



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 18 OF 2015

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 10, 22, 27 (1), 42, 67 (2a), 69, and 70 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

KENNETH KIPLAGAT KIMAIYO.....1ST PETITIONER

FRANCIS KIPLIMO LEMISO.....2ND PETITIONER

KENNETH KIPRUTO.....3RD PETITIONER

CHRISTOPHER KOSGEI CHERONO

(For and on behalf of the people of Kamariny,

Elgeyo Marakwet County.....PROPOSED 4TH PETITIONER

AND

COUNTY GOVERNMENT OF ELGEYO MARAKWET.....RESPONDENT

NATIONAL LAND COMMISSION.....PROPOSED 2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY.....PROPOSED 3RD RESPONDENT

JUDGMENT

Kenneth Kiplagat Kimaiyo and Others (**hereinafter referred to as the petitioners**) have lodged this Amended Petition against the County Government of Elgeyo Marakwet, the National Land Commission and National Environment Management Authority stating that the property known and or held as title No. ***Irong/Iten/451*** commonly referred to as Kamariny Stadium (**and hereinafter referred as the suit property**) is registered in the names of the defunct town council of Iten and Tambach which by law devolves and or vested into the respondent herein to be managed for on behalf of and in trust of the people of Elgeyo Marakwet and the public in general. That initially, the property had been designated as a show ground where after it was converted into a stadium whereof at all material times, the suit property has been utilized by both National and international athletes and other sports not only for training but also

hosting various sporting activities. That on or about 30.9.2015, he learnt that the County Government of Elgeyo Marakwet had resolved and embarked at constructing a house for the Governor on a portion of that property known as IRONG/ITEN/451, hereinafter referred to as suit property and that at all material times, he has known the said parcel of land to have been a public property, held in trust of the public initially by the defunct Elgeyo Marakwet County Council and which was taken over by the County Government of Elgeyo Marakwet. Initially the property had been designated for purposes of a show ground but which later was resolved by the defunct Elgeyo Marakwet County as a stadium with a view of providing a facility to train athletes and other supporting activities. They contend that their county is endowed with great men and women who have excelled internationally in so far as athletics is concerned. This great men and women have excelled in athletics courtesy of Kamariny Stadium situated within the suit property.

The petitioners contend that other than the said facility being used by the community as a stadium, the said property is located or situated at the Elgeyo escarpment which is a catchment area and a source of water whose source emanate from the said escarpment. On a number of occasions, the residents and or public living within the said area have opposed the setting up of the Governor's official resident within the said parcel of land and even petitioned their leaders to stop the developments herein before mentioned which agitation and protest have been ignored by the county government.

That as a result hereof, they on behalf of the residents have resolved to petition this court to intervene with a view of protecting the welfare and rights of the people of Elgeyo Marakwet County and Kenyans in general. They claim that the move by the Government of Elgeyo Marakwet County to develop the governor's official resident within the suit property violates the rights of the people in view of the fact that there was no public participation or involvement of the public and or residents before the county embarked on construction of the Governor's official residence and that they were not afforded an opportunity to comment on the implications of such development contrary to Article 10 of the Constitution.

According to the petitioners, the suit property was earmarked and or set aside for a stadium for the benefit of the current and future athletes, sportsmen and women and converting the same into a Government official's resident denies the people of Elgeyo Marakwet and public in general a national heritage and pride of a facility or such magnitude that has produced great athletes that has brought fame not only in the county of Elgeyo Marakwet but Kenya as a nation. Moreover, the situation of the official Governor's residence within or near Kamariny stadium shall and or is likely to pose a security concern or threat to the current and future governors in view of the massive population that characterizes the stadium whenever there are events hosted at the facility and that the situation of the Governors residence within the stadium shall inhibit and or affect the accessibility of the persons intended to utilize the facility due to heightened security facility and personnel.

