



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

PETITION NO. 3 OF 2018

IBRAHIM MOHAMUD IBRAHIM.....1ST PETITIONER

ABDI DIMA YAKUB.....2ND PETITIONER

AND

KENYA WILDLIFE SERVICE.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF WILDLIFE

AND TOURISM.....2ND RESPONDENT

CABINET SECRETARY MINISTRY OF INTERNAL

SECURITY AND COORDINATION.....3RD RESPONDENT

MANDERA COUNTY GOVERNMENT.....4TH RESPONDENT

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

RULING

A. INTRODUCTION

1. The petitioners filed the instant petition dated 9th October, 2018 and contemporaneously filed a Notice of Motion also dated 9/10/2018 brought under certificate of urgency seeking various conservatory orders to issue against the respondents named therein. The petitioners in their petition seek numerous prayers.

2. In response to the petition and the application seeking conservatory orders, the 4th respondent filed a Notice of Preliminary Objection dated 5th April, 2019 seeking the dismissal of both the petition and the motion on the grounds that:-

1) 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.

2) THAT this Honourable Court 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.

3) 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 the Jurisdiction as held by the Supreme Court in the case of Communication Commission of Kenya & 5 Others vs Royal Media Services & 5 Others, [2014] eKLR.

4) THAT the petition is defective and ought to be struck out as it does not disclose any cause of action or plead with specify 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] eKLR.

5) 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

B. BACKGROUND

3. The genesis of this petition as per the petitioners' allegations is the 4th respondent presentation of a budget to Mander County Assembly for the financial year 2018/2019 allocating finances for Infrastructure development within the area covered by Malka Mari National Park. The petitioners contest the same arguing that it is being conducted without public participation, Environmental Impact Assessment approval by NEMA or National Land Commission.

4. The petitioners allege that Malka Mari National Park which covers an area of 876 Kilometres square lying along Daua River on Kenya-Ethiopia Border was declared a National Park vide Legal Notice No. 338 dated October, 1989 under the provisions of Section 6 (1) of the Wildlife (Conservation and Management) Act Cap 376.

5. The Petitioners in sum allege that the respondents have neglected, refused and failed to manage, conserve and protect the ecosystem of Malka Mari National Park, which has led to invasion of the park by communities including Degodia Community to the great detriment of the heritage of the communities living within Mander County and Kenya at large.

6. It is their case that the building of schools, dispensaries and construction of roads within the park and encouraging communities to settle in the Park negatively affects the ecosystem and threat to the rare animal species residing in the Park which is a source of tourist attraction.

SUBMISSIONS

7. The 4th respondent filed their submissions dated 5th March, 2019 and filed on 8th March, 2019 in support of their Preliminary Objection. It is their argument that this Honorable Court lacks the Jurisdiction at this stage to hear the instant petition by the petitioners under Section 117 of the Wildlife Conservation and Management Act. No 47 of 2013; and that this Court Jurisdiction is appellate.

8. They submitted that Section 117 of the Wildlife Conservation and Management Act provide that disputes that may arise in respect to wildlife management, protection and conservation shall in the first instance be referred to the lowest possible structure under the devolved system of Government. In this, they argue that the petitioners should have raised their issues with the County Government of Mander County, failure to resolve it, they would then refer the matter to the National Environment Tribunal wherein an appeal would lie to this Court. They argue that the petitioners' first port of call should be the Sub-County Offices at Malka Mari Ward or the Mander County Assembly.

9. It is their submissions that the petitioners' failure to comply with such clear statutory provisions renders their petition defective and ousts the Jurisdiction of this Court under the statute. In support of their Preliminary Objection the 4th respondents relies on the following Authorities:- **Owners of the Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd [1986-1989] EA 305, Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 others [2012] eKLR, Speaker of the National Assembly vs Karume [1990-1994] EA 549, Narok County Council vs Trans Mara County Council (2000) 1 EA 161, International Center for Policy and Conflict and Others vs Attorney General & Others [2013] eKLR, Communication Commission of Kenya & 5 Others vs Royal Media Services and 5 Others, [2014] eKLR and Gabriel Mutava & 2 Others vs Managing Director Kenya Ports Authority and Another [2016] eKLR among others.**

10. Further, the 4th respondent submitted that the petition is defective as it does not meet the degree of precision required and does not disclose any reasonable cause of action, arguing that it is intended to settle a political question. It fails the principle in **Annarita Karimi Njeri vs Republic [1976-1980] KLR 1272.**

11. Furthermore, the 4th respondent submits that the petition violates the right to fair hearing by seeking orders for evictions against persons and communities who are not party to the petition.

C. ANALYSIS AND DETERMINATION

12. It is trite law that when a point of law, that goes to the jurisdiction of the court is raised, the court must first deal with that issue before proceeding with any other matter. In the often cited case of **Owners of the Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd (1989) KLR 1, Nyarangi, J.A** held:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.”

13. Consequently, this Court must first deal with the issue of jurisdiction as raised by the 4th respondent herein, before delving into any other issue.

