



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

PET. NO. 12 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF VIOLATION, CONTRAVENTION AND CONTINUED THREAT BREACH OF THE PROVISIONS OF
THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF VIOLATION, INFRINGEMENT, DENIAL AND THREAT TO FUNDAMENTAL RIGHTS AND
FREEDOMS**

AND

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 21,22,23,24,27,29,31,50,59,125,157,258, AND 259 OF THE CONSTITUTION OF
KENYA 2010**

AND

**IN THE MATTER OF THE CHILDREN'S ACT, THE BASIC EDUCATION ACT, FAIR ADMINISTRATIVE ACTIONS ACT
AND THE HEALTH ACT.**

AND

IN THE MATTER OF THE ACTIONS OF, THE NATIONAL POLICE SERVICE,

**THE CABINET SECRETARY IN CHARGE OF ENVIRONMENT & NATURAL RESOURCES, THE CABINET SECRETARY
LANDS HOUSING AND URBAN PLANNING, THE CABINET SECRETARY, MINISTRY OF INTERIOR AND
COORDINATION OF NATIONAL GOVERNMENT, THE CABINET SECRETARY MINISTRY OF EDUCATION, SCIENCE
AND TECHNOLOGY, THE KENYA FOREST SERVICE, THE COUNTY GOVERNMENT OF NAROK AND THE INTENDED
ACTIONS OF PHASE TWO EVICTIONS ON THE RESIDENTS AND POSSIBLE DESTRUCTION OF SCHOOLS, HEALTH
FACILITIES, WITHDRAWAL OF SECURITY AND GOVERNMENT SERVICES IN THE AREAS COMPRISED IN AREAS
FORMERLY KNOWN AS ENOOSOONI, NKARONI, SISIAN, ENAGISHOMI AND REIYO GROUP RANCHES**

BETWEEN

UZALENDO INSTITUTE OF LEADERSHIP AND

DEMOCRACY.....1ST PETITIONER

STEPHEN KIPNGETICH MUTAI.....2ND PETITIONER

CHERUIYOT LANGAT3RD PETITIONER

PASTOR RUTO4TH PETITIONER

EVANSTON KOECH5TH PETITIONER

SAMWEL RONO	6 TH PETITIONER
ERICK BETT	7 TH PETITIONER
DANIEL ROTICH	8 TH PETITIONER
ELIJAH TERER	9 TH PETITIONER
WILLIAM CHERUIYOT	10 TH PETITIONER
JOSEPH MARITIM	11 TH PETITIONER
WYCLIFF KIMUTAI	12 TH PETITIONER
JOSEPH SERSER	13 TH PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT.....	1 ST RESPONDENT
THE ATTORNEY GENERAL	2 ND RESPONDENT
THE CABINET SECRETARY, MINISTRY OF ENVIRONMENT AND NATURAL RESOURCES	3 RD RESPONDENT
CABINET SECRETARY MINISTRY OF LANDS HOUSING AND URBAN PLANNING	4 TH RESPONDENT
THE CABINET SECRETARY MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGY	5 TH RESPONDENT
THE CABINET SECRETARY MINISTRY OF HEALTH	6 TH RESPONDENT
TEACHERS SERVICE COMMISSION	7 TH RESPONDENT
INSPECTOR GENERAL OF POLICE	8 TH RESPONDENT
THE KENYA FOREST SERVICE	9 TH RESPONDENT
THE COUNTY GOVERNMENT OF NAROK	10 TH RESPONDENT
REGIONAL COORDINATOR RIFT VALLEY REGION	11 TH RESPONDENT
THE DIRECTOR DEPARTMENT OF CIVIL REGISTRATION.....	12 TH RESPONDENT
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS	13 TH RESPONDENT

RULING

The Petitioner/Applicant had filed a Petition dated 14th August, 2019 which was brought under Article 2,3, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 35,39, 43, 45, 47, 48, 53, 59, 129, 232, 244, 258, 259 and 165 of the Constitution of Kenya 2010 and the Fair Administrative Act 205 and New Paralegal Section 3 and 3 and the Children's Act No. 8 of the 2001 Section 4, 5, 9, 13, 15, 78, The Basic Education Act section 28, 39, 44, The Health Act No. 21 of 2017, The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Children against the Respondents in which the Petitioners allege that the Respondents had jointly violated the provisions of the constitution herein above stated and the various Acts referred by way of Illegal evictions, the destiny of children to family, Education, Health care, dignity, religion and worship, survival and development, cultural and Artistic rights of the children living within the Mau forest complex.

