



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC PETITION NO. 3 OF 2018

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 11, 19, 20, 21, 22, 23, 42, 60, 66, 159 AND 169 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE WILDLIFE CONSERVATION AND MANAGEMENT ACT NO. 47 OF 2013

AND

IN THE MATTER OF THE INVASION AND ENDANGERING THE SPECIES, ENVIRONMENT AND ECOSYSTEM OF MALKA MARI NATIONAL PARK, MANDERA COUNTY

BETWEEN

IBRAHIM MOHAMUD IBRAHIM.....1ST PETITIONER

ABDI DIMA YAKUB.....2ND PETITIONER

(Suing on their own behalf and on behalf of the people of Mandera County and the Republic of Kenya at large)

AND

KENYA WILDLIFE SERVICE.....1ST RESPONDENT

CS, MINISTRY OF TOURISM & WILDLIFE.....2ND RESPONDENT

CS, MINISTRY OF INTERNAL SECURITY AND

CO-ORDINATION.....3RD RESPONDENT

MANDERA COUNTY GOVERNMENT.....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

IBRAHIM MOHAMED YOUSSEF..... INTERESTED PARTY

JUDGEMENT

Introduction

1. The Petition before the Court dated 9th October 2018 seeks the following orders: -

(a) A permanent injunction to issue restraining the respondents from undertaking, commissioning or awarding tenders for construction/developments or structures or infrastructures within Malka Mari National Park in Mandera County, that

would endanger the habitat, ecosystem and species within the Park.

(b) A declaration that the settlement of communities at the Malka Mari National Park is illegal, unconstitutional and endangers the species and the habitat within the Park.

(c) An order to respondents to evict and relocate communities which have settled at the Malka Mari National Park.

(d) An order compelling the respondents to provide security, manage and conserve the wildlife species and ecosystem of Malka Mari National Park.

(e) Costs of the petition.

2. The petition sets out the following grounds: -

(a) That the 1st respondent has failed to exercise its Constitutional and Statutory mandate to conserve and manage the Malka Mari National Park that is now exposed to total degradation.

(b) That the 3rd respondent built an Administration Police Post, Police Station and Chief Camp in the Park without an environmental impact assessment or public participation contrary to the law.

(c) The 4th respondent has failed to participate and conserve the National Park to the detriment of the citizens of Mandera County and its future generation and has since built schools, dispensaries and construction of roads within the Park.

(d) That the respondents allowed the Gare and Degodia communities to settle in the Park without an environmental Impact Assessment, which has in turn, raised serious ethnic conflicts.

Petitioners Statements of Facts

3. The petitioners stated that the Malka Mari National Park was declared a National Park vide Legal Notice No. 338 dated 6th October 1989 and boundary plan Number 204/66, LR. No. 28084 due to its high concentration of wildlife as stated under Section 119(a) Eleventh Schedule of the Wildlife Conservation and Management Act No. 2013.

4. They further stated that Malka Mari Park covers an area of 876 Kms and lies along the Dana River on the Kenya Ethiopia border in the extreme north east of Kenya on the Mandera Plateau, Mandera County.

5. That the Malka Mari National Park is mostly semi-arid bush land and scrubby grassland in riparian woodland and different classes and species of wild animals including the Gazelles, Somali giraffe, hyena and the singing birds among others.

6. That the respondents have neglected, refused and failed to manage, conserve and protect the ecosystem of the Malka Mari National Park thereby allowing the Degodia Communities to settle in the National Park.

7. That the communities who have settled in the Park poses serious environmental threats to the already fragile ecosystem and will obviously lead to the extinction and death of the wildlife in the Park.

8. That the said communities are mostly pastoralists and are engaged in capturing, harvesting, cropping, hunting and poaching of animals and birds within the Park hence endangering and threatening the ecosystem and habitat.

9. That this has raised serious ethnic conflict and clashes between the Gare community and Degodia communities.

10. That the continued settlement of the said community in the Park risks the Park being totally degraded to the detriment of the heritage of the communities living within Mandera region, the Republic of Kenya and affects the tourism industry at large.

11. That Malka Mari National Park is a tourist attraction site and if managed properly and sustainably, can boost the economy and improve the lives of the marginalized people of Mandera County and the Nation at large.

12. That the area receives a mean annual precipitation of less than 200 mm of rain which makes it prone to environmental degradation and now to allow pastoralists communities to settle in the Park will even worsen the situation.

13. That the respondents allowed the said communities to settle in the Park without carrying out any environmental impact assessment and without conducting public participation as is the law required.

