



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 143 OF 2011

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOM UNDER ARTICLE 47(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLE 47(2) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

NGURUMAN LIMITED PETITIONER

VERSUS

KENYA CIVIL AVIATION AUTHORITY 1ST RESPONDENT

DIRECTOR GENERAL KENYA CIVIL AVIATION AUTHORITY..2ND RESPONDENT

MINISTER FOR TRANSPORT 3RD RESPONDENT

THE ATTORNEY GENERAL4TH RESPONDENT

JUDGMENT

Introduction

1.The petition before me pertains to the ownership and/or operation of an airstrip known as Laro Airstrip situate on **Title No Narok/Nguruman/ Kamorora/1** which the petitioner wishes to have closed to all air operators. The petitioner alleges that the respondents have violated its constitutional rights under Article 47 by the failure to issue a Notice to Airmen (NOTAM) closing the airstrip as the petitioner had requested in its letter to the 1st respondent dated 25th February 2011.

2. The petitioner also alleges violation of its rights under Article 47 because of the failure by the 3rd

respondent to implement an undertaking allegedly given in Parliament on 22nd February 2011 by the then Assistant Minister for Transport to the effect that the airstrip would be closed upon the petitioner providing the 3rd respondent with an order given by Lady Justice Mugo on 15th May 2009 in **Nakuru High Court Judicial Review Case No 52 of 2009-Nguruman Limited -vs- Kenya Civil Aviation Authority and Director Kenya Civil Aviation Authority**.

3. In the petition dated 23rd August 2011, the petitioner seeks the following orders:

(a) A declaration that under and by virtue of Regulations 14(4) and 29(I) of the Civil Aviation (Aerodromes) Regulations, 2008 no person should operate the Aerodrome known as Laro Airstrip without a valid licence or certificate issued by the 1st Respondent.

(b) A declaration that the petitioner's Aerodromes licence in respect of the Aerodrome known as Laro Airstrip expired.

(c) A declaration that the 3rd Respondent's unequivocal Ministerial undertaking to the Speaker of the National Assembly and the House on 22nd February 2011 in response to question no 679 raised by the Gichugu Member of Parliament Honourable Martha Karua regarding closure of Laro airstrip upon service upon the 3rd respondent of the orders given by the Honourable Lady Justice Mugo on 15th May 2009 in Nakuru High court Judicial Review No 52 of 2009 has been breached and the consequential obligation on the part of the 1st respondent to close Laro Airstrip has been dishonoured.

(d) A declaration that by neglecting, failing and or refusing to comply with and administratively implement the 3rd respondent's unequivocal ministerial undertaking to the Speaker of the National Assembly and the House on 22nd February 2011 to close Laro Airstrip, the 1st and 3rd respondents are in violation of the petitioner's fundamental rights under Article 47(1) of the Constitution.

(e) A declaration that the petitioner as the registered proprietor of title No Narok/Nguruman/Kamorora/1 upon which Laro airstrip is situated and who holds the right to operate the said Aerodrome thereupon, is entitled to be given reasons by the 1st and 3rd respondents for their failure to comply with the 3rd respondent's unequivocal Ministerial undertaking to the Speaker of the National Assembly and the House on 22nd February 2011 to close Laro Airstrip.

(f) A declaration that the failure by the 1st and 3rd respondent to furnish to the petitioner any reason(s) for the failure by the 1st and 3rd respondent respectively to administratively comply with the 3rd respondent's unequivocal Ministerial undertaking to the speaker of the national Assembly and the House on 22nd February 2011 to close Laro Airstrip violates the petitioner's fundamental right under Article 47(2) of the constitution.

(g) A declaration that the failure and or refusal by the 1st Respondent to issue a NOTAM prohibiting the operation of Laro Airstrip by any person(s) contrary to Regulations 14(4) and 29(1) of the Civil Aviation (Aerodromes) Regulations, 2008 and or as required of it by the petitioner on 25th February 2011 violates the Petitioner's fundamental right under Article 47(2) of the constitution to an expeditious, efficient, lawful, reasonable and procedurally fair administrative action by the 1st respondent regarding the issuance of the said NOTAM for the stated purpose.