Together with the Petition, the Applicants had filed a Notice of Motion dated 14th August, 2019 brought under Article 22 and 23 of the Constitution of Kenya 2010, Order 40 Rule 2 of the Civil Procedure Rules 2010 Rule 3 and 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms). Practice and Procedure 2013 in which the Applicants have sought the court pending the hearing and determination of the Petition to issue conservatory orders restraining the 1st, 3rd, 8th, 9th, 10th and 11th Respondents from carrying out any forms of eviction or displacement of people in the areas comprising of the former group ranches namely Enosokoni, Nkaroni, Sisian, Enagishomi and Reiyo within Narok County and not to interfere with the rights of education, security, housing, health through any form of eviction.

The Applicants also sought for pending the hearing and determination of the Petition, an order of injunction restraining the Respondents or any person acting under their instructions from interfering with the rights of education, health, housing through any form of eviction to the children in the affected areas.

Further, they sought temporary mandatory injunction to compel the 5th, 7th and 10th Respondents or those adjacent to reinstate teachers and other educational administrators to schools where the children were undergoing instructions.

The Applicants also sought for pending the hearing and determination of the Petition, the 6th and 10th Respondents to be compelled to set up temporary health facilities, deploy health workers and ensure provision of health services to the children in the affected areas. They also sought that pending the hearing and determination of the petition herein, the 12th Respondent be compelled to issue birth certificates to the children born and raised in the affected areas.

Those being the orders the Applicant sought, their prayers were based on the grounds that sometime between the year 2005 and 2018, the Government of Kenya undertook evictions of residents in areas comprising of the former Group Ranches of Enosokoni, Nkaroni, Sisian, Enagishomi and Reiyo discriminately and without any notice, right or legal justification and in utter disregard of the property rights, human dignity and without due regard to the constitutionally guaranteed rights of those residents. The Applicants further alleged the evictions aforementioned were conducted at night and in bad weather and in a heartless manner with families brutalized and subjected to torture and now the Government of Kenya through the utterances of the cabinet secretary Ministry of Environment and Natural Resources as well as the Regional Commissioner Right Valley threaten to carry out phase II of the evictions in the same area which eviction will amount to being illegal unlawful and thus compound the precarious situation of children in the concerned areas.

The Applicants further contended that if the evictions commence, over 60,000 families will be forcefully displaced resulting in humanitarian crisis, leading to the displacement of children affecting their constitutional right and freedom comprised especially for those sitting their national examinations which will begin on 29th October, 2019.

The Application was based on the supporting affidavit of Daniel Kamau Chege, the Executive Officer of the 1st Petitioner in which he contends that the justification for the instant application is inhuman and degrading and evictions previously carried out and fear that the new evictions may worsen the suffering of the children. He stated that the occupants of the land were issued with title deeds and they occupied their lands lawfully and following the aforesaid allocations in the said schools, hospitals and related services were established and if the evictions take place which will not be rights based, its impact will greatly fail the children who are school going in 16 primary schools in the area and they be subjected to great mental and emotional torture, anguish and desperation.

The Application was opposed by the 1st, 2nd, 3rd, 4th, 5th, 8th, 11th and 12th Respondent by way of a Replying Affidavit in which they averred that the same is an abuse of the court process and contrary to the provisions of law and hence be dismissed. It is the Respondents contention that the application is similar to the issues raised in Narok as Petition No. 12 and 13 of 2018 and also a petition that was filed at the East African Court of Justice at Arusha Reference No. 17 of 2018 and in which both the applications for similar orders were dismissed.

The Respondents termed the allegations that the schools listed in the petition were destroyed and averred that the said schools are unregistered by the Ministry of Education as learning institutions and hence are not allowed to enroll and admit students. The Respondents faulted the Petitioners that no certificate of registration of the said were annexed to the petition and the instant application to prove that the said schools indeed do exist. They further contend that no certificate of title deed was attached to the application that indeed the schools occupy the parcels of land upon which they stand.