. The petitioners further claim that the National Land Commission was not involved in the designation and implementation of the decision to build a governors residence at the stadium in violation of Article 67(2a) of the Constitution and the Land Act as the land in which the stadium lies is a public land in which the County government is holding in trust and on behalf of the people of Elgeyo Marakwet and Kenya. The constitution and the land Act establishes the National Land Commission whose functions among others is to manage public land on behalf of the National and county governments. That the County Government of Elgeyo Marakwet ought to have obtained authority and permission from National Land Commission to convert the stadium and or any part thereof into private residence for the governor in line with Article 67(1) of the constitution. That this being the case, the people of Elgeyo Marakwet have been denied the right to equal benefit and protection of the law and that there are fundamental issues that have not been complied in so far as the National Environment Management Authority and that is why he sought to have the said body enjoined in this proceedings.

The petitioner pray for orders that a declaration that the respondents violated the petitioners' constitutional rights to ensure sustainable exploitation, utilization and management and conservation of the petitioner's natural resource situated at that property known as IRONG/ITEN/451 commonly referred to as Kamariny stadium and an order of mandamus directing the respondents to demolish any developments or structures within the suit property and restore it to its original and intended purpose. Lastly a permanent order of

injunction to restrain the respondents, its agents, servants and or any authority or person legal or otherwise from any continued construction of the so called Governor's official residence on or within that property known as IRONG/ITEN 451 commonly known as Kamariny Stadium. Ultimately the petitioners pray that the costs of the petition be born by the respondents.

The petition is supported by the affidavit of **Kenneth Kiplagat Kimaiyo** who states that on or about 30.9.2015, he learnt that the county government of Elgeyo Marakwet had resolved and embarked at constructing a house for the Governor on a portion of the suit property which at all material times, he has known as public land held in trust of the public initially by the defunct Elgeyo Marakwet County Council and which was taken over by the County Government of Elgeyo Marakwet. The supporting affidavit basically is a reiteration of the facts in the petition.

The 1st respondent filed a replying affidavit sworn by **Paul Tenoï**, the Acting County Secretary, County Government of Elgeyo Marakwet stating that the decision to build the Governor's house was made much earlier on 15.3.2014 and further that while the said land is public, the truth of the matter is that it remains public land even with the building of the Governor's house and no one has interfered with its standing as public land and agrees that the said property was initially identified as a show ground but user has been extended to a stadium, exhibition grounds, Governor's house and cottages and still remains as such. The size of the said land is **8.296** hectares which is **23** acres and the Governor's house herein will take approximately 3 acres and even then, the Governor's house still remains a public utility. He reaffirms that the property will continue to be held in trust by the County Government of Elgeyo Marakwet for the people of the County of Elgeyo Marakwet and is not changing into private property, and neither will the user thereof exclude stadium, exhibition grounds cottages or the Governor's house, all of which are in the master plan.

He confirms that the section of the stadium that is used for training athletes will not be affected and extension of user has been effected to represent a section of the stadium as Governor's house. That indeed, the Governor's house is being put up in a section of the stadium that was initially identified as cottages for commercial purposes of the County Council of Elgeyo Marakwet, and which was occupied recently as a private residence and that the County is very much dedicated to working on its comparative advantage of training high class international athletes and indeed, the County has been able to open up the road to the stadium and the Iten Eldoret road for purposes of athletes training there and have developed a master plan on the stadium in order to elevate it to the world class status. He refutes the claim that the Governor's house is being put on an escarpment and confirms indeed, that an Environmental Impact Assessment report was done and the same was passed by the County Government and the National Environment Management Authority. He believes that the said opposition to the construction of the Governor's house is political just for the sake of politics and not based on any justifiable ground in that It is admitted that the land in question is the property of the County Government, which the County holds in trust for the people, and the Governor's house will not change that status. The leaders, through the County Assembly of Elgeyo Marakwet and the County Government of Elgeyo Marakwet and public barazas, have approved the said project and that public participation was carried out in various meetings and during the environmental impact assessment process which requires public participation as well as the development of the said master plan and the Spatial Plan which was done much earlier, all of which involve public participation and no objection was then raised.