14. That the 3rd respondent has built an Administration Police Post, Police Station, Chief Camp among others without carrying out any Environmental Impact Assessment or public participation or at all contrary to the law.

15. That the 4th respondent has since presented before the County Assembly a Budget for the year 2018/2019 for allocation of funds to finance illegal and unlawful construction of infrastructure within the Park without conducting public participation, Environmental Impact

Assessment, Approval by N.E.M.A or National Land Commission.

16. That the 4th respondent as a stakeholder failed to participate and conserve the National Park to the detriment of the citizens of Mandera County and its future generation and have since built schools, dispensaries and construction of roads within the Park.
17. That it is inconceivable that the respondents who are bestowed with the powers and mandate to provide security, conserve, manage and use the National Park sustainable for the benefit of the people and future generation have turned a blind eye on it and are now engaged in activities that is hazardous and endangers the ecosystem and the species within the Park.
18. That there is urgent need for a proper framework and policy to be put in place for the Park to be conserved, managed and used sustainably to protect and promote the Kenyan heritage and cultures.

1st Respondent's Statement of Facts

19. The 1st respondent through her legal officer one Doreen Mutunga filed a replying affidavit and deponed as follows: -
20. That she is a legal officer working with the 1st respondent herein (K.W.S) and being well conversant with the issues in question and therefore competent and fully authorized to swear the affidavit in reply to the petition herein.
21. That she confirmed that Malka Mari National Park in Mandera County was Gazetted in October 1989 under legal Notice No. 338 and that it has since been encroached with various activities and settlement which are posing serious environmental threats to the fragile ecosystem therein.
22. That the Park has not been fully operationalized due to various factors which include but not limited to lack of adequate resources to develop appropriate infrastructure and place enough manpower therein as well as presence of well-armed hostile and conflicting communities that pose serious security risk.
23. That full operationalization of the Park by K.W.S requires support and co-operation of all stakeholders who include the two conflicting communities, that is, the Gare and Degodia, Mandera County Government and the National Government.
24. That the 1st respondent therefore refutes any claim or assertion that it has deliberately failed in its mandate to conserve and protect the Park and avers that its efforts are currently being hampered by budgetary constraints and prevailing security situation in Mandera County as a result of inter-clan conflicts between the Gare and Degodia communities.
25. That the service is in the process of deploying an officer to man the Station and to ensure the service fulfils its mandate and protect the Park.

2nd, 3rd and 5th Respondents Response

26. The 2nd, 3rd and 5th respondents filed Grounds of Opposition to the petition herein and stated as follows: -
 - (a) That the petitioners have failed to plead any particulars of infringement of their fundamental rights and freedoms with the necessary precision.
 - (b) That the contents of the petition are merely speculative as there is no proof from the petitioners evidencing that the Government is allocating land in a National Reserve/Park.
 - (c) That the petitioners have failed to demonstrate that the communities complained of are actually residing inside the National Park.
 - (d) That the petition does not meet the threshold as laid out in the Anarita Karimi's case for the grant of the orders sought.
 - (e) That the petition as drawn does not disclose any reasonable cause of action against the respondents.
 - (f) That there has been no violation of the petitioners rights under any of the provisions of the Constitution that they relied on.
 - (g) That the petition is incompetent, misconceived, misplaced and is an abuse of the Court process as the petitioners rights and fundamental freedoms have not been violated.

4th Respondent's Response

27. The 4th respondent also filed a Notice of Preliminary Objection dated 5th March 2019 in which it raised the following issues: -
 - (a) That the petition herein is pre-mature and the Court lacks jurisdiction to hear the same as the petitioners have failed to refer the dispute in the first instance to the Mandera County Government as provided for under *Section 117 of the Wildlife Conservation and Management Act No. 47 of 2013*.

(b) That this Honourable Court's jurisdiction under *Section 117 of the Wildlife Conservation and Management Act No. 47 of 2013* is only appellate and therefore this Honourable Court lacks jurisdiction to hear and determine this petition.

(c) That the petition violates the doctrine of Constitutional avoidance and the statutory dispute resolution process under the *Wildlife Conservation and Management Act No. 47 of 2013* is sufficient to address the issue raised by the petitioners and this Honourable Court does not have jurisdiction as held by the Supreme Court in the case of *Communication Commission of Kenya & 5 others, (2014) e K.L.R.*

(d) That the petition is defective and ought to be struck out as it does not disclose any cause of action or plead with specificity the alleged contravention of the Constitution as held by the Court of Appeal in the case of *Mumo Matemu Vs Trusted Society of Human Rights Alliance and 5 others (2013) e K.L.R.*

(e) That the petition violates the rights to fair trial under *Article 50 of the Constitution of Kenya 2010* by seeking eviction of persons and communities who are not party to the petition.

