



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**PETITION J.R NO. 35 OF 2010**

**BEN T KIPENO.....PETITIONER**

**-VERSUS-**

**MASAI MARA NORTH CONSERVANCY LIMITED.....1ST  
RESPONDENT**

**KENYA TOURISM FEDERATION.....2ND RESPONDENT**

**JUDGEMENT**

1. The Petitioner herein alleges that at all material times hereto he was the absolute proprietor of the parcel of land known as Title No. CIS Mara/Koiyaki/Daguruguruet/295 (hereinafter referred to as the suit land). The said parcel of land is located in Koiyaki Area of Masai Mara and is close to but outside the Masai Mara Game Reserve. The 1st Respondent is a limited liability Company whose shareholders according to the Petitioner, include expatriates working in Kenya. The 2nd Respondent is a firm or association of traders in the Tourism Sector which was formed to protect their interest.

**THE PETITIONER'S CASE**

2.The Petitioner's case is that the suit land was originally trust land and was held by the County Council of Narok in trust for the community under the Trust Land Act Cap 288 Laws of Kenya.Subsequently the Government issued titles to individual members of the local community for the parcels of land that they owned within the Trust. After the adjudication, the suit land was designated as Agricultural land and all the wildlife in the area was to be moved to the Masai Mara Game Reserve. The 2nd Respondent was aware of the subdivision and adjudication and did not raise any objection.

3. The Petitioner further states that despite the change of user of the suit land, he decided not to carry out farming activities but instead chose to preserve the natural habitat on the land. Consequently some Leopards, which should have been moved to the Game Reserve remained on his land. Several of his neighbours also maintained their parcels uncultivated and in order to enhance the economic value of their properties they formed a company known as Masai Mara Leopard Gorge Conservancy. To enable the company fulfill its objectives, each shareholder and land owner agreed to lease its land to this company for a period of 20 years. The consent of the Land Control Board was sought and granted on 20th August, 2009 and the lease document subsequently registered. The company then set up a small tented camp on the suit land to generate income and create an economic enterprise.

4. The Respondents without the petitioner's consent entered into his property and converted it to their own commercial use by bringing tourists thereon for game viewing and camping. The Masai Mara Leopard Gorge Conservancy Company subsequently complained to the Local District Commissioner who by a letter dated 17th December, 2009 wrote to the 1st Respondent seeking an explanation and further

urging the parties to settle the matter amicably but the 1st respondent did not respond or make any payments to the petitioner.

5. The Respondents were not happy with the operation of the conservancy. The 1st Respondent filed an appeal before the National Environment Tribunal (**NET**) claiming that the petitioner had no right to undertake human activity or developments on his property as it was a breeding ground for leopards.

6. By these actions the petitioner feels that the respondents have infringed on his Constitutional rights and in particular-

1. The right to privacy and protection from deprivation of his property without compensation under S. 70 and 75 of the Constitution
2. the right to assembly and association under S. 80
3. protection against arbitrary search and entry under S. 76
4. the right not to be subjected to slavery or servitude under S. 73
5. the right not to be subjected to inhuman or degrading treatment under S. 74
6. the right not to be discriminated by the law in the enjoyment of his rights under S. 82
7. the right to secure protection of the law in safeguarding his property under S. 77

7. The Petitioner now seeks the following orders:

1. A declaration that the Respondent's entry onto the Petitioner's property without his consent and his claim to manage and control the use of the Petitioner's land contravenes his fundamental rights and freedoms under S.70 (c), 75, 76 and 77 of the Constitution.
2. A declaration that the Respondents use of the Petitioner's land for commercial purposes is an act of exploitation and contravenes the Petitioner's fundamental rights and freedoms
3. A declaration that the Respondents' claim that no human activity or development should be undertaken on the suit property contravenes the Petitioner's right under S. 70, 73, 74, 75, 77 and 81.
4. That the Respondents do account and pay the Petitioner all the income derived from the management and use of the suit land.
5. That a permanent injunction be granted to restrain the Respondents by themselves, their servants and/ or agents from entering into the suit land without the Petitioner's consent
6. That a permanent injunction be granted to restrain the Respondents by themselves, their servants and/ or agents from making any claim to manage or control the suit land or seeking to restrict or interfere with the Petitioner's enjoyment of the said property.
7. That the Respondents do bear the costs of the suit.

8. The Petitioner relied on his affidavit sworn in support of the petition on 26th February, 2010, a further affidavit sworn on 29th March, 2010 and submissions filed on 23rd January, 2013.

### **The 1st and 2nd Respondents' case**

9. The Petition herein was opposed by the Respondents. The 1st Respondent relied on the affidavit of Martin Sonderby Nielsen sworn on 26th January, 2010 and filed on 23rd March, 2010.