(h) A declaration that the petitioner is entitled to be given reasons by the 1st respondent for its decision to refuse to issue a NOTAM closing Laro Airstrip so that the said Aerodrome may not be operated by any person(s) contrary to Regulations 14(4) and 29(1) of the Civil Aviation (Aerodromes) Regulations, 2008 and or as required of it by the petitioner on 25th February 2011.

(i) A declaration that the failure by the 1st respondent to furnish the petitioner with reason(s) for the

failure by the 1st respondent to comply with the petitioner's request of 25th February 2011 requiring the 1st respondent to issue a NOTAM closing of Laro Airstrip so that the same may not be operated by any person(s) contrary to Regulations 14(4) and 29(1) of the Civil Aviation (Aerodromes) Regulations, 2008 violates the petitioner's fundamental right under Article 47(2) of the constitution.

(j) A declaration that the failure by the 1st respondent to issue a NOTAM closing Laro Airstrip so that the same may not be operated any person(s) contrary to the petitioner's directive under regulations 13(4) of the Civil Aviation (Aerodromes) Regulations, 2008 of 25th February 2011 violates the petitioner's fundamental rights under article 47(1) of the constitution to an expeditious, efficient, lawful,. Reasonable and procedurally fair administrative action by the 1st respondent regarding the issuance of the said NOTAM for the stated purpose.

(k) A declaration that the petitioner is entitled to be given reasons by the 1st respondent for its decision to refuse to issue a NOTAM closing Laro Airstrip so that the same may not be operated any persons under any circumstance whatsoever contrary to the petitioner's directive under Regulations 13(4) of the Civil Aviation (Aerodromes) Regulations 2008 of 25th February 2011 violates the petitioner's fundamental right under Article 47(2) of the constitution.

(l) A declaration that the failure by the 1st respondent to furnish to the Petitioner reasons for its failure to issue a NOTAM closing Laro Airstrip so that the same may not be operated any persons under any circumstance whatsoever contrary to the petitioner's directive under Regulations 13(4) of the Civil Aviation (Aerodromes) Regulations 2008 of 25th February 2011 violates the petitioner's fundamental right under Article 47(2) of the Constitution.

(m) An order of mandamus directed to the 1st and 2nd respondents compelling them to forthwith comply with and administratively implement the 3rd respondent's unequivocal ministerial undertaking to the Speaker of the National Assembly, Honourable Kenneth Marende and the House on 22nd February 2011 to close Laro Airstrip.

(n) An order of mandamus directed to the 1st and 2nd respondents compelling them to forthwith issue a NOTAM prohibiting the operation of Laro airstrip by any persons contrary to regulations 14(4) and 29(1) of the Civil Aviation (Aerodromes) Regulations, 2008 and or as required of the 1st respondent by the petitioner on 25th February 2011.

(o) An order of mandamus directed to the 1st and 2nd respondents compelling them to forthwith issue a NOTAM closing Laro Airstrip so that the same may not be operated by any person(s) under any circumstance whatsoever contrary to the petitioner's directive under Regulation's 13(4) of the civil Aviation (Aerodromes) Regulations, 2008 of 25th February 2011.

(p) General damages

(q) Interest of (p) above from date of judgment until payments in full

(r) Such other or further relief as this Honourable Court may deem just and fit to grant

(s) Costs of this application

4. The petition is supported by the affidavit of **Moses Loontasati Ololowuaya**, a director and Chairman of the petitioner, sworn on 23rd August 2011 and a further affidavit also sworn by **Moses Loontasati Ololowuaya** on 11th June 2012.

The Petitioner's Case

5. According to the petitioner, it is the registered owner of Title Number Narok/ Nguruman/ Kamorora/1 on which is situated an airstrip known as Laro. The airstrip is in Narok District. It also owns an airstrip known as Koka, also situated in Narok District. The petitioner is also the holder of an Aerodrome Clearance Certificate Ref. OPS/ADK/2454/182 dated 12th December 1991 in respect of Laro Airstrip and Aerodrome Clearance Certificate Ref. CAV/OPS/ADK/2454/100 dated 17th May 1989 in respect of Koka Airstrip.

