



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT MAKUENI

CONSTITUTIONAL PETITION NO.6 OF 2017

IN THE MATTER OF: ARTICLES 1,2,3,10,19,20,21,22,23,42,69,70,159,165,174, 183(3),

185(3), 190, 195(2), 225, 226(2), 228, 229(4), 258, 259, 260 AND THE 4TH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTIONS OF ARTICLES 42 AND 69 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF SECTIONS 2,3 3A,7,9,29,44,58,59,60,68,69,108,109,111,112 AND 147A OF THE ENVIRONMENT
MANAGEMENT & CO-ORDINATION ACT**

AND

IN THE MATTER OF SECTIONS 5, 38(1) AND 2 OF THE FORESTS ACT

AND

**IN THE MATTER OF THE DEFORESTATION AND ILLEGAL LOGGING AND WASTE AT THE KIVALE FOREST,
MBOONI WEST-SUB COUNTY, MAKUENI COUNTY.**

BETWEEN

MAKUENI COUNTY ASSEMBLY.....PETITIONER

-VERSUS-

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST RESPONDENT

KENYA FOREST SERVICE.....2ND RESPONDENT

CEC MEMBER, WATER, IRRIGATION AND ENVIRONMENT

GOVERNMENT OF MAKUENI COUNTY.....3RD RESPONDENT

CABINET SECRETARY, ENVIRONMENT

AND NATURAL RESOURCES.....4TH RESPONDENT

AND

MBOONI DEVELOPMENT GROUP.....1ST INTERESTED PARTY

MBOONI WEST SAWMILL LTD.....2ND INTERESTED PARTY

BASIKIKA NYAKIRARIO MORRIS

SAWMILL LTD.....3RD INTERESTED PARTY

KATENDE SAWMILL LTD.....4TH INTERESTED PARTY

KIKIMA TIMBER & HARDWARE.....5TH INTERESTED PARTY

FARM TECHNOLOGY SOLUTIONS

COMPANY LTD.....6TH INTERESTED PARTY

JUDGMENT

1) The petition herein is dated 27th November, 2017 and was filed in court on even date by the County Assembly of Makueni (hereinafter referred to as the Petitioner). The facts relied by the petitioner are, *inter alia*, that Kivale Forest is situated in Mbooni West Sub County of the larger Makueni County and that it harbours a water catchment area for the general public benefit. That the Petitioner learnt of logging in earnest being conducted at Kivale Forest without any licensing and or consideration by the County Environment Committee in total disregard of the law. That the forest cover has dwindled to very low margins and the existence of the forest and water catchment area remain threatened if the situation is left unchecked. That since no re-afforestation is taking place at the forest, this has exposed the general public and citizens of Makueni County to the risk of untold water shortage and insufficient rains.

2) The petition is supported by the supporting and further affidavits of Edward Libendi, who is the Petitioner's clerk, the two affidavits having been sworn at Machakos on the 27th March, 2017 and 14th February, 2018 respectively.

3) The 1stInterested Party has supported the petition vide the affidavit of Ngao Pius Mangati, who is the secretary of Mbooni Development Group.

4) The 1stRespondent has opposed the application vide the replying affidavit of David Ong'are, its director in charge of Compliance and Enforcement, the same having been sworn at Nairobi on the 28th December, 2017 and was filed in court on 3rd January, 2018. The 2nd Respondent has also opposed the application vide the affidavits of Michael Ngunga and Monicah Kalenda, both being the station manager Kenya Forest Service Mbooni, Makueni County and Senior Deputy Chief Conservator of Forest Support Services respectively.

5) The 3rdRespondent through the replying affidavit of Robert Kisyula, its County Executive member responsible for Environmental matters, distanced itself from the dispositions of the 1st and 2nd Respondents.

6) Equally, the 2nd to the 6th Interested parties (hereinafter referred to as the loggers) have opposed the petition.

7) Directions were given to dispose off the petition by way of written submissions. The parties have since then filed their respective submissions. The Counsel on record for the petitioners and the 1stInterested Party as well as the Counsel for the 2nd to the 6th Interested Parties highlighted their submissions on 16th October, 2018. And on the 15th November, 2018, the Counsel for 2ndRespondent had a chance to highlight his submissions whereupon the Counsel for the Petitioner made further submissions.