14. I have considered the detailed submissions filed herein by the respective parties and the authorities I was referred to, and therefore am going to deal with the issues as to whether this Court has the Jurisdiction at this juncture to adjudicate this petition.

15. The Court of Appeal in the case of **Karisa Chengo & 2 Others vs Republic (Criminal Appeal Nos. 44, 45 and 76 of 2014 (2015) eKLR** while commenting on the above case of **Owners of Motor Vessel 'Lillian S'** noted that:-

“Assumption of jurisdiction by the Courts is a subject regulated by the Constitution, by statute law and by principles laid down in judicial precedent. The classical decision in this regard is the *Owners of Motor Vessel ‘Lillian S’ vs Caltex Oil (Kenya) Ltd (1989) KLR 1.*

The ‘Lillian S’ case establishes that jurisdiction flows from the law, and the recipient Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.....”

16. In the petition filed herein, the petitioners seek the following declarations and orders:-

a) A permanent injunction restraining the respondents from undertaking, commissioning or awarding any tenders for construction or developments of any structures of whatever nature, allotting plots to squatters and/or settlers or doing anything within Malka Mari National Park that would be hazardous, injurious and/or endanger the habitat, the ecosystem and the species of Malka Mari National Park in Mandera County.

b) A declaration do issue that the settlement of the communities at the Malka Mari National Park Mandera County is illegal, unconstitutional, threatens and endangers the ecosystem, the species and habitat of the said park.

c) An order directing the respondents to evict and relocate the communities who have settled at the Malka Mari National Park with immediate effect.

d) An Order Compelling the respondents to provide security, manage and conserve the wildlife, species and ecosystem of Malka Mari National Park in accordance with the Constitution and the law.

e) Costs of this petition.

17. From the pleadings filed herein, it is apparent to this Court that the petitioners complaint is that the respondents’ in action threaten the existence of Malka Mari National Park, the ecology and the species found within the park. The 4th respondent on the other hand argues that this Court lacks the requisite jurisdiction at this stage to adjudicate the matter under section 117 Wildlife Conservation and Management Act.

18. Section 117 of the Wildlife Conservation and Management Act provides as follows:-

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

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

19. The Jurisdiction of the Environment and Land Court as established is derived from the Environment and Land Court No. 19 of 2011. Section 13 thereof reads as follows:-

“Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to Environment and Land.

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes :-

(a) relating to environmental planning and protection climate issues, land use planning title tenure, boundaries rates, rents, valuation, mining minerals, and other national resources.

(b) relating to compulsory acquisition of land.

(c) relating to land administration and management.

(d) relating to public, private and community land and contracts, choses in cation or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

20. From the prayers sought in the petition herein, the petitioners are seeking a raft of orders including injunction and eviction of communities who have settled in a land which allegedly was gazetted as a National Park.

21. The petitioners further allege that in view of the invasion of communities on the Malka Mari National Park, it has become untenable for the Kenya Wildlife Service to carry out their mandate of conserving endangered species and the ecosystem at the Malka Mari National Park.

22. In my understanding this petition relates to land administration and management which falls under the jurisdiction of this court.

23. The petitioners under prayer No. C are also seeking an order for eviction and relocation of the communities who have allegedly illegally, and unlawfully settled within the suit property which belongs to Marka Mari National Park.

24. In my view, the issues for determination in this petition squarely fall within the jurisdiction of this Honourable Court.

25. The issues for determination in this petition relate to the violation of rights and fundamental freedoms under Articles 19, 20, 21, 22, 23, 42, 60 and 66, 159 and 165. Those are issues in which this court has jurisdiction to handle.

26. The question of jurisdiction was dealt with in the locus classical case of **Owners of Motor Vessel "Lillian S" vs Caltex Oil [1986 – 1989] EA 305** where it was held:-

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for the decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means.”

27. Again in the case of **Republic vs National Environment Tribunal & 2 Others Ex-Parte Athi River Services Board [2015] eKLR Justice G. V. Odunga** cited with approval the case of **Samuel Macharia vs Kenya Commercial Bank & 2 Others, Civil Appeal No. 2 of 2011** where the Supreme Court observed 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 other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction the court cannot entertain any proceedings....

Where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

28. I have no doubt in my mind that from the pleadings on this petition and the prayers sought, the issues that arise for determination fall within the jurisdiction of this Honourable Court.

29. In the upshot, the 4th respondent’s Notice of Preliminary Objection dated 5th March 2019 lack merit and not upheld and the same is hereby dismissed with costs to be in the cause.

It is so ordered.

READ AND SIGNED IN THE OPEN COURT THIS 9TH DAY OF MAY, 2019.

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E. C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Muthoga holding brief Ayieko for Petitioner
2. Mr. Nyibolo holding brief Akwatta for 1st Respondent
3. M/s Mwikali: I appear for 4th Respondent
4. Fatuma: I appear for 2nd, 3rd and 5th Respondent
5. Amina Court Clerk