6. The petitioner avers that by letter dated 11th December 2009, the 2nd respondent informed it that under Regulations 14(4) and 29(1) of the Civil Aviation (Aerodromes) Regulations 2008, no person should operate an aerodrome without a valid license or certificate issued by the 1st respondent, and that since the petitioner's aerodrome licenses had expired, it was necessary for the aerodromes to be inspected prior to renewal of the license at a fee of Ksh20,000,000. The petitioner duly paid the fee required in respect of both airstrips on 28th December 2009. Following the payment, the 1st respondent inspected both Laro and Koka Airstrips on 19th March 2010 after which it wrote to the petitioner on 29th March 2010 informing it that certain shortcomings on Laro Airstrip needed to be rectified before issuance of the licence to operate the airstrips.

7. The petitioner avers that after receipt of this letter, it wrote to the 1st respondent on 24th August 2010 advising that it had closed Koka and Laro Airstrips forthwith for repairs and maintenance, and for the 1st respondent to advise all aircraft operators of the said closure. The petitioner also delivered, on 26th August 2010, a notice to air operators and to the 1st respondent's Chief Air Navigation Services Officer at Wilson Airport on 30th August 2010 advising them that all airstrips situate upon their property, title Number. Narok/Nguruman/ Komorora/1, had been closed with immediate effect.

8. The petitioner alleges that on or about 26th August 2010, it also mobilised its workers in order to effect the repairs on Laro Airstrip as required by the 1st respondent. It states, however, that no sooner had it commenced the repair work than its workers were arrested on or about 28th August 2010 and charged on 31st August 2010 in the Chief Magistrate's Court at Kibera Nairobi in Kibera Chief Magistrate's Court Criminal Case No. 3603 of 2010 with, inter alia, the offence of malicious damage of Laro Airstrip's runway contrary to section 339(1) of the Penal Code. Its director, Mr. **Moses Loontasati Ololowuaya** was also charged with the same offence on 15th March 2011 in Kibera Chief Magistrate's Court Criminal Case No. 981 of 2011.

9. The petitioner avers that on 30th August 2010, one Jan Bonde Nielsen sought orders in **Nairobi Milimani HCCC No 332 of 2010** to compel the petitioner to repair forthwith all damage to the Airstrip "Commonly known as the Ol Donyo Laro airstrip". The court (Koome J) issued an interim order restraining the interference with "the homestead commonly known as Ol Donyo Laro." Thereafter, on 3rd September 2010, the 1st respondent issued two separate NOTAM in respect of Laro and Koka Airstrips closing the two airstrips.

10. The petitioner states however that, despite the closure, and contrary to the express provisions of Regulations 14(4) and 29(1) of the Civil Aviation (Aerodromes) Regulations 2008 and the terms of the letter dated 11th December 2009 from the 1st respondent to the petitioners, the 1st respondent's offices at Wilson Airport's flight briefing Office and in particular the 1st respondent's Chief Air Navigation Services Officer at Wilson Airport over whom the 2nd respondent has overall control, have been permitting private planes to continue taking off from Wilson Airport and land at Laro Airstrip.

11. According to the petitioner, pursuant to a Parliamentary question on the status of Laro Airstrip by Hon. Martha Karua on 22nd February 2011, the 3rd respondent made an undertaking that upon a court order issued by Honourable Lady Justice Mugo on 15th May 2009 in Nakuru Judicial Review No 52 of 2009 being availed, the 1st respondent would close Laro Airstrip. Accordingly, the petitioner furnished to the 1st and 3rd respondents, under cover of its letter dated 25th February 2011, a certified copy of the

orders given by the Honourable Lady Justice Mugo on 15th May 2009 in Nakuru Judicial Review No 52 of 2009. The petitioner avers that this was done for immediate compliance by the respondents as was unequivocally undertaken to the National Assembly and the House on 22nd February 2011 by the then Assistant Minister of Transport.

12. The petitioner states that it also demanded in its letter aforesaid that the 1st and 3rd respondents forthwith comply with the orders given by the Honourable Lady Justice Mugo on 15th May 2009 by issuing a NOTAM to give effect to the orders failing which the petitioner would remonstrate with the Speaker of the National Assembly over the respondents' non-compliance with the Ministerial undertaking.