8) Briefly, the submissions by the Petitioner were that harvesting is taking place at Kivale Forest without;

i. E.I.A having been considered by the County Environment Committee as envisaged under Sections 29 and 30 of Environmental Management and Coordination Act (EMCA) Chapter 387 of the Laws of Kenya (Emphasis are mine). That the 3rd Respondent who is the County Executive member and Chairman responsible for environmental matters in Makueni has sworn an affidavit which shows that the said committee was never involved in EIA report.

ii. The loggers are on the ground with expired licences. The licences are in the replying affidavit filed on 31st January, 2018 sworn by the 4thRespondent. That all the licences are dated 22nd August, 2017. That the licencees were given 30 days to enter the forest and complete harvesting. That by the time the petition was brought to court on 27th November, 2017 they were still on the ground.

iii. That it has been argued by the 2nd Respondent that Kivale Forest is not a forest envisaged under the Forest Act. That the only forest in Makueni is Mbooni South Forest. However, when the initial interim order was issued, it stopped forest activities in Kivale forest. The 2ndRespondent was served with the order and if filed an affidavit to show that the order was fully complied with. The Counsel wondered how the 2nd Respondent could comply with the order and later claim that there is no forest known as Kivale. The Counsel added that it is true that the orders that will be issued have a specific target. That they are issued for Mbooni South but the order for Kivale forest has stopped the activity complained of.

iv. That it has been argued by the 4thRespondent that the petition is in contravention of Article 189 (3) & (4) of the Constitution and Sections 31,32 and 35 of the Intergovernmental Relations Act No.2 of 2012 (emphasis are mine). The Petitioner's Counsel was of the view that, this is not a dispute between the government at either levels. That this is a dispute in public interest where the residents of Makueni are saying that logging activities are affecting their source of livelihood and are violating their rights under Articles 69,

70 and 42 of the Constitution. The Counsel added that under Article 22, every person has a right to approach the court and it is a right which cannot be taken away.

v. That the 2nd Respondent has given a document which they say is EIA and that it was sent to the County Director of Environment. That a look at the document, it is clear that the postage does not show when it was received and, by whom, but most importantly whether any meeting was called to deliberate on the report. The Counsel pointed out that the assertions by the 2nd Respondent have been watered by the affidavit of the 3rd Respondent who said that he never sat down in a meeting to deliberate the report.

vi. That the 2nd to 6th Interested Parties' case is hanging on nothing since their licences have expired.

9) On the other hand, the 2nd to the 6th Interested Parties dispute the existence of Kivale Forest. The Interested Parties base their argument on the fact all public forests have been set out in the 3rd schedule of the Forest Conservation and Management Act No. 36 of 2016. That under the said 3rd Schedule of the Act No. 36 of 2016, only South Mbooni Forest which was gazetted under legal notice number 14/1933 is recognized.

10) Their second reason, is that South Mbooni Forest is a plantation forest as defined under Section 2 of the Forest Act, 2005 (now repealed). That contrary to the assertions of the petitioner, it is not an indigenous forest meant for purposes of conservation of water, soil and diversity. That South Mbooni forest being a plantation, logging activities are indeed allowed for commercial purposes as is provided for under Section 43(1) of the Forest Conservation and Management Act No.36 of 2016. It was also submitted that Article 69(1)(b) of the Constitution provides for environment and natural resources to be used for the benefit of the people of Kenya. The interested parties further submitted that the only benefit to be derived from South Mbooni Forest is by harvesting the trees found in the forest for commercial purposes.

11) Regarding their licenses, the Counsel for the 2nd to the 6th Interested parties submitted that the same have not expired. The Counsel added that the letters the petitioner is referring to were meant to allocate saw millers specific areas in which to harvest trees. That the period indicated in the allocation letters are for purposes of harvesting and is not the period for the validity of the licenses. That the period had not expired by the time the suit was filed before this court.