Interested Party's Statement of Facts

28. The Interested party filed Grounds of opposition and a replying affidavit in opposition to the petition in which he stated as follows: -

(a) That the petitioners have no cause of action and are not entitled to any of the declarations and orders sought and they have failed to demonstrate to this Court in any manner whatsoever how their Bill of rights have been violated.

(b) That the petitioners have no right to bring this petition under *Article 22 of the Constitution* as it does not violate or infringe any right or fundamental freedom in the Bill of Rights.

(c) The petition is not supported by any substantial evidence to show that the Degodia community has encroached and engaged in the capturing, harvesting, cropping, hunting and poaching of animals.

(d) That the petition is prematurely before Court contrary to *Articles 69(1) (d) and 159(2) of the Constitution*.

(e) The sought orders of eviction and stopping development in the area is an infringement to the interested party's right to life which is guaranteed under *Article 26 of the Constitution*, the right to life which include the right to the community's livelihood, water and other life dependent resources from the County Government.

(f) The orders sought if granted will infringe the inherent human dignity of the interested party guaranteed under *Article 28 of the Constitution*.

(g) The eviction orders sought if granted and implemented will amount to cruel and inhuman treatment contrary to *Article 29 of the Constitution*.

(h) That the home of Malka Mari National Park and Malka Mari Sub-District is a community land, and even though Malka Mari National Park is for a public purpose, it must be implemented and carried out in accordance with Article 4 of the Constitution.

(i) The eviction orders sought by the petitioners are in direct contravention of Article 69(1) (d) of the Constitution.

(j) Kenya Wildlife Services is an authority mandated to conserve National Park in accordance with the Wildlife Conservation and Management Act No. 47 of 2013 and Article 72 of the Constitution of Kenya.

(k) The petitioners are usurping the powers of Kenya Wildlife Services which is the mandated body to conserve and manage National Parks.

(l) That Kenya Wildlife Services has formulated National policy, strategic plans and goals to move away from Sessional Paper No. 3 in the statement on the future of wildlife Management Policy in accordance with Article 72 of the Constitution and Wildlife Conservation and Management Act 2013.

(m) The orders sought go against the purpose of recognizing and protecting human rights and fundamental freedoms which is to preserve the dignity of individuals and communities.

(n) The petition undermines the gains made by Kenya Wildlife Services and its strategic priorities and 2030 vision goals.

(o) The interested party and their community have the right to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent and the Courts have to respect the Bill of rights in their decisions and not to be repugnant to justice and morality.

(p) The orders sought are cruel, inhuman, degrading and completely incompatible with our new progressive Constitution.