13. Mr. Michuki for the petitioner submitted that despite the undertaking to the National Assembly, the 1st respondent has neglected failed and or refused to issue a NOTAM closing Laro Airstrip, and its officers have continued to allow private planes to take off from Wilson Airport and land at Laro Airstrip. He contends that the 1st and 3rd respondents are in breach of the Ministerial undertaking to the Speaker of the National Assembly, and consequent to the failure to act in accordance with the Ministerial undertaking, the 1st and 3rd respondents are in violation of the petitioner's fundamental rights under Article 47(1) of the Constitution to an expeditious efficient, lawful, reasonable and procedurally fair Administrative action.

14. The petitioner contends that it is entitled to be given reasons, as the registered proprietor of Title No Narok/Nguruman/Kamorora/1 upon which Laro Airstrip is situate and as the holder of a licence to operate the Airstrip on the property, for the failure by the 1st and 3rd respondent to administratively implement the said undertaking of 22nd February 2011 requiring the closure of Laro Airstrip; that it is adversely affected by the non-implementation by the 1st and 3rd respondent of the Ministerial undertaking of 22nd February 2011 requiring the closure of Laro Airstrip as the airstrip is being unlawfully and illegally operated by unauthorized persons and for unlawful purposes by one Jan Bonde Nielsen and Peter Bonde Nielsen; and that this has resulted in a violation of its rights under Article 47(2) of the Constitution.

15. The petitioner avers that there are several matters pending in various courts relating to the subject matter of this petition. It cites in particular **Nakuru High Court Judicial Review Application No 52 of 2009 Nguruman Limited-vs- Kenya Civil Aviation Authority** in which the petitioner seeks Judicial review orders of certiorari against the 1st and 2nd respondents to bring to the High Court and quash the decision made by the 1st and 2nd respondent on 12th May 2009 to open Laro Airstrip in which Honourable Lady Justice Mugo issued orders on 15th May and 10th June 2009; proceedings filed by the petitioner against **OI Donyo Laro Estate Limited and Jan Bonde Nielsen in Nakuru HCCC No 103 of 2009; Nguruman Limited -vs- Jan Bonde Nielsen Nakuru HCCC No 120 of 2010 and Jan Bonde Nielsen -vs- Hermannus Phillipus Steyn, Hedda Steyn and Nguruman Limited Nairobi Milimani HCCC No. 332 of 2010.** The petitioner also cites **Nakuru High Court Judicial Review application No 99 of 2010 (formerly Nairobi HCMCA No 293 of 2010)** in which it is seeking Judicial Review orders of prohibition against the Commissioner of Police and 5 others to prohibit them from maintaining police presence on its property and involving themselves in any civil dispute arising from matters touching on the dispute between the petitioner, its shareholders and the said Jan Bonde Nielsen.

16. The petitioner contends that this Court has jurisdiction to hear and determine the matter before it for redress of the violation of its fundamental rights under articles 21(1), 22(2)(b),47(1) and (2) of the Constitution by the respondents.

Response by the 1st and 2nd Respondents

17. The 1st and 2nd respondents rely on the replying affidavit of Cyril Simiyu Wayong'o, a legal officer with the 1st respondent, dated 23rd April 2012, and written submissions dated 12th July 2012. Mr.

Wayong'o depones that the 1st respondent had, pursuant to advice by the petitioner via email on 30th March 2009 to close the Laro Airstrip on safety and security concerns, issued a Notice to Airmen (NOTAM) on 4th April 2009 closing Laro Airstrip. However, on 28th April 2009, **Ol Donyo Laro Estate Limited**, which had been operating the Laro Airstrip pursuant to commercial/business arrangements with the petitioner, wrote to the 1st respondent complaining about the closure of the airstrip and stating that there were no security threats or safety concerns at the said airstrip to warrant its closure.