12) The 2nd to 6th Interested parties further submitted that the logging activities are within the set rules and regulations as issued by the 2nd Respondent and in line with the management plan prepared by it. That 2nd to 6th Interested Party contend that if the petition is allowed as prayed, they shall suffer irreparable damage in that:-

(a) They have paid over Kshs.5,000,000/= in licensing fees and AIA fees for the purposes of harvesting the trees. That they have taken loans to undertake the activity and are currently in danger of being auctioned as they have been unable to continue harvesting activities since the suit was instituted.

(b) That the people of Makueni will suffer as they are unable to carry out any harvesting which is their main source of livelihood as they have been hired by the millers to work for them in tree harvesting.

(c) That the forest itself will suffer as there are over mature trees in the forest which will end up rolling and cannot be harvested for commercial purposes and further that re-forestation cannot be carried out without first harvesting the over mature trees thus preventing the regeneration of the forest.

13) In reply, the Counsel for the Petitioner submitted that the Petitioner is not against logging activities so long as there is approval by the County Executive Committee. That although the forest in question is indeed or could be a plantation, logging activities are regulated and that is why the 2nd Respondent had to conduct its EIA and send it to the 1st Respondent herein. The Counsel added that the report was not considered by the County Environment Committee. As for the licenses, the Counsel submitted that they were not before court.

14) On the 16th November, 2018, the Counsel for the 2nd Respondent urged the Court to balance and see that what the 2nd Respondent is doing is sustainable since the constitution provides for sustainable exploitation. That the Forest Conservation and Management Act No.36 of 2016 provides for public participation.

15) The Counsel further submitted that sustainable exploitation is a mechanism for managing and conserving forests. That in the instant petition, all parties are agreed that the forest in question is a plantation and not indigenous. That logging can be allowed and that by harvesting the plantation forest, we end up conserving indigenous forests. That the plantation forest yields money which is used to administer resources required in conservation efforts.

16) It was also the submission by the 2nd Respondent that the lead agency which is the 1st Respondent approved the process. That the affidavit of David Ongare at Paragraph 12 states clearly that EAI was carried out. That paragraphs 14 and 17 talk of sector wide consultation and at paragraph 18, David has deposed that the 2nd Respondent submitted a forest management plan for Mbooni forest which they approved. That at paragraph 20, the 1st Respondent says that under the law, nothing is lost since they continued to inspect for compliance even as the logging was ongoing. That the loggers were licensed in a fair process.

17) Arising from the above, it is my view that the following issues arise for determination:-

Issues for determination

a) Whether Kivale forest is a recognized forest under the law.

- b) What is the nature of South Mbooni forest?
- c) Whether the logging in South Mbooni forest was illegal.
- d) Whether the Constitution has been violated.

Whether Kivale forest is a recognized forest under the law.

18) The 3rd schedule of the Forest Conservation and Management Act, 2016 gives a list of gazetted public forests and Kivale forest is not one of them. There is however a forest known as South Mbooni and the schedule indicates that it was gazetted under legal notice No. 14/1933.

19) In its further affidavit dated 14/02/2018, the petitioner deposes that the forest in question is South Mbooni forest also known as Kivale forest. In my view, if South Mbooni forest had an alternative name, it should have been included in the schedule otherwise, 'Kivale forest' is unknown in law.

What is the nature of South Mbooni forest?

20) According to the 2nd Respondent (KFS), South Mbooni Forest is both an indigenous and plantation forest but the petitioner contends that it is a purely indigenous forest.

21) **Section 2** of the Forest Conservation and Management Act defines an indigenous forest as *"a forest which has come about by natural regeneration of trees primarily native to Kenya."* On the other hand, a plantation forest is *"a forest that has been established through forestation or reforestation for commercial purposes."*

22) According to the 2nd Respondent, in every indigenous forest, it usually outlines a section or boundary of the forest which consists of the plantation forest. The plantation forests are used as a source of revenue for the 2nd Respondent and the County Governments and as a source of employment to the local community in the area where the plantation forest is located.