10. The 1st Respondent operates a private conservancy made up of about 600 parcels of land in the areas known as Koiyaki and Lemek located outside the Masai Mara Game Reserve within Narok South District. It partners up with members of the communities in the said areas in conservation of wildlife resources and preservation of the ecological biodiversity so as to ensure the improvement of tourism resources in the area. The Petitioner's parcel of land is adjacent to the several parcels of land falling under the conservancy.

11. The 1<sup>st</sup> respondent denies that it had claimed ownership, control, management or any other proprietary rights over the Petitioner's parcel of land or that it had entered into or trespassed into the suit land whether by itself, its agents or servants. In particular the 1st Respondent denies operating tourist

camps, lodges or receiving guests or tourists in the Masai Mara. The tourists who come to the Mara are brought therein by specific tourist camps and lodges which decide which of the several conservancies in the Mara to visit including that of the 1st Respondent.

12. The company known as Masai Mara Leopard Conservancy Limited, wherein the Petitioner is a Shareholder currently operates a tented tourists camp in the Mara without an Environment Impact Assessment License (EIA License). The 1st Respondent therefore instituted proceedings before **NET** where he sought, *inter alia*, that the project site be investigated, and demolition and appropriate Environmental restoration orders be issued; That this petition is actually intended to scuttle and delay the expeditious disposal of the matter before **NET** and that the averments in the affidavit sworn by Mr. Marc Goss in NET Appeal No. 40 of 2009 had been taken out of context with an intention to mislead the court.

13. The 2nd Respondent opposed the Petition and relied on the replying affidavit sworn by Lucy Karume, the Chairperson of the 2nd Respondent on 23rd March, 2010. It is deponed that the 2nd Respondent is neither a trading nor a commercial entity and does not own or operate any tourists' facility in Masai Mara or elsewhere through which it would bring tourists to the suit land. It therefore denies entering into, managing, controlling or conducting any commercial activities on the Petitioner's parcel of land.

14. The 2nd Respondent agrees with the 1<sup>st</sup> respondent that the petition herein is intended to delay the determination of NET 40/2009 where it has been enjoined as an interested party and its involvement in that matter is purely conservation and preservation of the ecological bio-diversity of the Masai Mara ecosystem. It had filed a similar case in 2006 for the cancellation of an EIA License to a company known as Wasafiri Limited. The case was allowed and the approval quashed by the **NET**. It is this same project that was revived by the Petitioner's company and this Petition is actually meant to protect the commercial interests of the company and has nothing to do with the fundamental rights and freedoms of the Petitioner. The filing of bona fide legal proceedings cannot amount to infringement of fundamental rights and freedoms as this is a right that has been guaranteed to the Respondents under Article 48 of the Constitution. In any event if the Petitioner's rights have been infringed as alleged, which is denied then the remedy if any lies in the tort of trespass and criminal proceedings for conversion.

15. The Respondents' further contended that the Petitioner's rights are not absolute and are subject to statutory and constitutional limitations. In addition, the issues raised herein are private law matters which this court does not have the jurisdiction to deal with. According to the Respondents, the Petitioner ought to have been enjoined in NET 40 of 2009 to explain how his use of the property would not cause harm to the property and therefore they should be allowed to operate without a license. On the claim of ownership, he should have commenced civil proceedings whereupon the proprietary rights of the parties would be adjudicated. On the allegation of entering or using the Petitioner's parcels of land, the Petitioner ought to have sought an injunction.

16. The Respondents also raised a preliminary objection that the petition was fatally defective and ought to be dismissed as the Petitioner had failed to serve the same within the stipulated 7 days which provision was couched in mandatory terms. He also objected to the petition on the ground that the Petitioner lacked *locus standi* to bring any proceedings in a case of alleged breach of the right to use or enjoy the use of the land as the same had been leased to a 3rd Party. The objections were determined and dismissed by the court by its ruling made on 17th June, 2011.

17. The Respondents filed joint submissions dated 14th February, 2013. The synopsis of their submissions is that the court, in considering the petition must first be satisfied on the basis of the evidence placed before it that the acts complained of were indeed done by the Respondents. It should then consider the conceptual structures of the limitation to the rights and freedoms and in particular the constitutional and statutory limitations imposed on those rights. The Petitioner had failed to demonstrate how the Respondent had infringed his right from being held in slavery, servitude, inhuman and degrading treatment.

18. I have considered the pleadings and submissions of the parties and I find the issues for determination to be as follows-

- (a) whether the Petitioner's rights were violated
- (b) whether the Petitioner is entitled to the remedies sought.