He states that further public participation was carried out and indeed the family of Arap Too who had encroached on the County's property in issue and put up residential house thereon, voluntarily chose to move out and that the graves on the said land will remain on the said portion without any interference whatsoever and that the house that was demolished, belonging to the family of Arap Too who moved out voluntarily, confirms that the relevant section of this land is fit for a residence. The right to public participation under Articles 10 and 20 of the Constitution was implicit in the various consultations at the public barazas, Spatial Planning, Master Planning, County Assembly and the environmental Impact Assessment process which has not been challenged by any member of the public including the applicants, who are now estopped from claiming otherwise. The project that is ongoing is a building construction and as such, the issue of accruing damages as per the Force Majeure clause is costly against the County Government, thus affecting the rest of the County inhabitants. A third party contractor, M/s Taj Logistics

has already signed a contract to put up the said house at Kshs.52,000,000/= and this will be a big loss to the County Government as the applicants cannot pay security for this amount for damages. The petition itself is not signed by the Petitioners as is required of petitions. The petitioner's file is incurably defective as it prays for an injunction and prerogative orders when this is not a judicial review application.

The replying affidavit prompted to petitioner to file a further affidavit stating that the land is public land held in trust for the people of Elgeyo Marakwet and Kenya with the exclusive purpose to be used as a stadium and thus any use that negates this purpose should be prevented and that due process of the law was not adhered to in having the so called extension of user from a stadium to a governor's house. That he has had an occasion of looking at the master plan of the stadium annexed as PT2 and it is not true that the plan refers to Governor's house and that the excuse that 3 acres hived from 8.296 hectares has no basis. The respondent has not annexed any document to show that they are hiving only 3 acres for the Governor's house. The petitioners further contend that even if the section to be built is not within the section used for training athletes the same will adversely affect future expansion of the stadium. The petitioner states that annexure PT4 is totally misleading given the fact that the County Government was seeking public participation on the Budget process which process does not constitute public participation on conversion of the stadium into a Governor's residence. On the issue of joinder of the Attorney General the petitioner contends that it is the respondent that has violated the rights of the people of Elgeyo Marakwet which is an entity to be sued in their own capacity and thus the National Government should not be dragged into this litigation through the Attorney General.

The petitioners believe the annexure marked JK 1 and 2 annexed in the affidavit of Joyce Kiplimo is schewed and misleading because the professional athletes through their association PAAK, the Chairman of the said association whose membership were directly affected stated that they were never consulted nor involved and that in their submissions, PAAK further objected on construction of the Governor's house because projects such as cottages, podium within Kamariny Stadium, provision of rapped water and latrines would adversely be affected. Even if the cabinet of Elgeyo Marakwet County had resolved to hive off part of the stadium to build the Governor's house, such action is ultra vires in view of the fact that the National land Commission was not involved in the change or extension of user of public land. that the family of the so called Arap Too, the graves on the said land has no bearing on this proceedings. The third party contractor is not a party to this proceedings and thus has no bearing to this proceedings.

The petitioners deny that the respondents conducted public participation over the said project and if this rule had been complied with, the respondent ought to have been candid to annex evidence of such activity. That the annexed National Environmental Impact assessment licence is schewed, doctored and tailored to suit this proceedings.

That he has had an occasion of visiting the site where the Governor's house have been built on the stadium and as a result, he gathers a number of fact and observes that the construction is on the edge of Kerio Valley escarpment and that the house is built on and situated about 10 metres from the cliff and that below the cliff, there is situate a shrine where the local people perform a very crucial traditional rites graduation or initiation of their sons from childhood to adulthood. That it is taboo in the Keiyo customary laws for the said boys to be exposed to unauthorized persons and this will befall a curse on the community, the initiates and the persons exposed thereto. That the situation and locality of shrine is covered with thick cover of the Flora and Fauna which is an ingredient that makes the shrine unique. That the shrine relies on water that emanate from the cliff and the vegetation cover thereof which shall be affected by the developments thereof. That the people of Elgeyo Marakwet and in particular, Kamariny village are not opposed to the development of a residence for their beloved governor, but their only concern is that a separate land should be sought to put up such a noble project. That within the place where the Governor's house is being built, there are graves which the landscaping and excavation is likely to interfere with.

