flora and fauna in the Park from environmental degradation. That the fencing project was commissioned after extensive consultative meetings held between 4th June 2019 and 8th June 2019 and it had garnered the support of the surrounding communities, the Makueni County Government and the National Government.

5. It is deposed in reply to the Petitioner's claim of threat to its right to access and use of its land that, in no way will the fencing project touch the Petitioner's property. That the Petitioner's members have been trespassing onto the 4th Respondent's property by use of an access road which was never demarked as such and thus, the Petitioner cannot use the access road as a basis to oppose the fencing project. That the Petitioner's members have an alternative access route to their properties through Makindu. That the inconvenience of an alternative access route should not justify the claim for an unlawful easement over the 4th Respondent's property. That the Petitioner has neither laid out a prima facie case nor demonstrated any irreparable loss its members will suffer if the order of permanent injunction which has been sought is not granted. The 2nd Respondent prays that the Petition be dismissed with costs.

6. Also opposing the Petition is the 4th Respondent vide the replying affidavit sworn by Simon G. Kuria, the 4th Respondent's Centre Director, on 14th August 2019. He deposed therein that the 4th Respondent is the registered owner of all that land known as LR. No. 25379 measuring approximately 25,925.1 hectares. That since the 4th Respondent's land is not fenced, it has for a long time experienced intrusion from trespassing wild animals coming from the Chyulu Hills National Park and also human and domestic livestock which interferes with the 4th Respondent's research activities. That the 4th Respondent has severally cautioned members of the Petitioner to desist from their actions of trespass to no avail.

7. It was deposed further that the Petitioner's members have persistently continued to trespass through the 4th Respondent's land despite being aware that they had no right of way. That the 4th Respondent entered into an understanding with the 1st Respondent and the 2nd Respondent and it was agreed that the 2nd Respondent would erect an electric fence around the 4th Respondent's land. That there was general consensus on the fencing project from the local community following various public participation forums. That a copy of Survey Plan No. 234845 and the Kibwezi Constituency Road Network Map did not show the existence of an access easement within the 4th Respondent's property.

8. Moreover, it was deposed that the judgment delivered in Machakos ELC Case No. 475 of 1995 only barred the eviction of members of the Petitioner from their land and did not grant the Petitioner property rights of access through the 4th Respondent's property. That the Petition has been made in bad faith as the Petitioner's members have an alternative access route to their properties through Kiboko Town along the river but only insist on illegally traversing the 4th Respondent's property. That this Court has no jurisdiction to establish an access road over the 4th Respondent's land since that would result in violation of its constitutional rights guaranteed in Articles 27(1) and 40 of the Constitution. Lastly, it was deposed that the Petition is devoid of merit because the Petitioner fails to demonstrate the manner in which its constitutional rights have been violated or threatened by the 4th Respondent.

9. In the 3rd Respondent's replying affidavit sworn by Richard Bonham in his capacity as the Director and Founding Trustee on 22nd August 2019, it was deposed that the claim against the 3rd Respondent was unsustainable and a total abuse of process of this Court. That the 3rd Respondent had been wrongly joined as a party to these proceedings as it had no operations or engagements at or around KARI/Mikululo area and in particular the fencing project. That it was unfair and vexatious on the part of the Petitioner to drag the 3rd Respondent through onerous litigation absent of any evidentiary link or proof of interest in the dispute at hand. It prayed that the Petition be dismissed with punitive costs.

10. Last to oppose the Petition was the 1st Respondent in a replying affidavit sworn by Doreen Mutunga, who is its legal officer, on 25th October, 2019. The affiant deposed that it was indeed true that the 1st Respondent was in the process of constructing an electric fence which stretches 60km from Wikiamba B to Kilenyete. That the 2nd and 3rd Respondents were financiers of the fencing project. That the 1st Respondent was not aware about an access road through the 4th Respondent's property giving access to the Petitioner's members to their homes. That the fence line would be redirected from the Park Boundary to the Wikiamba B which is within the 4th Respondent's property. That the 1st Respondent had not interfered with the Petitioner's members occupation of their land. That the 60km fence had been designed to cater for entry gates every 15km and therefore, the Petitioner's members would have access to their land. Also, there it was deposed that there is a public road through Kilenyete town where the Petitioner's members can access their land from Kiboko.

11. It was deposed further that the electric fence had been intended to deter human-wildlife conflict in addition to conserving the Chyulu Hills National Park. That the 1st Respondent had already conducted public participation prior to the commencement of the fencing project. That the allegations levelled by the Petitioner that erection of the electric fence was meant to limit movement to the Petitioner's land and to also defeat the judgment delivered by the Court in Machakos ELC Case No. 475 of 1995 were untrue. It was prayed that the Petition be dismissed with costs.

12. The Petitioner filed submissions on 30th September, 2019 in support of its claim. Two issues were identified for determination by this Court namely: -

i) Whether the Petitioner's members usage of the access road is as of right?

ii) Whether the erection of the fence violates the Petitioner's members constitutional rights?

13. From the outset, it is the Petitioner's submission that it was allowed by the Government to use the access road to their land (Mikululo

Ranch) in the 1970s and that its members have been using it since then. That the access road cuts across land which was allocated and registered to the 4th Respondent in the year 2001. Sections 28 and 98 of the Land Registration Act No. 3 of 2012 were relied on in defending their right of way in the 4th Respondent's land. The Petitioner also contended that the doctrine of legitimate expectation prevented closure of the access road due to prolonged use.