18. The 1st respondent avers that following the complaints by **Ol Donyo Laro Estate Limited**, it conducted an inspection of the airstrip on 30th April 2009, ascertained the security and safety situation at the airstrip and recommended issuance of a Clearance Certificate with Limitations until appropriate action was taken on its recommendations, which included resolution of the commercial dispute between the petitioner and Ol Donyo Laro Estate Limited. Thereafter the 1st respondent issued a NOTAM reopening the airstrip, which precipitated the filing of Nakuru Judicial Review Application No. 52 of 2009 by the petitioner seeking orders of certiorari and prohibition.

19. Mr. Wayong'o depones that the orders of the court issued on 15th May 2009 did not direct the 1st and 2nd respondent to close the Laro Airstrip. Indeed, the respondents point out in their submissions that the order as extracted by the petitioner did not accord with the orders of the court: the court had only given leave to file judicial review proceedings while the order as extracted gave final orders of certiorari and prohibition.

20. The respondents aver further that as at 17th February 2011, when the issue of compliance with the orders in Nakuru JR No 52 of 2009 arose in Parliament, there were no orders subsisting and capable of obedience. Further, on 2nd June 2009, the petitioner had filed a notice of withdrawal of proceedings in Nakuru JR No 52 of 2009 and the court wholly discontinued the proceedings against the 1st and 2nd respondents. When the petitioner applied on 10th June 2009 to set aside the orders granted on 2nd June 2009 withdrawing the proceedings against the 1st and 2nd respondents, the court granted the petitioner's application and revived the proceedings, reinstated the leave granted on 15th May 2009 and extended it for 15 days from 10th June 2009. The respondents therefore contend that the Ministerial undertaking given by the Assistant Minister for Transport on 22nd February 2011 is not capable of enforcement as it was based on a non-existent court order.

21. The respondents also contend that their only responsibility with respect to private airstrips is to inspect them to ascertain that they meet the required safety and security standards, and to issue licenses to their operators. They contend that it is the responsibility of the operator of an aerodrome to keep the aerodrome free of unauthorized persons and, accordingly, it is not the responsibility of the 1st respondent to determine the aircrafts that can fly into Laro Airstrip as the airstrip is private property. They submit that the petitioner, as the legal owner of the land on which the Laro Airstrip is situated, is at liberty to pursue other legal means to bar any person from operating the Airstrip.

22. The 1st and 3rd respondents also point out that this court has no jurisdiction to entertain this petition as it is one in a series of suits relating to the same subject matter. They refer in this regard to **Nairobi Milimani High Court Civil Case No. 332 of 2010** in which the petitioner in this case is the 3rd respondent. The issue in contestation in that case appears to be the issue of shares in the petitioner or ownership of the land on which the airstrip is situated. They also cite Kibera Criminal Case No 3603 of 2010 and 481 of 2011 in which the plaintiff in Milimani HCCC No. 332 of 2010 is the complainant, which relate to malicious damage to the Laro Airstrip; **Nakuru HCCC No. 103 of 2009** involving the petitioner and Ol Donyo Laro Limited; **Nakuru High Court Civil Case No. 120 of 2010** in which the petitioner is the plaintiff; **Judicial Review Case No. 172 of 2010** where the petitioner is the applicant, and **Nakuru Judicial Review No. 52 of 2009** in which the issue is the NOTAM issued by the 1st respondent in May 2009.

23. With regard to the alleged Ministerial undertaking to Parliament, the respondents contend that such

statement cannot give rise to administrative action as it was issued pursuant to Rule 41(2) of the Parliamentary Standing Orders which relates to seeking information and pressing for action, and it is therefore not a decision to which Article 47 of the Constitution applies.

24. The respondent denies authorising flights to Laro Airstrip, pointing out that the documents relied on by the petitioner in support of its contention that such flights have been authorised have been prepared by 3rd parties and received by 3rd parties, and do not therefore amount to authorization by the 1st respondent. The 1st respondent contends, however, that even if the said documents were to form the basis of authorisation, at the time of the manifests, the orders of the court in JR 52 of 2009, which had been issued in May 2009, had lapsed. The 1st respondent therefore asks the court to dismiss the petition with costs to the respondents.