Mr. Korir, learned counsel for the petitioner submits that the argument by the respondent that injunction cannot be granted against the government must fail as it does not hold water in view of the fact that the constitution specifically provides for relief to be granted in petitions and one of such relief is injunction. If the Government was immune from the injunction, then the makers of the constitution would have been

very specific to exclude the Government from such proceedings. He argues that the Government Proceedings Act and Civil Procedure Act does not apply to proceedings under Article 23 of the Constitution. Moreover, that section 16 of the GPA is inconsistent with Article 23(3) of the Constitution of Kenya which provides for injunctive reliefs. Further that there was no public participation and or involvement of the public residents before the respondent embarked on the project is violation of Article 10 of the constitution. He also relies on section 87 of the County Government Act which provides for citizen participation in County government to be based on

He submits that public participation of the people in county government's affairs is an integral part that every institution must adhere to. He referred to the annexures PT4 and PT5 and submitted that they do not any iota of public participation. According to Mr Korir, the stadium is still being utilized by the athletes as a training facility and therefore converting it into the Governor's residence would deny the athletes the training facility. Moreover, on security, he argues that building a Governor's house on the facility will be a security to risk to the Governor and that the heightened security for the Governor's residence will be a hindrance to the enjoyment of the stadium facilities by the people of Elgeyo Marakwet. Mr. Korir further argues that the Government did not involve the National Land Commission as provided by law as the property is held by the County Government of Elgeyo Marakwet in trust for the people.

Learned counsel for the 1st respondent, Mr. Chebii argues that the decision to build the Governor's house was made much earlier on the 15.3.2014 and a cabinet resolution thereto made. It is admitted that the land in issued is public land for which the registered proprietor is the County of Elgeyo Marakwet being the successor of the Iten Tambach town Council and therefore, the construction of the Governor's resident on the said land will not change the status of the said land into private land Moreover that the user of the whole land will not change. Only 3 acres will be excised to construct the Governor's residence. The grounds will remain a show ground as the County Government of Elgeyo Marakwet does not intend to convert the whole stadium into a residence for Governor.

On public participation, he submits that there is evidence that there was a public participation as evidenced by PT4 and PT5. There was notice for the meeting which clearly invited members of the public to make submissions but the petitioners did not make any objection. Mr. Chebii submits that the public participation was at the budget process and the environmental impact assessment process which makes members of the public there were no objection from the public. The learned counsel also submits that injunction cannot be issued against the Government in accordance to the provisions of the Government Proceedings Act Cap 40 Laws of Kenya.

I have considered the submissions by the petitioner and the submissions by the respondent and do find the following issues ripe for determination:

1. **Whether the decision to convert part of Kamariny stadium into the Governors official residence was made with sufficient public Participation as required by the constitution of Kenya 2010**
2. **Whether the National Land Commission ought to have been consulted**
3. **Whether injunction can be issued against the Government under Article 23(1) of the Constitution.**
4. **Whether the respondent has breached article 69(1) of The Constitution of Kenya**

1. Whether the decision to convert part of Kamariny stadium into the Governors official residence was made with sufficient public Participation as required by the constitution of Kenya 2010

Article 10 of the Constitution of Kenya provides as follows:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality,
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.

The relevant tenet in this article is the value of participation of the people whose mechanisms are clearly spelt in section 59 of the EMCA.

Section 87 of the *County Government Act, 2012* compliments section 59 of EMCA and provides that:

“Citizen participation in county governments shall be based upon the following principles—

1. *Timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;*
2. *Reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;*
3. *protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;*
4. *legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;*
5. *reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;*
6. *promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and*
7. *recognition and promotion of the reciprocal roles of non-state actors’ participation and governmental facilitation and oversight.”*

Section 59(1) of the EMCA provides for the publication of Environmental impact assessment study report upon receipt of the same by the authority for two successive weeks by notice in the gazette and in a newspaper circulating in the area or proposed are of the project from any proponent under subsection 58(2) . The Notice shall state a summary description of the project, the place where the project is to be carried out and the place where the environmental impact assessment study, evaluation or review report may be inspected and a time limit of not exceeding sixty days for the submission of written or oral commentson the environmental impact assessment study, evaluation or review report. This period can be extended on application by any person.