Submissions by the Petitioners

29. The petitioners through the firm of Laichena Mugambi & Co. Advocates submitted as follows: -

- (a) That the respondents have neglected, refused and failed to manage, conserve and protect the ecosystem of the Malka Mari National Park thereby allowing the Degodia communities to settle within the National Park.
- (b) That the communities have settled in the Park and therefore pose serious environmental threat to the already fragile ecosystem and will obviously lead to the extinction and death of the wildlife in the Park.
- (c) That the said communities are mostly pastoralists and are engaged in capturing, harvesting, cropping, hunting and poaching of animals and birds within the park hence endangering and threatening the ecosystem and the habitat.
- (d) That the continued settlement of the said community in the park risks the park being totally degraded to the detriment of the heritage of the communities living within Mandera region in the Republic of Kenya and affects the Tourism industry at large.
- (e) That the 3rd respondent has built an Administration Police Post, Police Station, Chief Camp among others without carrying out any Environmental Impact Assessment or public participation or at all contrary to the law while the 4th respondent has failed to participate and conserve the National Park to the detriment of the citizens of Mandera County and its future generation and have since built schools, dispensaries and construction of roads within the park.
- (f) That the 4th respondent has since preserved before its County Assembly a Budget for the financial year 2018/2019 to finance illegal and unlawful construction of infrastructure within the park without conducting public participation, Environmental Impact Assessment, Approval by N.E.M.A or National Land Commission and contrary to the law.
- (g) That the petition herein concerns Management and Administration of a public National Park which they seek to preserve and conserve from being wasted and/or endangered by the acts and omissions of the respondents and for the Court to compel the respondents especially the 1st respondent to perform its mandate and functions over the National Park as provided for under Articles 42, 60, 69 of the Constitution and Sections 4, 6 and 7 of the Wildlife Conservation and Management Act No. 47 of 2013.
- (h) That these are matters that affect public interest and that the petitioners have instituted this petition in the interest of the general public under Articles 22, 42, 70 and 258 of the Constitution of Kenya, 2010 and cited the following cases:-
 - (i) John Kabukuru Kibicho and Another Vs County Government of Nakuru and 3 Others (2016) e K.L.R.
 - (ii) Mohammed Hussein Yakub and 5 Others Vs County Government of Mandera and 5 Others (2020) e K.L.R.
- (i) That on the issue of jurisdiction, the 4th respondent had raised a Notice of Preliminary Objection dated 5th March 2019 which was dismissed vide a ruling delivered on 9th May 2019 and a subsequent ruling on 2nd August 2019 where the Court ruled that it is now functus officio on the issue of jurisdiction.
- (j) That Malka Mari National Park is a public land and that the 1st respondent is established with the mandate of managing and conserving of all National Parks and wildlife in Kenya. He cited the case of *Onyango Okello and 69 Others Vs Kenya Wildlife Services and 5 Others (2019) e K.L.R.*
- (k) That the 2nd, 3rd and 5th respondents are the biggest players and stakeholders in sustainable use and management of the environment as stipulated under Article 67(3) of the Constitution which vests the National Park in the National Government to be held in trust for the people and administered on their behalf and that as players, they have failed to administer the park in question prudently.
- (l) That the orders being sought for eviction and injunction restraining development in the Park is an infringement to their right to life as guaranteed under Articles 26, 28, 29, 40 & 69 of the Constitution.
- (m) That the Report of the County Assembly Budget and Appropriation Committee on Budget Estimates of Mandera County Mandera Government (the 4th Respondent) for the Fiscal year 2018/2019 indicates an allocation for construction of ECD classes at Malka Mari Town for Ksh. 1,150,000. That there is also a budget allocation for construction of 5 ECD classes – Malka Mari Ward.
- (n) That there is a budget allocation for proposed heavy bush clearing works from Hullo – Arda Garbicha in Banissa.
- (o) That all these projects and the allocated areas are within the National Park.

1st Respondent's Written Submissions

30. The 1st respondent through the firm of Mithega & Kariuki Advocates submitted on the following issues: -

- (a) Whether this Court has jurisdiction to hear and determine this petition?**
- (b) Whether the Petitioners rights have been violated by thy Respondents and are deserving of the orders sought?**

(I) On the first issue, the counsel for the 1st respondent submitted that this is a dispute within the purview of Section 117 of the Wildlife Conservation and Management Act No. 47 of 2013 and as such, the proper mode the petitioners should have taken under the devolved system of Government is to have the dispute determined at the community or County level.

(II) The counsel for the 1st respondent submitted that by prematurely invoking the jurisdiction of this Court, the petition has been rendered defective as there is a clear non-compliance with the statutory dispute mechanism established by the Wildlife Conservation and Management Act No. 47 of 2013. He cited the Supreme Court case of *Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others* (2012) e K.L.R.

(III) He submitted that the mandate given to this Honourable Court by statute in such a dispute is that of an Appellate Court once an aggrieved party is not satisfied with a determination given at the County level and at the National Environment Tribunal.

(IV) He argued that the petitioners ought to have lodged their complaints with the County Government of Mandera in the first instance and if at all they were not satisfied with the County determination, then their next forum should have been the National Environment Tribunal. They cited the case of *Speaker of the National Assembly Vs Karume E.A.* 549.

(V) The 1st respondent also submitted that this Honourable Court does not have the requisite jurisdiction to adjudicate over this petition as the petitioners have not exhausted the statutory avenue for dispute resolution and that the petition fails to raise any Constitutional issue for determination and consequently it ought to be struck out on the principle of Constitutional avoidance. He cited the case of *Communication Commission of Kenya & 5 Others Vs Royal Media Services & 5 Others – Petition No. 14 A, B & C* (2014) e K.L.R.

(VI) In conclusion on that limb, the 1st respondent submitted that in the unlikely event that this Court finds that it has the jurisdiction to hear and determine this petition, then the petition is bad in law as the petitioners have not set out with a reasonable degree of precision the rights they complain have been violated and the manner in which the rights as alleged have been infringed.

(b) Whether the Petitioners rights have been violated by thy Respondents and whether they are deserving of the orders sought.

31. This issue, the counsel submitted that the 1st respondent is a State Corporation established under Section 6 of the Wildlife Conservation and Management Act No. 47 of 2013 whose statutory functions are spelt out in Section 7 of the Act. Counsel submitted that its key functions include conservation and management of National Parks, Wildlife conservation areas and sanctuaries under its jurisdiction among other duties.