23) In her affidavit dated 28/03/2018, Monica Kalenda, the acting Chief Conservator of forests deposes that Mbooni forest is made up of 882.6 Ha (44.3%) indigenous vegetation and 1,110.1 Ha (55.7%) plantation vegetation. That the plantation vegetation is distributed within nine forest blocks including the South Mbooni forest which covers 207.6Ha as plantation forest.

24) According to the Forest Conservation and Management Act 2016, the mandate of the 2nd Respondent is to conserve, develop and sustainably manage forestry resources in Kenya including the management of all state forests and regulation of the forest sector comprising public, community and private forests. The 2nd Respondent is the custodian of all public forests on behalf of the state and the people of Kenya.

25) In light of the mandate of the 2nd Respondent and the statistics given by Monica Kalenda, it is quite obvious that the 2nd Respondent is better placed to categorize the South Mbooni forest. The burden of proving otherwise is on the petitioner and in my view; this burden has not been discharged. The categorization is vital because it has a direct bearing on the kind of activities that should be allowed therein.

Whether the logging in South Mbooni forest was illegal.

26) It is not in dispute that logging was done at the South Mbooni forest. The second schedule of the Environmental Management and Coordination Act (EMCA), gives a list of activities which require environmental impact assessment (EIA) prior to commencement. In paragraph 7, the following forestry related activities are listed; timber harvesting, clearance of forest areas, reforestation/afforestation with alien species, introduction of alien species, excisions of gazette forest for whatever purposes, any projects located within forest reserves such as construction of dams or other control structures that flood large areas of relatively un-degraded areas. It is therefore evident that the logging in the South Mbooni forest required an EIA licence.

27) The 1st Respondent, National Environment Management Authority (NEMA) is a creature of EMCA. Section 9(1) of EMCA provides that *"the object and purpose for which the Authority is established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment."* Under section 58 of EMCA, it is the mandate of the 1st Respondent to issue the EIA licenses to applicants who have complied with the provisions of EMCA.

28) One of the grounds relied upon by the petitioner in support of the petition is that there was failure to have an environmental impact assessment carried out by the illegal loggers and to have the same published for the lead agency's input as well as failure to undertake an environmental audit of the forest despite the outcry by the area Senator.

29) According to the 1st Respondent, the relevant licensing procedures were followed in issuing the license to 2nd Respondent. Further, it submits that according to part II and III of the Environmental Impact Assessment and Audit Regulations, 2003 (Legal Notice 101 of 2003), there is a difference between EIA project report and EIA study report. That the former is the basic level and mostly applicable for low impact projects while the latter is the upgrade level mostly applicable to high impact projects.

30) It also submits that 2nd Respondent conducted and submitted an EIA project report whereupon it satisfied itself that the project was not

inconsistent with the environment, would have no significant impact on the environment and disclosed sufficient mitigation measures. Consequently, the 1st Respondent issued a license. The license dated 28/04/2017 is attached to Monica Kalenda's replying affidavit and marked as KFS-1. The report is attached to the 1st Respondent's affidavit and marked as DOI (a).

31) I have looked at part II and III of the regulations and indeed, there is a difference between the project report and study report. Having read the report, it is my considered view that the activities in the South Mbooni forest called for the preparation of a project report as opposed to a study report. Further, the logging was being carried out in the plantation forest in line with section 43 (1) of the Forest Conservation and Management Act, 2016 which provides that *"All plantation forests shall be managed on a sustainable basis for the production of wood and other forest products and services for commercial purposes."*

32) The above provision is echoed in Article 69(1)(h) of the Constitution which provides that; *"The state shall utilize the environment and natural resources for the benefit of the people of Kenya"*. I agree with the submissions of the 2nd Respondent that the only way a plantation forest can be utilized for the benefit of the public is if it is used for the purpose for which it was planted namely commercial, which through logging and harvesting of trees, improves the economic wellbeing of the communities around South Mbooni forest. The locals are also issued with licenses to carry out the activities of harvesting the trees.