The Respondents further averred that the Applicants have failed to provide for the particulars of infringement of their fundamental rights and the same does not satisfy the conditions for the grant of conservatory orders and thus prayed that the instant application be dismissed.

The 3rd Respondent in his Replying Affidavit stated that the Right to own property is not absolute and does not include property that was unlawfully acquired since the title to the land in question were irregularly, illegally and unprocedurally acquired in blatant violation of encroachment into the Maasai Mau Forest Reserve.

The 2nd interested party also opposed the Application and their Replying Affidavit stated that the Maasai Mau Reserve is a complex cover of about 400,000 hectares of land and the source of all the main rivers as the western side of the Rift Valley and is a crucial life line of the

Ewaso Nyiro and Maa Rivers, in which the population downstream and the Maasai Mara Reserve do depend on entirely and therefore he contends its conservation is crucial to the people living downstream.

The Application was argued and dispensed on the courts directions by filing of written submissions. The Applicants in their submissions trusted the court to safeguard the rights and interest of the children in the areas earmarked for eviction and what ought to guard the court is the need to balance conservation of forest land the rights of those who have acquired land and live within the forest. The Applicants contend that the action by the Government to evict people is undertaken without due process.

The Applicants have proposed for determination: -

1. Whether the court has jurisdiction to hear and determine the Application and grant the orders sought.
2. Whether the instant Application be consolidated with Narok ELC Petition No. 12 and 13.
3. Whether the Applicants have satisfied the grounds for the grant of orders sought.

On the jurisdiction of the court, the Applicants contend the substratum of the dispute before the court is that of eviction which affects the rights of the children and hence the same is amenable to the provisions of section 13 (2) of the Environment and Land Court Act and under Article 53 of the constitution in which the court is bound to treat the welfare of the child as paramount and more particularly since the decision to evict the children is unlawful and malicious and pending the determination of the Petition the court do invoke its jurisdiction.

On whether the instant petition should be consolidated with Narok ELC Petition 12 and 13 they argued that the right of the children to Education, Housing, Health and other constitutionally guaranteed rights are independent from those of their parents and hence they be accorded a chance to be heard.

On whether the Applicants have satisfied the grant of interim orders, they contended that the court has discretion to stay an action where such action is unfair, oppressive to defeat the purpose of the final determination of a substantive issue. They contend that they have raised fundamental constitutional questions touching on the planned evictions such as whether sufficient notice was given, whether alternative settlement was given to those to be affected. They stated that save for informal press statements they were not given any notice and that no meaningful engagement was undertaken and hence it shall be paramount for the court to safeguard the character and integrity of the subject matter. They invited the court to bear in mind the central issue about the rights of the children and nothing more.

On the prayer for temporary injunction orders, the Applicants submitted on the Provisions of Section 13 (7) of the Environment and Land Court Act which empowers to grant any reliefs including interim or permanent preservation orders including injunctions. They contend that they have enumerated several violation of Rights and lack of sufficient notice and have met the conditions set out in the case of **Giella v. Cassman Brown & Co. Ltd EA 358**.

The Respondent on their rival submission to that of the Applicant contend that the encroachment and destruction of the forest goes against the principle of sustainability and that of generational equity in which the Government has the responsibility to protect and preserve in the interest of the public and the evictions are thus done and initiated in the best interest of Kenyans. The Respondents further argued that the measures undertaken are to remedy a looming irreversible damage to the Maasai Mau Forest and that the Petitioners are under a duty to collaborate with the Government.

The Respondents further argued that the principles laid down in the case of **Giella vs. Cassman Brown & Co. Ltd** do not apply in Environmental matters as the question of damage may not be easy ascertainable and thus the Petitioner must show that the case is not frivolous.

The 2nd Interested party in his submissions contend none of the Petitioners have shown that they are suing as parents or next of friend of the children who are not even disclosed. They contend that the petitioners have not proved that the schools are indeed registered and that they possess title to the land on which the said schools are constructed.

The 2nd Interested Party also contends that the Petition is subjudice and violates the provisions of Section 6 of the Civil Procedure Act. They argued that the 2nd, 3rd, 6th and 7th Petitioners are also among the Petitioners in Narok ELC Petition No. 12 and 13 of 2018 which is currently being heard by a 3 bench. They further contend the Application and the Petition also offends the provision of Order 32 Rule of 1 of the Civil Procedure Rules as the Petition.