14. Further, the Petitioner submitted that that public participation as espoused in Article 10 of the Constitution was not properly conducted prior to commencement of the fencing project. Several authorities were relied on by the Petitioner namely: -

- i) **Tom Laban Keya & Another -Vs- Christine Ongayo [2010] eKLR;**
- ii) **Kiambu County Government & 3 others -Vs- Robert N. Gakuru & others [2014] eKLR;**
- iii) **Kenya Human Rights Commission -Vs- Attorney General & another [2018] eKLR;** and
- iv) **Kiambu County Government & 3 others -Vs- Robert N. Gakuru & others [2017] eKLR**

15. The 4th Respondent filed submissions on 28th October, 2019 in opposition. It stated that it was the registered owner of the parcel of land known as LR. No. 25379. That the Petitioner claims for an easement over the 4th Respondent's land, a claim which was not legally recognized. It is also submitted that if at all the Petitioner's claim for a right of way through the 4th Respondent's land lies, then the same ought to be determined through a civil suit and not vide a petition under Article 22 of the Constitution. Two authorities were relied on for this line of argument namely: -

- i) **Uhuru Muigai Kenyatta -Vs- Nairobi Star Publications Limited [2013] eKLR;** and
- ii) **Republic -Vs- Attorney General & another Ex parte Samuel Kazungu Kambi [2012] eKLR**

16. It was further submitted that the Petition does not disclose in what manner the constitutional rights of the Petitioner had been violated by the 4th Respondent. That the failure to precisely disclose the provisions of the Constitution that had been violated made it difficult for the Court to determine with certainty which rights and freedoms had been infringed. That the Petitioner had failed to specifically identify where the access road it alleges to have a right of way over passes in the 4th Respondent's land. It relied on the case of **Ledidi Ole Tauta & others v Attorney General & 2 others [2015] eKLR** for that limb of submission. Lastly, the 4th Respondent submitted that this Court has no jurisdiction to alienate public land, sub-divide it and create an access road for the convenience of the Petitioner. It was argued that such an intervention would violate and disrupt the 4th Respondent's mandate which is outlined in the Kenya Agricultural and Livestock Research Act No. 17 of 2013 as a State corporation. Reliance was placed on the case of **Kenya Industrial Estates Limited -Vs- Anne Chepsiror & 5 others [2015] eKLR.**

17. The 3rd Respondent also filed submissions on 28th October, 2019 in opposition to the Petition. It reiterated that it had been wrongly joined to these proceedings because it is neither a stakeholder, partner, contributor nor donor to the fencing project at Chyulu Hills National Park. It was prayed that the Petition be struck out against it in accordance with Order 1 Rule 10(2) of the Civil Procedure Rules, 2010.

18. It is common ground from the pleadings herein that the Petitioner's members have for a long time been crossing through the 4th Respondent's land into theirs via an access route which they now wish this Court to officially sanction as theirs by right under the Constitution to continue using. It is also not in dispute that the 1st and 4th Respondents wish to fence off their respective properties in order to limit human-wildlife conflict as well as to effectively carry out their mandates. In my assessment, the only relevant issue for determination herein is: -

- i) ***Whether the Petitioner has demonstrated any constitutional violations or threats thereof to its right to property with a reasonable degree of precision?***

19. The substantive test to be applied when making a finding on whether the alleged violations forming the basis of the Petitioner's complaint were committed must be in line with the High Court's pronouncement in **Anarita Karimi Njeru -Vs- The Republic (1976-1980) KLR 1272** where it held as follows: -

"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

20. It was a finding which the Court of Appeal reaffirmed in **Mumo Matemu -Vs- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** in the following terms: -

"(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case.”

21. Having perused the pleadings, the principal grievance of the Petitioner is that once the 1st Respondent and the 4th Respondent finish fencing off their properties, the Petitioner will have no road by which to access its property. The 4th Respondent produced the title deed to its property as the Exhibit marked SGK-1. Again the 4th Respondent produced SGK-5 which is a survey plan of the property and the road network map to its property. The alleged access road which is set to be closed does not feature anywhere and neither did the Petitioner identify this key object of concern. The 1st Respondent on the other hand has an already determined judgment clearly delineating its boundary limits as seen in the judgment delivered by a Court of concurrent jurisdiction in Machakos ELC Case No. 475 Of 1995 and produced by the Petitioner as Exhibit marked WN2. In what manner then can this Court interfere with a registered title with all its appurtenant rights intact or a judgment debtor whose rights are still in question before the Court of Appeal?

22. In addition, the 4th Respondent rightly submitted that although Articles 10, 21, 40 and 69 of the Constitution were cited by the Petitioner, no direct particulars of alleged contraventions thereof had been disclosed. I have noted the cavalier manner in which the Petitioner alleged that its right to property will be violated without providing any substance as to the allegation as seen in paragraphs 6-9 of the Petition. Again, regarding breach of national values and principles of governance, it is very remiss for the Petitioner not to quote specific instances of violations while at the same time admitting in its supporting affidavit that there was an aspect of inclusiveness in the fencing project after public participation forums were conducted by the Respondents.

23. It is therefore my finding that the Petitioner resorted to an arbitrary decision to file a constitutional petition when it had other avenues to have its grievances addressed. The petition herein has not been made out of necessity, merit and most importantly to the requisite legal threshold. That said, in **Gabriel Mutava & 2 others -Vs- Managing Director Kenya Ports Authority & Another [2016] eKLR** the Court of Appeal held as follows: -

“In saying all these, we are not oblivious to the fact that a party is entitled to sue under the Constitution even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

24. Lastly, in **John Harun Mwau & 3 Others -Vs- Attorney General & 2 Others [2012] eKLR** the learned judges of the High Court held as follows:

“180. In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.”

25. It is therefore my conclusion that the Petition herein lacks merit. The order which deservingly commends itself is dismissal of the Petition with costs to the Respondents.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 13TH DAY OF SEPTEMBER, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi