



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC PETITION NO. 3 OF 2020

WILDLIFE DIRECTOR (KENYA).....PETITIONER

VERSUS

KENYA WILDLIFE SERVICES.....1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF TOURISM &

WILDLIFE.....3RD RESPONDENT

NAKURU COUNTY GOVERNMENT.....4TH RESPONDENT

NAKURU COUNTY TOURISM ASSOCIATION.....5TH RESPONDENT

CAPITAL GROUP LIMITED T/A KOROGA FESTIVAL6TH DEFENDANT

THE NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY

R U L I N G

Introduction

1. The petitioner filed the present petition on 5th February 2020 and simultaneously with the petition also filed a Notice of Motion under a certificate of urgency. The Notice of Motion which is the subject of this ruling interalia prayed for the following orders:-

(i) That pending the hearing and determination of this application a conservatory order and injunction do issue restraining the respondents by themselves, their officers, employees, agents, servants and/or any other persons whosoever from holding the 29th Koroga festival – Naivasha Love Edition in Hell’s Gate National Park.

(ii) That pending the hearing and determination of the main petition a conservatory order and injunction do issue restraining the respondents by themselves, their officers, employees, agents, servants and/or any other persons whosoever from holding the 29th Koroga Festival- Naivasha Love, Edition in Hell’s Gate National Park.

(iii) That the approval granted by the 1st Respondent to the 5th and 6th Respondent to hold the festival at Hells Gate National Park be withdrawn pending the hearing and determination of the main petition.

2. The application was supported on the grounds set out on the body of the application and on the supporting affidavit sworn by Dr. Paula Kahumbu. The application was certified urgent and directed to be served for interpartes hearing on 10th February 2020. All the respondents save for NEMA the 1st interested party appeared and filed their responses to the application and the petition. The Court took oral submissions from counsel on the basis of the pleadings that the parties had filed.

The petitioner's case

3. The petitioner set out the following grounds in support of the Notice of Motion:-

1. *The 1st Respondent has failed to come up with a management plan for the Hell's Gate National Park as is required by the Wildlife Conservation and Management Act. As such, the 1st Respondent is forbidden from taking any decisions affecting the National Park.*
2. *The 1st Respondent failed to carry out public consultations prior to granting the approval to hold the festival within the National Park.*
3. *The respondents failed to seek the approval of the 1st Interested party prior to making the decision to hold the 29th Koroga Festival- Naivasha love Edition in Hell's Gate National Park.*
4. *The respondents have failed to carry out an Environmental Impact Assessment of the 29th Koroga Festival- Naivasha Love Edition as is required under the Environmental Management and Coordination Act.*
5. *Hell's Gate National Park is a sensitive ecosystem, home to vulnerable and threatened species. It is deserving of the maximum level of protection from detrimental activities such as the 29th Koroga Festival-Naivasha Love Edition.*
6. *Holding the festival within the Park violates fundamental rights, the Constitution and all environmental laws.*
7. *If the orders sought are not granted urgently, the Hell's Gate National Park ecosystem will be permanently damaged.*

4. Ms Mercy Mutemi Counsel for the petitioner relied on the supporting affidavit sworn by Paul Kahumbu, Chief Executive Officer of the Petitioner. It was the petitioner's contention that Hell's Gate National Park was designated as a Category II park and was home to Native and rare species of animals and birds and therefore is a protected area and if the 29th Koroga Festival Scheduled to be held in Hell's Gate National Park on 14th February 2020 goes ahead the sensitive ecosystem within which the rare species thrive is likely to be disrupted and the environment damaged. The petitioner argues that owing to the magnitude of the event there is likelihood of significant and irreversible damage to the National Park's critical habitat and this could have the effect on the wildlife including driving away some of the species found in the park.

5. The petitioner faulted the 1st respondent for not having in place a park management plan as required under Section 44 of the Wildlife Conservation and Management Act, 2013. The petitioner submitted that such a Park Management Plan would have outlined how an event such as the one the 5th and 6th respondents seek to hold in the Park would be considered for approval. The petitioner submitted there was no public consultation/participation before the 1st respondent gave its approval for the event to be held in the park. The petitioner was of the view that for the nature of the event, an Environmental Impact Assessment (EIA) would have been a prerequisite and approval by the interested party (NEMA). The petitioner contended that the approval for the event given by the 1st respondent was unlawfully given and should therefore be withdrawn.

6. The petitioner submitted that Hell's Gate National Park which is categorized under category II ought to be viewed as one ecosystem and it should not matter that the event will be carried out at one section of the Park as such an event had the potential of affecting the whole ecosystem.

7. Counsel further argued that Hell's Gate National Park being home to some endangered and rare Species should be a park where traffic is restricted and where only minor activities are allowed. She stated the 29th Koroga Festival will open the Park to unprecedented human and motor traffic and that there will be widespread lighting and noise which she argued would no doubt disturb the environment and the ecosystem and would lead to the degradation of the environment to the detriment of conservation. She stated this would result in permanent damage to the environment which would run counter to the doctrine of sustainability. The petitioner urged the court to invoke the precautionary principle and hold that there is a potential threat to the environmental and on that account stop the intended event.

Respondents Response

8. Mr. Lutta Advocate appeared for the 1st Respondent, Kenya Wildlife Service. He relied on the grounds of objection and the replying affidavit sworn by Doreen Mutunga, Principal Legal Officer of the 1st Respondent filed on 10th February 2020. *Inter alia* the 1st respondent, by the grounds of objection averred that the application by the petitioner was bad in law and fatally defective; there was inordinate delay in filing the application; the application was brought in bad faith; no provision for damages was proffered; and that the application did not meet the threshold for grant of conservatory orders.

9. In response to the petitioner's affidavit in support of the petition the 1st respondent averred that the Court lacked the jurisdiction to hear and determine the matter as a Court of first instance. Counsel for the 1st respondent in support of this averment in his oral submissions cited Section 117 of the Wildlife Conservation and Management Act, 2013 which expressly provided that any dispute arising in respect of Wildlife Management, Protection or Conservation shall in the first instance be referred to the lowest dispute resolution structure within the devolved system of governance. The 1st Respondent's Counsel in support of the submission further referred the Court to the Court of Appeal decision in the case of ***The Speaker of the National Assembly –VS- James Njenga Karume (1992) eKLR.***

10. The 1st Respondent's counsel further submitted the petition was incompetent as there was no Board of Directors Resolution authorizing

the institution of the suit annexed and in support of that submission referred the Court to the Ruling by Mumbi Ngugi, J in the case of **East African Portland Cement Ltd -vs- Capital Markets Authority & 4 others (2014) eKLR** where the Judge in striking out the petition for lack of authority to institute the same, agreed with the holding by Njagi, J in the case of **Affordable Homes Africa Ltd -vs- Ian Handerson & 2 Others HCCC No.524 of 2004** where Njagi, J held that a company being an artificial body, could only take decisions only through the agency of its organs, the Board of Directors and the shareholders.

11. The 1st Respondent vide the replying affidavit sworn by its Principal Legal Officer averred that the Hell's Gate National Park previously hosted virtually similar events notably the "Wheelbarrow race" annually and exhibited a report marked 'B' of the race held on 2nd August, 2014. Further the Safaricom International Jazz Festival was held in Hell's Gate National Park on 20th October, 2018 and an annexure marked 'C' being a publication of the event was exhibited.

12. The 1st respondent argued its mandate of conservation and Management of Wildlife included marketing of the National Park Resources to the Kenyan Public and that the Koroga Festival would serve that purpose and additionally generate revenue that would be applied towards the conservation efforts by the 1st respondent for the sustainability of the Hell's Gate National Park eco-system.

13. The 1st respondent stated that in giving the approval for the event to be held within the National Park, they acted within their mandate and that the approval was granted under strict conditions that the event organizers had committed to abide with. The 1st respondent stated that it was satisfied the event would not pose any negative impacts to the eco-system as the 1st respondent had imposed on the organisers several safeguards to ensure there was no adverse effects resulting from the holding of the events. These included:-

1. A solid Waste Management plan.

2. Security risk assessment and mitigation report for the event.

3. Site plan layout for the grounds at Hells Gate.

4. KWS Ecological Impact Assessment Report.

5. Environmental Assessment Report or Environmental Management Plan (EMP) for the event's potential impacts and proposed mitigation measures.

6. A noise permit issued in accordance with the Environmental Management and coordination (Noise and Excessive Vibration Pollution) Regulations, 2009.

7. All cars, save for 5 cars for suppliers, VIP and emergency response, will be parked outside the park.

14. The 1st Respondent contended that it had a statutory duty to carry out Wildlife Conservation and Management and that in approving the event it was satisfied conservation and protection of the ecosystem would not be compromised.

15. The 1st respondent submitted that the petition was founded on mere speculation and there was no empirical evidence that the holding of the event would result in any adverse effects to the environment. The 1st respondent thus contended the petitioner had failed to demonstrate a *prima facie* case with any probability of success. Besides, given the attendant circumstances, the 1st respondent submitted the balance of convenience undoubtedly tilted in favour of allowing the event to go on.

16. The 2nd, 3rd, 4th, 5th and 6th Respondents associated themselves with the submissions made on behalf of the 1st respondent. The Attorney General through Victor Ondieki and Winnie Cheruiyot both Senior State Counsels appeared for the 2nd and 3rd Respondents. They relied on the grounds of opposition dated 10th February 2020 and filed on the same day. The grounds mirrored those argued on behalf of the 1st respondent.

17. The 2nd and 3rd respondents contended the application and petition did not meet the threshold for petitions established in the **Anarita Karimi and Mumo Matemu** cases. They contended the petition was prematurely instituted contrary to Section 117 of the Wildlife Conservation and Management Act No. 47 of 2013. They further contended the delay on the part of the petitioner in serving the petition upon the 2nd & 3rd respondents was an affront to the right to fair trial under Article 50 of the constitution.

18. The 2nd & 3rd respondent further argued the petition was not supported by any evidence and was baseless, speculative and could not satisfy the threshold established in the case of **Giella -VS- Cassman Brown (1973) EA 358** in regard to grant of temporary injunctions.

19. The 4th Respondent, the County Government of Nakuru represented by Kinuthia Advocate filed a replying affidavit sworn by Florence Wanjiru Karanja a Tourism officer in the Trade Department of the 4th Respondent in opposition to the application and the petition. She outlined the mandate of the County Government under Schedule 4 of the Constitution, which among other functions includes regulation and provision of Cultural Activities, Public entertainment and other public amenities. She averred under Section 7(d) of the 4th Schedule of the Constitution the 4th Respondent was empowered to develop and regulate local tourism as a means of enhancing trade. In that regard she averred the 4th respondent in collaboration with the 5th respondent entered into an agreement for purposes of organizing and holding the Naivasha Love Festival annually with the inaugural event scheduled to take place from 14th to 16th February 2020. She stated that the organisers have obtained all the necessary approvals from the 1st respondent and the interested party (NEMA). The 4th respondents assert

that there would be no negative impact on the environment in the event the event is allowed to go on as scheduled.

20. Mr. Bitok Advocate represented the 5th respondent. It was his submission that the staging of the event was in public interest and would have no adverse impact on the ecosystem. He furnished a map of Hell's Gate National Park and pointed out that the site for the event was next to Elsa Gate, the entry to the park and was not close to the nesting site for the birds at the cliffs.

21. The 6th respondent was represented at the hearing by Musangi Advocate and had filed a replying affidavit in opposition to the application and the petition sworn by Ms. Ashleigh Ali, Head of Events of 6th respondent. The 6th respondent vide the replying affidavit more particularly under paragraph 15, 16, 17 and 18 of the replying affidavit affirmed that they had fulfilled all the set conditions by the 1st respondent and the interested party resulting in their being given the approval to hold the event.

22. The 6th respondent explained that the event scheduled to take place was the 29th edition and that they had held similar like events at the Nairobi Arboretum which is also a conservation area, the Uhuru Gardens, Nairobi National Park and Karura Forest. The 6th respondent was clear that they were sensitive to their responsibility to the environment and their experience in the organization of the events bears them out.

23. The 6th respondent pointed out the hosting of the Safaricom Jazz Festival in Hell's Gate National Park which was similar in character to their event and questioned the motivation by the petitioner in raising objection to their event when they never questioned the hosting of the previous event.

24. Mr. Musangi in his submissions on behalf of the 6th respondent reiterated the submissions made by Lutta Advocate for the 1st respondent. He emphasized that the petition is hinged on speculation without any evidence of any kind. He contended it was not enough for the petitioner to disagree with the 1st respondent's decision approving the event and argued that the petitioner had to avail evidence to demonstrate KWS was wrong in permitting the event to go on. He stated the respondents had taken every precaution to ensure the Koroga Festival met its objectives and that nothing was left to chance in its preparation.

25. In reply Ms. Mutemi Advocate responding to the issue of jurisdiction stated that the ELC under Section 13 of the ELC Act had original jurisdiction to hear and determine environmental matters. On the issue of authority to institute the petition she stated Article 159 of the constitution enjoins the Court not to be unduly fettered by technicalities of procedure. She further stated that the 1st respondent had not developed a Park Management Plan For Hell's Gate National Park as required under section 44 of the Wildlife Conservation and Management Act and therefore did not have a basis to grant the approval that they did to the 5th and 6th Respondents. She maintained the event militates against the sustainable use of the park for the present and future generations.

Analysis and determination

26. Having set out albeit in brief the rival submissions of the parties, I now turn to consider the merits of the application. The respondents having raised the issue of the jurisdiction of the Court and competence of the petition, it is necessary that I consider and determine these issues first as they are in the nature of preliminary objections. The respondents contend that the petitioner failed to exhaust the dispute resolution mechanism applicable to matters such as the present matter before invoking the jurisdiction of this court and thus the institution of the petition before this court constituted abuse of the Court process.

27. Section 117 of the Wildlife Conservation and Management Act, No 47 of 2013 that the Respondents rely on provide as follows:-

(1) Any dispute that may arise in respect of wildlife management, protection or conservation shall in the first instance be referred to the lowest possible structure under the devolved system of government as set out in the Devolution of Government Act including traditional resolution mechanisms.

(2) Any matter that may remain un-resolved in the manner prescribed above, shall in all appropriate cases be referred to the National Environment Tribunal for determination, pursuant to which an appeal subsequent thereto shall, where applicable, lie to the Environment and Land Court as established under the Environment and Land Court Act, 2011.

28. Under the Wildlife Conservation and Management Act, there is established under section 18 County Wildlife conservation and compensation Committees. Under section 19 of the Act, the functions of the County Wildlife Conservation and compensation Committees includes the overseeing and review of programmes related to the protection, conservation and management of Wildlife resources in the County, including in the parks within their counties. Thus any dispute arising in regard to Wildlife Management, protection or Conservation in the first instance ought to be referred to the County Committee. Under Section 117 (2) of the Act reproduced above it is clear that this Court is divested of jurisdiction as a Court of first instance in matters relating to Wildlife Management, protection or conservation and that its jurisdiction is that of an appellate Court. In my view the petitioner's first recourse ought either to have been to the County Wildlife Conservation Committee or to National Environment Tribunal established under EMCA.

29. The Supreme Court in the case of *Interim Independent Electrol Commission (Constitutional application No.2 of 2011) unreported* discussed the issue of jurisdiction and observed as follows:-

“Assumption of jurisdiction by Court in Kenya is a subject of regulated by the Constitution; by statute and by principles laid out in

precedent, --the "Lillian SS" case established that jurisdiction flows from the law, and the recipient, the court, is to apply the same with any limitation embodied therein. Such Court may not arrogate to itself jurisdiction by way of endeavors to discern or interpret the intentions of parliament where the wording of the legislation is clear and there is no ambiguity ..."

30. The Supreme court further in the case of **Communication Commission of Kenya & 5 others -vs- Royal Media Services Ltd & 5 others (2014) eKLR** restated what has come to be known as "Constitutional avoidance Principle"- That is where it is possible to determine a matter on some other basis, that other forum should be pursued other than the Court being petitioned to determine a Constitutional issue. The Court in the case that involved infringement of intellectual property rights at paragraph 256 of its judgment stated:-

256. The Appellants in this case are seeking to invoke the "principle of avoidance:.. The principle of avoidance entails a Court will not determine a Constitutional issue, when a matter may properly be decided on another basis. In South Africa in S -vs- Mhangu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority judgment as follows (at paragraph 59): " I would lay it down as general principle that where its possible to decide any case, civil or criminal, without reaching a Constitutional issue, that is the Course which should be followed"

31. The present matter though coached as a constitutional petition in real sense is a Wildlife Conservation and Management matter which the Wildlife conservation and Management Act read together with the Environmental Management and Co-ordination Act, 1999 have provided adequate dispute resolution mechanisms which the Petitioner ought to have invoked rather than come to this Court . In the Court of Appeal case of **The Speaker of the National Assembly -vs- James Njenga Karume (1992) eKLR** cited by the 1st respondent's counsel, the Court stated as follows in regard to the exhaustion doctrine:-

"—Where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed."