32. The 1st respondent submitted that she has always performed its functions and duties with distinction though with some difficulties posed by the perennial budgetary cuts, animosity between the communities bordering the Park and lack of political good will from leaders from the regions where these Parks are situated aimed at conserving the Park.

33. That the petition is not supported by any substantial evidence to show that the Degodia community has encroached and engaged in the capturing, harvesting, cropping, hunting and/or poaching of wild animals within the Park.

34. The 1st respondent further submitted that the petition is full of allegations and speculations which have not been proved with certainty any violation of these rights.

35. The 1st respondent submitted that the petition does not meet the degree of precision required and does not disclose any reasonable cause of action.

36. She submitted that no Constitutional rights have been violated against the petitioners by the 1st respondent and that he who asserts must prove. She cited **Section 107 of the Evidence Act and the case of Bungoma Election Petition No. 4 of 2017 between Levi Simiyu Makate Vs Kovi John Waluke & 2 Others (2018) e K.L.R.** She also cited the Supreme Court decision in the case of **Presidential Election Petition No. 1 of 2017 between Raila Amolo Odinga & Another Vs I.E.B.C & 2 Others (2017) e K.L.R.**

37. She submitted that the legal burden of proof in a case is always static and rests on the claimant throughout the trial who has failed to discharge in totality.

38. The 1st respondent further submitted that the petitioners are alleging that the respondents are allotting plots to squatters. However, no single letter of allotment has been annexed to the affidavit in support of the petition to prove the same and that there is no basis upon which the Court can uphold any of the alleged violations.

39. The 1st respondent submitted that a party pleading violations of Constitutional rights is at the very least expected to give credible evidence of the alleged violation and that it is not enough to merely plead and particularize a violation as alleged in the case of **Anarita Karimi Njeru Vs Republic and in Mumo Matemu Vs Trusted Society of Human Rights Alliance.**

40. The 1st Respondent further submitted that no tangible evidence was given to support the allegations and no iota of evidence was tendered to establish any cited acts. She cited the following case of **Benard Murage Vs Fine Serve Africa Limited.**

41. In conclusion, the 1st respondent submitted that the petitioners have failed to prove and/or provide any evidence showing how the 1st respondent has deliberately failed in its mandate to conserve and protect the Park and that set out with a reasonable degree of precision how

the right they complain has been violated and the manner in which the right alleged have been infringed.

2nd, 3rd and 5th Respondents Written Submissions

42. The 2nd, 3rd and 5th Respondents through Falma Ali, State counsel submitted as follows: -

- (a) That the petition is full of allegations and speculations and the petitioners have not proved with certainty any violation of their rights.
- (b) That the petitioners have not proved that the respondents are indeed settling people in the National Park.
- (c) That the petitioners may have pleaded with reasonable particularity and precision that a specific right exists but have failed to satisfy the evidential burden that the respondents have violated that right. She cited the case of **Titus Barasa Makhanu Vs Police Constable Simon Kinuthia Gitau & 3 Others (2016) e K.L.R.**
- (d) That no Constitutional rights have been violated against the petitioners.
- (e) That it is trite law that he who asserts must prove.
- (f) That whereas the petitioners may have asserted, but they have failed to prove their case with precision.
- (g) That Section 107 of the Evidence Act provides that the person that has asserted has the burden of proof and that the petitioners have failed to discharge the same.
- (h) That the petitioners are also alleging that the respondents are allotting plots to squatters but no single letter of allotment has been annexed to the affidavit in support of the petition to prove that indeed the Government is indeed allocating plots in a National Reserve.
- (i) That the procedure of settling people in a Gazetted National Reserve is set out under Section 7 of the Wildlife Conservation and Management Act, 2013 and that no such order has been provided by the petitioners and therefore the petition herein is full of speculations with no evidence to support the allegations made.
- (j) That a party pleading violation of Constitutional rights is at the very least expected to give credible evidence of the alleged violation and that it is not enough to merely plead and particularize a violation. She cited the case of **Anarita Karimi Njeru Vs Republic and Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others.**
- (k) That save for the allegations made in the petition and the affidavits, no tangible evidence was given to support the allegations.
- (l) That no iota of evidence was tendered to establish any of the cited acts. She cited the case of **Bernard Murage Vs Fine Serve Africa Limited & 3 Others (2015) e K.L.R.**
- (m) That the Court should exercise deference to first instance mechanisms for appeal or review and that the petitioners should follow the remedies available under the **Public Procurement and Assets Disposal Act and the provisions of Section 9(1) and 9(2) of the Fair Administration Action Act.**
- (n) That it is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a Constitutional Petition.
- (o) That a party should only file a Constitution Petition for redress of a breach of the Constitution or denial, violation or infringement of or threat to a right or fundamental freedom.
- (p) That any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure. She cited the case of **Harrikissoon Vs Attorney General of Trinidad and Tobago (1980) A.C 265.**