Response by the 3rd and 4th Respondents

25. In opposing the petition, Mr. Wamotsa for the 3rd and 4th respondents relied on the written submissions dated 12th April 2012. Mr. Wamotsa agreed with the submissions of Counsel for the 1st and 3rd respondent that a Ministerial statement cannot form the basis for action by the 1st respondent, failure to act on which would amount to a violation of the petitioner's right to fair administrative action. As a corporate body established under the provisions of the Civil Aviation Act, Cap 394, it has a procedure for making decisions and does not rely on Ministerial statements to make decisions. It also has a board of directors established under section 4 of the Act, and the management and control of the 1st respondent is vested in the Board.

26. With regard to the orders of the court issued on 15th May 2009 in JR 52 of 2009, the 3rd and 4th respondents took the position that the orders had lapsed, and cannot be enforced by this court. They submitted therefore that the petition did not raise any constitutional issue and ought to be dismissed.

Determination

27. The petitioner alleges violation of its constitutional rights under Article 47 of the Constitution. The basis of its complaint is the Ministerial statement made in Parliament on 22nd February, 2011. The petitioner alleges that failure to comply with the undertaking and close Laro Airstrip as ordered by the court in its order of 15th May 2009 in **Nakuru High Court Judicial Review Case No 52 of 2009-Nguruman Limited -vs- Kenya Civil Aviation Authority and Director Kenya Civil Aviation Authority** has violated the petitioner's right to fair administrative action as contained in Article 47.

28. The issue that would arise for determination in this matter is whether a Ministerial statement in Parliament amounts to a 'decision' in relation to which orders of judicial review can be made against the respondents. The parties before me have submitted at length on this issue, and have provided various authorities in respect of their respective positions on the issue. However, I believe that the facts before me do not require an examination or determination of this issue.

29. Having considered the respective submissions of the parties and their pleadings in this matter, I have come to the conclusion that this petition must fail, demonstrating as it does, in the pleadings of the petitioner itself, its fundamental weaknesses.

30. The core of the petition is a Ministerial statement made in Parliament in which the Assistant Minister in charge of Transport allegedly undertook to close Laro Airstrip once the Ministry received an order of the Court issued in Nakuru Judicial Review Case No 52 of 2009. The petitioner thereafter sent a copy of the order to the respondents, and by its letter dated 25th February 2011 demanded that the 1st respondent acts in accordance with that Ministerial statement.

31. My perusal of the Constitution, the statute governing the respondents, or the decisions cited by the

petitioner reveals no provision or precedent that imposes an obligation on the respondents to act on the basis of a statement made in Parliament. Even where the basis of that statement is a court order, the respondent cannot, in my view, be required to act on a Ministerial statement with regard to that order. The manner in which compliance with an order of the court is enforced is, I believe, clear: the petitioner has the right to file an application for contempt of the court order should there be disobedience of the court order, and the court has jurisdiction to enforce its own orders.

32. However, even had it been lawful for the respondent to act on the basis of the Ministerial statement issued in reliance on the court order, the court order relied on varies demonstrably from the order made by the court in **Nakuru High Court Judicial Review Case No 52 of 2009-Nguruman Limited -vs- Kenya Civil Aviation Authority and Director Kenya Civil Aviation Authority**. As correctly submitted by the 1st respondent, the order of the court as indicated in the proceedings annexed to the petitioner's affidavit as **MLO-19(c)** was in the following terms:

'Based on the grounds set out in the application, which raises matters of security concerns I hereby grant the leave sought under prayer 3 for 21 days during which time the applicant must institute and serve the JR proceedings as intended. Failure to do so within the said period shall mean that the leave granted herein shall automatically lapse.'

33. The order which was extracted and which the petitioner relies on is annexed to the petition as annexure **MLO-19(a)**. The said order in effect grants what cannot lawfully be granted at the application for leave stage, couched, as it is, in the following terms at orders 1, 2, 3, 4 and 5:

IT IS HEREBY ORDERED:

1. THAT the application is certified as urgent.

2. THAT the NGURUMAN LIMITED the applicant herein be and is hereby granted leave to bring a judicial review application.

3. THAT an order of certiorari be and is hereby issued to bring the High Court the 1st and 2nd Respondents decision made on 12th May, 2009 contained and reflected in a Notam issued on the even date opening the aerodrome known as Laro Airstrip situate of the property known as Title No. Narok/Nguruman/Komorora/1 for operations for the purpose of being quashed.