On whether the Applicant has satisfied the grant of conservatory orders, the Interested Party contends that the Petitioners have not satisfied the conditions of grant of the orders sought as they have not demonstrated that they have a prima facie case with probability of success and damages may not be adequate compensations.

I have read the Application before me and the submissions filed by all the parties in respect of the instant application. The Application that is before me for determination is one that save for the occasional mention of the word eviction, Maasai Mau Complex is largely hinged on the fundamental constitutional rights of all children. The Applicants in mounting the instant Application are apprehensive that their eminent eviction from the lands they occupy by the Government their children rights to Housing, Health, Education, birth certification, Pre-natal and Post Natal Health is being contravened. In the main Petition, the Petitioners have sought for various declaratory acts and injunction orders are acquired at the preservation of the Petitioners rights to Basic Education, access to Health, deployment of Health workers, the issuance of Birth Certificates. From the orders sought I must first as a matter of course to determine whether I have the requisite jurisdiction to hear the instant application and by the extension the substantive petition and accordingly grant the orders sought by the Petitioners.

The Environment and Land Court is a creation under Article 162 (2) of the Constitution of Kenya 2010 which provides that: -

“Parliament shall establish courts with equal status to the High Court to hear and determine disputes relating to

(a)

(b) The environment, the use and occupation of and title to land

(3) Parliament shall determine the Jurisdiction and Functions contemplated in clause (2)”

Parliament enacted the Environment and Land Court Act and Provides what is the Jurisdiction of the Environment and Land Court.

Section 13 the Environment and Land Court does provide as follows in so that the Jurisdiction of the court is concerned.

Under Section 150 of the Land Act it is provided that the Environment and Land Court shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.

From the provisions of the above section it is clearly evident that the jurisdiction of this court is what is only donated to it by the constitution under Article 162 (2) g and under section 13 of the Environment and Land Act. In the instant Application the Applicant has sought the interaction of the court in safeguarding the fundamental rights and freedom of children within the Maasai Mau Complex. The question that is to be answered is whether the Environment and Land Court has jurisdiction to hear and determine the same.

In the case of Owners of Motor Vessel Lilian ‘S’ –vs- Caltex Oil Kenya Ltd (1989) KLR 1 Nyarangi J as he then was, expressed himself in the following terms when he addressed the issue of jurisdiction.

“Jurisdiction in everything, without it, a court has no power to make one more step where a court has no jurisdiction there is no basis for the continuation of the proceedings.....A court of Law downs it’s tools in respect of a matter before the moment it holds it has no jurisdiction.”

In the case of **Joseph Njuguna Mwaura & Others –vs- Republic Court of Appeal No. 5 of 2008** the court stated:-

“It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice and that is jurisdiction.”

The Applicants had in their submissions stated that the court has the requisite jurisdiction to hear and determine the instant Application and the substantive Petition under the provisions of Section 13 (2) of the Environment and Land Court Act. However, I respectfully beg to defer with the said submissions to the extent that the instant Application and Petition in its entirety seek for the enforcement of rights to education, right to Health, Pre-Natal and Post Natal, right to Health centres, right to Birth Certificates and other documents of civil registration as clearly outlines in the face of the Application and particularly prayers (a) (b) (c) (d) (e) which in my considered opinion do not fall within the jurisdiction of the Environment and Land Court.

Having determined that I have no jurisdiction to hear and determine the application before me I have no other option but to down my tools accordingly.

The upshot of the above is that this court lacks the jurisdiction to hear and determine the Petition and the instant application therefore I order the same be struck out.

Since this was a public interest litigation I direct that each party bears their own costs.

Orders accordingly.

DATED, SIGNED and DELIVERED in open court at NAROK on this 30TH day of OCTOBER, 2019

Mohamed Kullow

Judge

30/10/19

In the Presence of:

CA:Chuma/Kimiriny

Mr Kiplangat, Rotich, Korir and Langat for the Petitioners

Mr Kamwaro holding brief for Mr Eredi for the 1st to 9th, 11th and 12th respondents and also appearing for the 2nd interested party

Mohamed Kullow

Judge

30/10/19