4th Respondent's Written Submissions

43. The 4th respondent through the firm of Issa & Company Advocates submitted as follows:

- (a) That the petition herein is premature and the Court lacks jurisdiction to hear the same as the petitioners have failed to refer the dispute in the first instance to the Mandera County Government as provided for under **Section 117 of the Wildlife Conservation and Management Act No. 47 of 2013.**
- (b) That this Honourable Court's jurisdiction under **Section 117 of the Wildlife Conservation and Management Act No. 47 of 2013** is only appellate and therefore this Honourable Court lacks jurisdiction to hear and determine this petition.
- (c) That the petition violates the doctrine of Constitutional avoidance as the statutory dispute resolution process under the *Wildlife*

Conservation and Management Act No. 47 of 2013 is sufficient to address the issues raised by the petitioners and this Honourable Court does not have jurisdiction as held by the Supreme Court in the case of **Communication Commission of Kenya & 5 Others Vs Royal Media Services & 5 Others (2014) e K.L.R.**

(d) That the petition is defective and ought to be struck out as it does not disclose any cause of action or plead with specificity the alleged contraventions of the Constitution as held by the Court of Appeal in the case of **Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others (2013) e K.L.R.**

(e) That the petition violates the right to fair trial under *Article 50 of the Constitution of Kenya 2010* by seeking eviction of persons and communities who are not party to the petition. He cited the case of **J.M.K. Vs M.W.M. & Another (2015) e K.L.R.**

Interested Party's Written Submissions

44. The Interested party through the firm of A.K. Sheikh & Partners Advocates submitted as follows: -

(i) That Malka Mari is an old settlement that predates independence Kenya where the interested parties' Dagodia Community lived for centuries.

(ii) That Malka Mari had an air strip and fortes used by the colonial Government and that there is no doubt that Malka Mari was a settlement before independence and the establishment of the said recent park.

(iii) That Malka Mari is the ancestral Homeland of the interested parties' Degodia community and that the petitioners' Garee community and the interested parties' Degodia community have had a long and recorded history of rivalry and that the creation of the Park was meant to disfranchise the interested parties' which was voting as a block.

(iv) That the sole purpose of the Park was political meant to disrupt the interested parties' and force them to move out of Malka Mari and be squatters in the neighbouring Garee majority settlements.

(v) That the Park was not created in accordance with the laid down procedures under the trust land *Act Cap. 288 laws of Kenya* (repealed).

(vi) That the interested parties have never been given any notice, consulted or informed by the then County Council of Mandera of the setting apart of the land for the said Park as required by the law. They cited the case of **Meza Galana & 3 Others Vs Attorney General & 2 Others (2007) e K.L.R.**

(vii) That the provisions of *Articles 19, 20, 21 and 22 of the Constitution* invoked by the petitioners are on the side of Human dignity and Human rights and thus the orders sought are in direct conflict with the preservation of Human dignity and Human rights.

(viii) That the petitioners' application does not fully meet the basic tenets of Constitutional references as it is founded on generated complains without any focus on fact, law or Constitution.

(ix) That the issues raised in the petition are attenuated to bring out concretely the alleged violations neither do they bring out with precision any elaboration of the damage and loss the petitioners are likely to suffer should the orders sought not be granted.

(x) That there were schools, dispensaries, administration Police Camps and Chiefs office way before the creation of the Malka Mari National Park in 1983.

(xi) That the inhuman and cruel eviction orders sought are in direct conflict with the spirit and letter of the Constitution under Article 20 and 28.

(xii) That the National wildlife Conservation and Management Policy is one of consultative approach where stakeholders e.g. local communities are recognized and consulted in the management and conservation of wildlife and national parks.

(xiii) That it is therefore a Constitutional imperative that the local communities have to participate and consulted on the management of the National Parks.

(xiv) That in order to promote harmony, the Constitution must be interpreted purposely to protect the dignity and fundamental rights and freedoms of all communities living in disputed park and to achieve an amicable resolution to the dispute, it will be best to refer this matter to A.D.R.

Issues for Determination

45. I have carefully considered the parties respective pleadings and submissions, and in my view, the following are the issues for determination: -

(a) **Whether this Honourable Court has jurisdiction to hear and determine this petition?**

(b) Whether the petitioners' rights have been infringed, violated and/or threatened with violation by the respondents and whether they are deserving of the orders sought?