4. THAT the 1st and 2nd defendants whether by itself its agents or howsoever be and are hereby restrained by an order of prohibition from opening the aerodrome known as Laro Airstrip situated of the property known as Title No. Narok/Nguruman/Kamorora/1 for Civil Aviation (Aerodromes) Regulations, 2008.

5. THAT leave is hereby granted for 21 days during which time applicant must institute and serve the judicial review proceedings as intended. Failure to do so within the said period shall mean that the leave granted herein shall automatically lapse.'

34. As the court had not granted the above orders as is clear from the proceedings, and in particular had not granted orders 3 and 4 set out above, it would appear that an order that was not based on the proceedings before the court, or the orders that the court granted, is being used as the basis for enforcement of a Ministerial statement and for alleging violation of the right to administrative action. In my view, it is not permissible for a party to rely on a questionable court order to seek redress from this court.

35. A third reason for this petition to fail is the multiplicity of suits pertaining to the same subject matter now pending before the High Court in Nairobi and Nakuru. Since 2009, judging from the pleadings so obligingly annexed to the petitioner's affidavit in support of the petition, no less than five (5) suits have been filed, either by the petitioner, or parties with which it is embroiled in a dispute either on the

ownership of the property on which the Laro Airstrip is located, or the operations of the Airstrip itself. In addition to **Nakuru High Court Judicial Review Case No 52 of 2009-Nguruman Limited -vs- Kenya Civil Aviation Authority and Director Kenya Civil Aviation Authority**, there is **Nakuru HCCC No 103 of 2009- Nguruman Limited –vs- Ol Donyo Laro Estate Limited and Jan Bonde Nielsen**; **Nakuru HCCC No 120 of 2010 Nguruman Limited –vs- Jan Bonde Nielsen** and **Nairobi Milimani High Court Civil Case No. 332 of 2010 Jan Bonde Nielsen –vs- Hermannus Phillipus Steyn, Hedda Steyn and Nguruman Limited**; and **Nakuru High Court Judicial Review Application No 99 of 2010** formerly Nairobi **HCMCA No 293 of 2010**.

36. The 1st respondent has also made reference to **Judicial Review Case No. 172 of 2010**, in which the petitioner is the applicant, as also pending between the parties in relation to the said Laro Airstrip. The pendency of all these matters, all between the same parties or parties through whom they claim, litigating on the same subject matter, is, to my mind, in violation of the provisions of Section 6 of the Civil Procedure Act

37. It appears, therefore, that in the circumstances of this case, the attempt by the petitioner to enforce the orders of the court in **Nakuru High Court Judicial Review Case No 52 of 2009** through this petition by alleging a violation of its rights under Article 47 of the Constitution and seeking orders of Mandamus to compel the 1st respondent to close the Laro Airstrip amounts to an attempt to steal a march on the other parties to the dispute over the airstrip. Should there be a violation of the fundamental rights of the petitioner, the High Court seized of any and all of the above matters has the same jurisdiction as this court under Article 165(3)(b) and Rule 23 of the Gicheru Rules to hear and determine the constitutional issue(s) that arise in the cases.

38. I believe that the proper course for the petitioner to follow is to pursue the determination of the pending cases, which would lead to a determination of the ownership and shareholding of the subject property, should that be the core issue behind all the litigation now before our courts. Any determination of this matter on its merits, such as they are, would prejudice the hearing and determination of the other matters now pending before various courts, and would lead to a miscarriage of justice and be an abuse of the court process.

39. For the above reasons, this petition is dismissed with costs to the respondents.

Dated Delivered and Signed at Nairobi this 8th day of May 2013.

MUMBI NGUGI

JUDGE

Mr. Michuki instructed by the firm of A. F. Gross & Co. Advocates for the Petitioner

Mr. Munyi instructed by the firm of Sisule Munyi Kilonzo & Associates Advocates for the 1st and 2nd Respondents

Mr. Wamotsa instructed by the State Law Office for the 3rd and 4th Respondents.

