



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT GARISSA

PETITION CASE NO.3 OF 2018

IBRAHIM MOHAMUED 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

BACKGROUND

1. The application before me is the Notice of Motion dated 9/10/2018 brought under Certificate of Urgency under Articles 19, 20, 21, 22, 23, 27, 28, 47 and 48 of the Constitution of Kenya 2010 and Section 1A, 1B and 3A Civil Procedure Act as well as Order 51 Civil Procedure Rules. The Applicant is seeking the following orders:

1. Spent.

2. THAT pending the hearing and determination of this application, an order of temporary injunction do issue restraining the respondents from undertaking, commissioning, awarding any tenders for constructions or developments of any structures and/or infrastructure of whatever nature, allotting plots to squatters and/or settlers or doing anything within Malka Mari National Park that would be hazardous and/or endanger the habitat, the ecosystem and the species of Malka Mari National Park in Mander County.

3. THAT pending the hearing and determination of the petition, an order of temporary injunction do issue restraining the Respondents from undertaking, commissioning or awarding any tenders for constructions or developments of any structures and/or infrastructure of whatever nature, allotting plots to squatters and/or settlers or doing anything within the 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 Mander County.

4. THAT costs be in the cause.

2. The application is supported by an affidavit sworn by the 1st Petitioner on 10th October, 2018 and grounds shown on the face of the said application thereof. The application is further supported by ten documents attached to the supporting affidavit.

3. In response to that application, the 1st Respondent filed a replying affidavit through its legal officer one Doreen Mutunga who does not

come out clearly whether she supports or opposes the application herein. The 4th Respondent filed a Notice of Preliminary Objection dated 5th March, 2019 and filed on 8th March, 2019. While the said application came up for hearing, the parties agreed to canvass the preliminary point first and on 9th May, 2019, this court rendered itself on the said preliminary point. The parties agreed to canvass the application together with the said preliminary objection by written submissions.

PETITIONER'S/APPLICANT'S SUBMISSIONS

4. The Applicant submitted that Malka Mari National Park was declared a National Park vide a legal notice No. 338 dated 6th October, 1989 and boundary plan number 204/66, L.R. No. 28084 due to its high concentration of wildlife as stated under Section 119 (a) Eleventh Schedule of the Wildlife Conservation and Management Act 2013, covering an area of 876 KM² and lies along the Dana River on the Kenya -Ethiopia border in the extreme North East of Kenya on the Mandera plateau, Mandera County.

5. The Applicant further submitted that the Respondents have neglected, refused and/or failed to manage, conserve and protect the ecosystem of the Malka Mari National Park thereby allowing members of a certain community within Mandera to settle in the National Park. It is also submitted that the settlement of the communities stated above in the Malka Mari National Part poses serious environmental threats to the already fragile ecosystem and will obviously lead to the extinction and death of the wild life in the park.

6. It is argued that the communities who have been allowed to settle in the park are mostly pastoralists and are engaged in capturing, harvesting, cropping, hunting and poaching of animals and birds within the park hence endangering and threatening the ecosystem and the habitat.

7. The Applicant also contends that the continued settlement by the said community in the park risks the park being totally degraded to the detriment of the heritage of the communities within Mandera region, the Republic of Kenya and affects the tourism industry at large.

8. The Applicant submitted that the Respondents allowed the said communities to settle in the park without carrying out any environmental impact assessment and without conducting public participation as is required in law.

9. The Applicant further argued that the 3rd Respondent has built an Administration Police Post, Police Station, Chief Camp, among others without carrying out any environmental impact assessment. Or public participation or at all contrary to the law while the 4th Respondent has failed to participate in the conservation of the National Park to the detriment of the citizens of Mandera County and its future generation and have even gone further and built schools, dispensaries and construction of roads within the park.

10. It is further submitted that he 4th Respondent has also presented a budget before its County Assembly for the year 2018/2019 for allocation of funds to finance illegal and unlawful construction of infrastructure within the park without following the law.

11. In conclusion, the Applicant submitted that the only issue for determination in the application is whether or not the applicant has satisfied the principles for the grant of injunction orders as set out in the celebrated case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358**. According to him, the three principles for the grant of the injunction orders have been established and that the court ought to grant the orders in his favour. He cited numerous authorities in support of the application.

1ST RESPONDENTS SUBMISSIONS

12. The 1st Respondent through the firm of Muthega & Kariuki Advocates submitted that the Wildlife Conservation and Management Act No. 47 of 2013 has in place an elaborate dispute settlement procedure that ought to be respected, honoured and promoted by this court and that such disputes relating to management, conservation and protection of wildlife ought to be resolved within the confines of the Dispute Resolution Mechanism established under the Act and the regulations herein.