### **Violation of the Petitioner's rights**

19. The Respondents claim that the issues raised by the Petitioner are governed by private law and have nothing to do with the Bill of Rights. Therefore the Petitioner should have sought remedies before the proper forums. It is also suggested that the duties imposed by the Constitution can only be enforced against the State and not individuals and such an action cannot be maintained against an individual.

20. There are several High Court decisions which have dealt with the issue whether a private individual can maintain an action for declaration against another private individual or individuals for breach of fundamental rights. In those decisions the Courts have held that the rights and duties of individuals are regulated by private law and the duties imposed by the Constitution under the fundamental rights provisions are owned by the State and not private individuals. That the duty to uphold human rights under Article 21 is vested on the state and not on the citizens.

In **Martha Karua vs. Radio Africa t/a Kiss f.m Station & 2 Others Nairobi High Court Civil Suit No. 288 of 2004**, it was held-

*“.....the fundamental rights and freedoms apply vertically not horizontally and are secured, guaranteed and protected by the state and the plaintiff as a person in the suit articulating her individual right to a fair hearing and cannot under the Constitution be liable to the Defendant for any violation.”*

21. However, the courts have also held that each case should be determined on its specific and unique circumstances. In a petition, the court should be concerned with whether the acts complained of were committed and amounted to an infringement of the petitioner's rights and what reliefs should thereafter be accorded. In the Court of Appeal case of **Rashid Odhiambo Aloggoh & 245 Others vs Haco Industries Ltd, Civil Appeal No.110 of 2001**, where the Court dealing with an appeal in which the High Court had refused to deal with the issues because there were other lawful avenues through which the Appellant could ventilate them held thus-

*“...with respect to the learned judges of the High Court, they erred in holding that the Appellants had other lawful avenues in which they could go to ventilate their grievances.*

*What should the Constitutional Court have done? In our respective view, it should have considered whether or not the allegations made by the Appellants were true. It appears that the parties were prepared to have the factual issues which they raised to be determined on Affidavit evidence.*

*We do not know how the Constitutional Court would have gone about this, but since this was an Originating Summons, some assistance could have been derived from the provisions of Order 36 Rule 10(1) of the Civil Procedure Rules which allow the Affidavits to be treated as pleadings and there after the parties allowed to give viva voce evidence from which the Court would be able to make up its mind on which side of the divide the truth lays. The burden of Court, would have been on the Appellant to show the Court that the facts on which they based their claim were true. If the Court had found that the facts as put forward by the Appellant were not true, then that would have been the end of the matter...But if the Court found that the facts were as stated by the Appellants, the Court would have to move to the next stage namely, do the proved or admitted facts constitutes or amount to violation or contravention of the Constitution? In determining that issue, the court would be entitled to consider the various statutory provisions relied on by the Appellants ... the facts, if they were to be found to be as*

***stated by the Appellants, amount to or constitute a contravention of Sections 73, 74, 80 of the Constitution as contended by the Appellants ... then in that event the Court would move to the last stage, namely the remedy of remedies to which the Appellants would be entitled to ...***

22. In the present case, the matter concerns the interference with the Petitioner's use and enjoyment of land as well as a claim to ownership by the Respondents. These are matters that can be dealt with under the realm of Private law and the Petitioner's interests to the property can be protected and upheld by the remedies provided for under land law, tort and civil law. However, it is my view that this does not bar the Petitioner herein from being heard by this court. In order to be granted the reliefs sought, a petitioner in a constitutional matter is expected to plead the particular provision that he alleges to have been contravened, cite the act which he alleges to have been contravened and the manner in which the said act contravened his rights aforementioned. In the case of **Anarita Karimi Njeru vs Attorney General [1979] KLR 154** the court held that in matters concerning enforcement of fundamental rights and freedoms, a Petitioner must plead with particularity that of which he complains, the provision said to be infringed and the manner in which the particular right is violated. Similarly in **Matiba vs. Attorney General High Court Misc. Applic. No. 666 of 1990** the court held that-

***“ An applicant in an application under Section 84 of the Constitution is obliged to state his complaint, the provisions of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the section. It is not enough to allege infringement without particularizing the details and manner of infringement.”***

and in **Uasin Gishu Memorial Hospital Limited vs. Moi Teaching and Referral Hospital Board & 2 Others High Court Misc Civil Case No. 12 of 2006** -

***“From our perusal of the Originating Summons and the affidavit, in support, the Plaintiff has not specifically pleaded on how its right to life, liberty, security, protection of the law have been infringed. It is trite law that one approaching the court under Section 84 for enforcement of his rights must plead with particularity that which he alleges, the section, paragraph or sub-paragraph which has been, is being or is likely to be infringed.”***