32. On the basis of the authorities I have referred, it is my view this Court lacked the jurisdiction to entertain the petition as a court of first instance and on that account the petition must fail.

33. Though I have determined the matter on the basis of jurisdiction, the issue whether or not the petition as presented was competent on account of there having been no authority by way of resolution of the Board of Directors authorizing the institution of the suit was raised by the Respondents. The petitioner under paragraph 1 states it is a company limited by guarantee. The Board of Directors of the company did not give any authority authorizing the filing of the suit as none was filed with the petition. The deponent of the affidavit in support of the petition did not state from where the authority to swear the affidavit was derived. The certificate of incorporation or the Memorandum and Articles of Association were not annexed to the petition and it is therefore unclear who was vested with the powers of Management of the Company. The Article of Association of the Company ordinarily would make that provision. In the case of **East African Portland Cement Ltd- vs- Capital Markets Authority & 4 others** (supra) Mumbi, J referring to the case of **Affordable Homes Africa Ltd -vs- Ian Henderson & 2 others** (supra) stated thus:-

"—The Court (Njagi, J) observed that it was common ground that there was no authority from the Board of Directors to institute the suit, and consequently, held as follows :-

"The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the Court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff".

34. The Uganda case of **Bugerere Coffee Growers Ltd -vs- Sebadaka & Others (1970) EA 147** had much earlier taken the same position to strike out the suit filed without an accompanying Board of Directors resolution authorizing the commencement of the suit. The advocate in the matter was equally held personally liable for the costs.

35. Regrettably the same position obtains in the present matter as the suit was filed without any board resolution authorizing the commencement of the suit. The petition is incompetent and is unsustainable and the same is for striking out.

36. Although the fate of the Notice of Motion is already determined, I wish to observe that even if I had held the Court had jurisdiction and that there was a competent petition, I would not on the material before the Court have found the petitioner had demonstrated a *prima facie* case with a probability of success to warrant the grant of a conservatory order or injunction as sought in the Notice of Motion. The petition was founded on imagined and /or speculative threats to the environment not backed by any empirical evidence. I am satisfied the 1st Respondent appropriately evaluated the application by the 5th and 6th Respondents to hold the event in Hell's Gate National Park and issued a well considered approval with attached conditions. It has not escaped the Court's attention that previous events some with somewhat similar character as the scheduled event have been held in Hell's Gate National park and there is no recorded evidence of any negative impacts/effects that may have resulted from the holding of those events in the park. The 6th Respondent has uncontroverted record of having staged similar events at diverse sites with equally sensitive ecosystems as the Hell's Gate National park and there is no evidence of any adverse reports from the previous events they have held. This experience stands in their favour that they are alive to the demands in regard to the scheduled event.

37. The Respondents have committed to meet the conditions of the approval and have demonstrated their commitment by moving fast to satisfy the pre requisite conditions. There would be no basis to stop the holding of the 29th Koroga Festival-Naivasha Love Edition in Hell's Gate National Park. The event is allowed to proceed but on the strict terms of the approval given by the 1st Respondent.

38. The upshot is that the Notice of Motion dated 5th February 2020 is dismissed and the petition is struck out.

39. I have agonized on the issue of costs and I have considered that it may have inadvertent on the part of counsel to file the petition without exhibiting any authority and for that reason will not order costs against counsel. Equally, public interest may have driven the petitioner to file the petition as clearly this was a petition in public interest. Penalizing the petitioner with costs could have the undesired effect of stifling public interest litigation. I do not desire such eventuality. For those reasons I order that each party meets their own costs of the application and the petition.

40. Orders accordingly.

Ruling dated signed and delivered at Nakuru this 12th day of February 2020.

J M MUTUNGI

JUDGE