13. The Counsel for the 1st Respondent further submitted that since the Petitioner allege that the 1st Respondent has failed to exercise its power under the Constitution and the law to conserve, protect and manage Malka Mari National Park by allowing members of a certain community to settle within the park leading to its degradation and neglect, the dispute therefore falls within Section 117 of the Wildlife Conservation and Management Act No. 47 of 2013 which reads 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 unresolved in the manner prescribed above, I 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.”

14. The Learned Counsel further argued that the County Wildlife Conservation and Compensation Committees (CWCCC) established under Section 18 of the Wildlife Conservation and Management Act No. 47 of 2013 are the lowest possible structures mandated by law to hear any disputes that may arise in respect of wildlife management, protection or conservation.

4TH RESPONDENT SUBMISSIONS

15. The 4th Respondent filed a Notice of Preliminary Objection to this application and the petition herein in which he dwelt on jurisdictional

challenges.

16. The 4th Respondent submitted that the Petitioner's grievances revolve around Wildlife Management, protection and conservation of Malka Mari National Park which dispute ought to have been referred to the Mandera County, specifically the Sub-County offices at Malka Mari Ward or the Mandera County Assembly in the first instance.

17. The 4th Respondent also submitted that failure to comply with the Statutory Dispute Resolution Mechanism renders the petition and this application defective and ousts the jurisdiction of this Honourable Court under the enabling statute. The 4th Respondent cited numerous case law.

2ND, 3RD & 5TH RESPONDENTS

18. The 2nd, 3rd and 5th Respondents did not file any submissions.

ANALYSIS AND DETERMINATION

19. The application before me is seeking conservatory orders of injunction restraining Respondents from undertaking, commissioning or awarding any tenders for constructions or developments of any structures and/or infrastructure of whatever nature, allotting plots to squatters and/or settlers or doing any within Malka Mari National Park. The Applicants stated that unless the orders sought are granted, there would be disastrous consequence to the habitat, the ecosystem and the species living in the said national park. The Applicants further stated that the Respondents who are mandated to protect the said national park have abdicated their responsibilities under the law.

20. I have considered the affidavit evidence and the submissions by the parties. I have also considered the cited authorities and the applicable law. Since this court has rendered itself on the jurisdictional issues raised by the Respondents in its ruling delivered on 9th May, 2019, the court is now *fundus officio* on the matter.

21. The remaining issue for determination now is whether the Applicant has established the principles for the grant of the conservatory orders sought.

22. The principles for the grant of injunction orders was set out in the celebrated case of **GIELLA –VS- CASSMAN BROWN CO. LTD (1958) 358**.

23. The subject of this petition is a national park located in Mandera County covering an area of approximately 876 Km² and declared a National Park vide legal notice No. 338 dated 6th October, 1989 of boundary plan number 204/66, L.R. No. 28084.

24. The Applicant has made allegations on oath that the Respondents who are charged with protecting, conserving and managing the park have turned a blind eye on it and instead have now engaged in unlawful activities within the park such as construction of roads, building of school and dispensaries, and police stations.

25. The Applicant has also deponed on oath that the 4th Respondent has since presented before the County Assembly a budget for the year 2018/2019 for allocation of funds to finance those illegal activities within the park without following the law. These averments stated on oath have not been controverted by Respondents.

26. The 4th Respondent has not denied those allegations specifically the issues that it has presented before the County Assembly a budget for the year 2018/2019 in which the alleged activities have been factored in.

27. The issue in contention in this application is whether the Applicant has established a *prima facie* case to warrant the grant of the conservatory orders. The law on whether or not to grant conservatory orders was considered by Odunga J. in the case of **KEVIN K. MWITI & OTHERS –VS- KENYA SCHOOL OF LAW & OTHERS** as follows:

“ The first issue for determination is whether the petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success.”

28. The Supreme Court of Kenya put the issue in perspective in the case of **GATIRAU PETER MUNYA –VS- DICKSON MWENDA KITHINJI & 2 OTHERS (2014) eKLR** where it was held as follows:

“Conservatory orders bear a more decided public law connotation; for these are orders to facilitate, ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicants case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the Constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.”

29. The above decisions are precedents which are binding on me which I hereby apply *mutatis mutandis* to the circumstances of this case.

30. As such, I find that the Applicant has demonstrated the public interest in the matter, the Constitutional values and the proportionate magnitude attributable to the cause. In the final analysis, I find merit in the said application and the same is hereby allowed as prayed.

31. The costs of the application shall be costs in the cause. It is so ordered.

Read and delivered in the Open Court this 2nd day of August, 2019.

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E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Ayieko: for Petitioners
2. Mr. Odhiambo holding brief Issa for Respondent
3. Fatuma: Appear for the Attorney General
4. Court Clerk: Taib.