(c) Who shall bear the costs of this petition?

(a) Whether this Honourable Court has jurisdiction to hear and determine this petition?

46. It is trite law that jurisdiction of any Court is the mainstay of its exercise of judicial authority. Where a Court has no jurisdiction, it has no moral authority for judicial proceedings or issue any judicial decision or orders. The Court of Appeal set out the applicable standard in the celebrated case of **The Owners of Motor Vessel "Lillian s" Vs Caltex Oil Kenya Ltd (1989) K.L.R 1** where it was held: -

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

47. The petitioners' grievance as can be seen from the petition herein revolve around wildlife management, the protection and conservation of Malka Mari National Park. **Section 117 of the Wildlife Conservation and Management Act No. 47 of 2013** (herein referred to as the Act) provides internal mechanism for resolution of such disputes. The Act provides as follows: -

"117 (1) Any dispute that may arise in respect of wildlife management, protection and 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".

48. I agree with the counsel for the 4th respondent that the dispute herein is an internal matter which ought to have been referred to the Mandera Sub-county based at Malka Mari Ward or the Mandera County Assembly as the first port of entry. The matter could have been escalated to the National Environment Tribunal before being brought to this Honourable Court on appeal by any aggrieved party. Failure by the petitioners to follow the statutory dispute resolution mechanism renders this petition defective.

49. Again, in the case of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others (2012) e K.L.R**, the Supreme Court of Kenya restated the principle as follows: -

"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 the other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by lawWhere the Constitution exhaustively provides for jurisdiction of a Court of law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.... Where the Constitution confers powers upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law"

50. The Superior Courts also rendered herself on the issue of jurisdiction in the case of **Speaker of the National Assembly Vs Karume (1990 – 1994) E.A. 549** where it was held: -

"In our view, there is considerable merit in the submission that 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".

51. Under the **Wildlife Conservation and Management Act No. 47 of 2013**, the National Assembly has stated clearly that the jurisdiction of this Honourable Court would only be appellate in matters of conservation and protection of wildlife. In my view, the petitioners should have lodged their complaint with the County Government of Mandera as the first port of entry before filing this petition in this Honourable Court. Any issue not addressed by the Mandera County Government would have been referred to the National Environment Tribunal and subsequently an appeal to this Honourable Court. That was the holding in the case of **NAROK COUNTY COUNCIL VS TRANS MARA COUNTY COUNCIL (2000) 1 E.A. 161** where the Court of Appeal rendered itself as follows: -

"Though Section 6 of the Constitution gave the High Court unlimited jurisdiction, it did not cloth it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of his statutory duty

I am accordingly satisfied that the learned Judge wrongly rejected the objection raised by counsel for Narok. The Court had no jurisdiction to deal with matters at that stage and the Preliminary Objection have been upheld and the suit struck out as it was clearly incompetent. The proceedings were a nullity as the Court acted without jurisdiction".

52. Similarly, in the case of **Communication Commission of Kenya & 5 Others Vs Royal Media Services & 5 Others, Petition No. 14, 14A, 14B and 14C of (2014) e K.L.R**, the Supreme Court set out the principle of law and stated as follows: -

"(256) The appellants in this case are seeking to invoke the "principle of avoidance", also known as "Constitutional avoidance". The principle of avoidance entails that a Court will not determine a Constitutional issue, when a matter may

properly be decided on another basis. “In South Africa, in *S-V- Mhiungu*, 1995 (3) S.A. 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 a general principle that where it is possible to decide any case, civil or criminal, without reaching a Constitutional issue, which is the course which should be followed”.

(257) Similarly, the U.S. Supreme Court has held that it would not decide a Constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander Vs Tennessee Valley Authority*, 297 U.S 288, 347 (1936).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a Constitutional issue. This was, therefore, not a proper question faulting to the jurisdiction of the Appellate Court”.

53. I entirely agree with the principles set out by the Superior Courts and the persuasive comparative decisions. I therefore, find that though this Court has jurisdiction to handle the dispute herein, that jurisdiction only crystallizes on appeal and not prior. Where Parliament has clearly stipulated the procedure in which a dispute can be resolved by statute, the petitioner cannot avoid that procedure provided for by an Act of Parliament as that would be tantamount to a Constitutional avoidance. I therefore find that the petition herein is premature as the petitioners failed to refer the dispute to the County Government of Mandera as required under **Section 117 of the Wildlife Conservation and Management Act No. 47 of 2013** thus violating the principles of Constitutional avoidance and therefore liable to be struck out.