23. However, the court in **Trusted Society of Human Rights Alliance vs. AG & 2 Others [2012] eKLR** having regard to the above finding held that the court is bound to determine matters on their merit and where the matter in issue could be deciphered from the pleadings then the court is bound to determine such matter even where the particulars of breach have not been specifically pleaded. It stated-

***“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”***

24. In the present case, the Petitioner alleges that the Respondents had claimed ownership and managerial rights over his property: That they had without his consent entered therein and converted it to their own commercial use and profit by bringing tourists thereon for game viewing and camping thus

depriving him of income. It was his submission that by these actions, the Respondents had denied him the right to privacy and protection from deprivation of his property without compensation under S. 70 and 75 of the Constitution, protection against arbitrary search and entry under S. 76 and the right not to be subjected to slavery or servitude under S. 73 of the Constitution.

25. The right to property provides that a person is entitled to acquire, own or dispose property of any description anywhere in the country. It also prohibits the state from arbitrarily dispossessing a person of his property without compensation. There was no evidence submitted in this case that this right has been infringed by any acts of the Respondents. Firstly, the fact that the Petitioner is the legal owner of the suit property is admitted by all parties. The Respondents have denied making any claim and the Petitioner has not established any action by the Respondents that has prevented him from owning, acquiring or disposing of his property or evidence furnished of an attempt to compulsorily acquiring the property as alleged. He has not furnished particulars of instances when the Respondents herein claimed entitlement to his property.

26. The principle under Article 27 is that all persons are equal before the law and none is entitled to specialized treatment. That the laws made apply to and benefit all persons to whom they relate and they are not to be impartially applied or administered. Discrimination refers to preferential treatment that is accorded to a person either on the basis of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. The provision may only be violated by a difference in treatment between persons who are in comparable situations which has objective and reasonable justification.

27. It is true that the Petitioner has a right to equal protection and equal benefit of the law and is entitled to full and equal enjoyment of all rights and fundamental freedoms. It is also true that he has the right of protection of the title deed issued to him under the Registered Land Act (*Repealed*) and to benefit like all the other title holders from the benefits conferred to him under the said statute. However the petitioner herein has not demonstrated that he had unfairly and without justification been subjected to different treatment or the law applied differently to him by the Respondents or at all. He has not established that he has been denied an entitlement that had been accorded to him by the law by the actions of the Respondents as a result of which his right to equality has been infringed.

28. It is not contested that the Petitioner is the absolute owner of the suit land and as owner he is vested with powers to invest or conduct such activities thereon as he deems fit without undue influence by third parties. In this particular case, the Petitioner admits that he willingly decided not to cultivate his parcel of land thus allowing leopards to continue living on the natural habitat that he had maintained.

29. Human rights are not absolute and are subject to the statutory and constitutional limitations. Whereas the suit land is private property, use thereof is subject to Section 3 of the Environment Management and Coordination Act (**EMCA**) No. 8 of 1999 which provides that everyone is entitled to a clean and healthy environment. The Petitioner's property is situated next to the Masai Mara National Park which contains natural resources and wild animals and he has conceded that there are Leopards on his property which he intends to use for profit.

30. Section 58(1) makes it mandatory for anyone seeking to undertake the projects listed under the Second Schedule of (**EMCA**) to cause to be undertaken an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project will issue an environmental impact assessment license to the applicant. Amongst the projects for which an assessment impact report is required under the 2nd Schedule is commercial exploitation of fauna and flora.

31. This is a requirement placed on all land owners who intend to put their land to such use and not the Petitioner alone. The filing of suits before the **NET** by the Respondents on the above provision did not in any way infringe the rights of the Petitioner as alleged. They only sought to ensure the compliance with the law for their own benefit as well as that of the Public at large. It has not been demonstrated that this requirement was enforced unfairly against the Petitioner as compared to other land owners who were in a similar position.

32. From the foregoing, I find that none of the allegations made against the Respondents herein have been proved at all or any unlawful act on the part of the Respondents. It is my view that the grievances stem from the cancellation of the Environmental Impact Assessment License to a company known as Wasafiri Limited as a result of which he is unable to carry out the commercial activities he intended to on his parcel of land. It is that cancellation that should be challenged through the statutory mechanisms provided for.

33. I therefore dismiss the petition with costs to the Respondents.

**Dates, signed and delivered in open court at Nakuru this 8<sup>th</sup> day of November 2013**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mr Karanja Mbugua holding brief for Oyatsi for the petitioners

N/A for Respondents

CC: Kennedy Oguma

**L N WAITHAKA**

**JUDGE**