33) The EIA project report was prepared by Eco Consultants which, according to the 1st Respondent, is a registered EIA expert firm. There is no evidence before the Court to rebut the firm's eligibility. The report is therefore compliant with regulation 7(3) which provides that *"A project report shall be prepared by an environmental impact assessment expert registered as such under these Regulations."*

34) As for public participation, one of the differences between a project report and a study report is the level of public participation. The 1st Respondent submits that project reports have less involvement as they are perceived to cause less environmental impact and in which case, the requirement to gazette or advertise a project in the newspaper or radio does not apply. That only questionnaire surveys from persons likely to be affected are required.

35) The exhibit marked DO2 attached to the 1st Respondent's (NEMA's) affidavit is a dispatch letter showing that the project report was sent to various lead agencies including representatives of the petitioner, the 3rd and 4th Respondents. The addressees were required to give their comments to the 1st Respondent (NEMA) within 14 days of receiving the project report. The only lead agency that responded was the Water Resources Management Authority (WARMA) as can be seen from the exhibit marked DO3.

36) It is actually fool hardy for the petitioner to allege that there was no public participation yet it is the one that did not bother to give comments on the project. Further, section 29 of EMCA provides for the establishment of County Environment Committees which comprises *inter alia* an officer from 1st Respondent who is in fact its secretary. In my view, the evidence on record shows that the requirements with regard to public participation were adhered to.

37) As for the environmental audit, the requirement is that they should be undertaken 12 months after project commencement as can be discerned from section 68 of EMCA. General condition 1.8 of the licence issued to 2nd Respondent states that *"the proponent shall submit an Environmental Audit Report in the first year of occupation/operations/commissioning to confirm the efficacy and adequacy of the environmental management plan."* As stated before, this license was issued in April 2017 and it is therefore clear that at the time of filing the petition in November 2017, one year had not lapsed. The petitioner's complaint was pre-mature and without basis.

38) As for the loggers, there is evidence to show that they have all been pre-qualified and duly licensed by 2nd Respondent to conduct harvesting in South Mbooni forest. The relevant notification letters for pre-qualification and payment receipts have been attached and marked JNM 3 in the affidavit of Joseph Musau Ndavi filed on 31/01/2018.

39) It is also evident from the project report and conditions in the license that appropriate measures to facilitate re-a forestation have been put in place hence making the project sustainable and in line with the provisions of EMCA and the Constitution.

40) From the foregoing, it is my considered view that the logging in the South Mbooni forest was legal.

Whether the Constitution has been violated.

41) It is trite that where a petitioner alleges violation of the Constitution, he/she must plead with reasonable precision, the provisions of the Constitution which have allegedly been violated, the manner in which they have been violated and the remedy sought for that violation.

42) The basis of the petitioner's grievance is the logging that is said to be taking place in South Mbooni forest which it refers to as Kivale forest. The Respondents have ably demonstrated that the said logging was strictly conducted within the law. It is my considered view that conduct which is not illegal cannot result in violation of the Constitution. The petition is devoid of specificity and does not meet the competency test laid down in the celebrated case of **Anarita Karimi Njeru-vs- Republic (1976-1980) 1KLR**.

43) Further, it has already been demonstrated that 'Kivale Forest' is unknown in law and as such, any orders granted would be unenforceable. In my view, the petition only brings out the petitioner's poor appreciation of the relevant laws and lack of initiative to verify facts in order to act from a point of being informed.

44) A petition which is hopelessly defective in both form and substance should be struck out to avoid further abuse of the Court process. This was the position taken by Justice Onguto in Nairobi's **Constitutional Petition No. 254 of 2015; Peter Michobo Muiru -vs- Barclays Bank of Kenya Ltd & another [2016] eKLR**.

45) The upshot of the foregoing is that balancing the rights between preservation of environment and exploitation of it in a sustainable manner, the same tilts in favour of the latter. In the circumstances, I hereby proceed to dismiss the petition with costs.

Signed, dated and delivered at Makueni this 13th day of June, 2019.

MBOGO C. G.,

JUDGE.

In the presence of:-

Mr. Masaku for the Petitioner present

Mr. Kwake holding brief for the 2nd Respondent present

No appearance for the 1st Respondent

No appearance for the 2nd to 6th Interested Parties Absent

C. Nzioka – Court Assistant

MBOGO C. G. (JUDGE),

13/06/2019.