54. Even assuming that I was wrong in upholding the Preliminary Objection that this Court lacks original jurisdiction to handle this petition, I have also rendered myself on the merit of the remaining issues in this dispute herein below.

55. As guided by the decision of the Court of Appeal decision in **Daniel N. Mugendi vs Kenyatta University & 3 Others (2013) ekr** and in **United States International University (USIU) vs Attorney General (2012) Ekr**, this court is clothed with the jurisdiction to determine issues on violations or infringement of rights under the Constitution which are incidental to matters before it, in this case land and environment issue.

56. The question therefore before this court is as to whether the issues raised herein by the Petitioners are issues to do with violations or infringements of fundamental rights protected under the Constitution warranting this court’s intervention in the exercise of its jurisdiction to determine such violations. The Respondents have argued that the instant petition does not particularize with precision the violations they allege have been violated.

57. Indeed, a Constitutional petition is not an ordinary claim but a special jurisdiction where an aggrieved party must plead with precision and specificity any violation, infringement and/or threat to his Constitutional right and fundamental freedom(s). In the case of **S.W.M. VS G.M.N (2012) e K.L.R, Justice Majanja** cited with approval the case of **John Kimani Mwangi Vs Town Clerk Kangema Nairobi Petition No. 1039 of 2007** where he adopted principles of pleading Constitutional infringement with specificity as follows: -

“Our Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights, they must state the provision of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement The reason for this requirement is two fold: First the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by Section 84 of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to man but specific rights defined and protected by the Constitution. It is not sufficient to rely on a broad notion of unconstitutionality but rather point to a specific provision of the Constitution that has been abridged”.

58. **Section 6 of the Wildlife Conservation and Management Act No. 47 of 2013** establishes the Kenya Wildlife Service. The functions of the said entity are spelt out in **Section 7 of the Act**. Its key function includes conservation and management of National Parks, Wildlife Conservation areas and sanctuaries under its jurisdiction among other duties.

59. The petitioners in the petition have averred that respondents have neglected, refused and failed to manage, conserve and protect the ecosystem of the Malka Mari National Park thereby allowing the Degodia communities to settle in the National Park.

60. The petitioners further alleged that the said communities who have settled in the Park poses serious environmental threats to the already fragile ecosystem and will obviously lead to extinction and death of the wildlife in the Park. The petitioner also stated that the communities who are mostly pastoralists are engaged in capturing, harvesting, cropping, hunting and poaching of animals and birds within the Park hence endangering and threatening the ecosystem and habitat.

61. These allegations by the petitioners are not supported by any substantial evidence to show that the Degodia community has encroached and engaged in the alleged criminal activities of capturing, harvesting, cropping, hunting and/or poaching of wild animals within the Park which are criminal activities.

62. The petitioners also alleged that the 3rd respondent has built an Administration Police Post, Police Station, Chief Camp and that the 4th respondent has since presented before the County Assembly a budget for the year 2018/2019 for allocation of funds to finance these illegal constructions in the Park. However, the petitioners have not adduced any evidence in support of the allegations.

63. Coming to the instant petition, the petitioners have cited various Articles of the Constitution but in my view, they have failed to state how the specific provisions allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement. An ordinary person reading the petition would imagine that this petition is about violation, infringement and threat to animal rights and not human rights. I agree with counsel for the 4th respondent that the petition falls short of the precision required in framing of Constitutional issues for adjudication and does not identify how the cited Articles of the Constitution have been violated by the respondents and to what extent.

64. In view of the foregoing, it is clear to this court that the issue raised by the petitioners herein relate to matters to do with wildlife management, protection and conservation, which according to section 117 of Wildlife Conservation and Management Act 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. The Petition as pleaded does not warrant this Court to determine violations and or infringements of rights as alleged by the petitioners. Therefore, it is my finding that the petition ought to fail for want of jurisdiction as held above.

Who will bear the costs of this petition?

65. Costs ordinarily follow the event. However, the petitioner has instituted this petition as a public interest matter. To that extent, I order each party to bear his/her own costs.

Conclusion

66. In view of my finding on the three issues raised hereinabove, I find this Court lacking jurisdiction to hear this case and do proceed to strike it out with each party to bear his/her own costs. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Garissa this 30th day of October, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Ayieko for the Petitioner.
2. Mwalizi holding brief Fatma for the 2nd, 3rd and 5th Respondents
3. Mr. Kakicha for the 1st Respondent.
4. Mr. Issa for the 4th Respondent.
5. Mr. Abdikadir Sheikh for the Interested Party.