The 1st Respondent has not demonstrated that section 59 of the EMCA was complied with albeit it was the duty of the 1st respondent to demonstrate that the petitioners had been consulted through the frameworks set out by law. Sections 59 1and 2 of EMCA should be read with the ***Environment (impact assessment & audit) Regulations 2003. Regulation 17(1)*** thereof provides that during the process of

conducting an environmental impact assessment study under these regulations the proponent should in consultation with the authority seek the views of the persons who may be affected by the project. In seeking the view of the public, after the approval of project report by the authority the proponent shall publicize the project and its anticipated effects and benefits by posting posters in strategic places in the vicinity of the site of the proposed project informing the parties and communities of the proposed project and by publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation and by making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks. The authority is required to hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments. Prior to the meetings, the authority should ensure that appropriate notices are sent out at least one week before the meetings and that the venue of the meetings should be convenient to parties and communities. Regulation 17 to regulation 25 are very relevant as they make provision and mechanism for public consultation and participation before an the Environmental Impact Assessment Licence is issued.

I have painstakingly perused the replying affidavit and do not find any evidence of compliance with section 59 (1) and (2) of the EMCA and the regulations therein, and section 87 of the County Governments Act. In my view, Article 10 of the Constitution envisages such detailed process and not a cosmetic process. The public participation forums conducted by the county government of Elgeyo Marakwet between 9/4/2014 to 17/4/2014 was for budget preparation process and not for change of user of the 3 acres of the Kamariny Stadium. I do find that the provision of Article 10 of the constitution of Kenya and section 59 of the Constitution of Kenya were not complied with.

The petitioners have cited the case of *Robert N. Gakuru and others V The Governor Kiambu County and others where justice Odunga held that public participation plays a central role in both legislative and policy functions of the Government whether at the National or County level. It applies to the processes of legislative enactment, financial management and planning and performance management. I entirely agree with the finding.*

In Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), Ngcobo, J who delivered the leading majority judgment expressed himself as follows:

“The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected..... Significantly, the ICCPR guarantees not only the “right” but also the “opportunity” to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.....The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in article 25(b) of the ICCPR, represents one institutionalization of the right to take part in the conduct of public affairs. The broader right, which is provided for in article 25(a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation.....”

From the foregoing, it is clear that the petitioner's were not given an opportunity to participate in the decision-making as to the change of user of part of the suit property.

WHETHER THE NATIONAL LAND COMMISSION OUGHT TO HAVE BEEN CONSULTED

Article 67 of the Constitution of Kenya is very clear on the functions of the National land Commission, thus *inter alia*, to manage public land on behalf of the National and county Governments. The national Land Commission and the County Government of Elgeyo Marakwet have a duty as state organs to ensure sustainable exploitation, utilization, management and conservation of the environment and natural

resources and to ensure the equitable sharing of the accruing benefits.

Section 8 of the Land Act 2012 provides that in managing public land on behalf of the national and county governments, the Commission—

(a) shall identify public land, prepare and keep a database of all public land, which shall be georeferenced and authenticated by the statutory body responsible for survey;

(b) shall evaluate all parcels of public land based on land capability classification, land resources mapping consideration, overall potential for use, and resource evaluation data for land use planning; and

(c) shall share data with the public and relevant institutions in order to discharge their respective functions and powers under this Act; or

(d) may require the land to be used for specified purposes and subject to such conditions, covenants, encumbrances or reservations as are specified in the relevant order or other instrument.

A proper construction of Article 67 of the Constitution and section 8 of the Land Act 2012 leads to the conclusion that the National Land Commission ought to have been involved in the process of change of user of part of the property from a stadium to the governors residence as the property in dispute is public land whose sole manager is the National Land Commission.

The creation of the National Land Commission was realized with the promulgation of the Constitution of Kenya, 2010. The Constitution dedicated an entire chapter to the subject, Land and Environment. Article 62 states the guiding principles of land policy, with Article 62 classifying land into three categories: *public, community and private*. Article 62 defines public land, and states how it will be administered:

“(2) Public land shall vest in and be held by a County Government in trust for the people resident in the County, and shall be administered on their behalf by the National Land Commission, if it is classified under

- ***Clause (1) (a), (c), (d) or (e); and***
- ***Clause (1)(b), other than land held, used or occupied by National state organ.***

(3) Public land classified under clause (1)(f) to (m) shall vest in and be held by the National Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.”

Article 67 provides for the establishment of the NLC and its functions:

“(a) to manage public land on behalf of the National and County Governments;

(b) to recommend a national land policy to the National Government;

(c) to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

(g) to assess tax on land and premiums on immovable property in any area designated by law; and

(h) to monitor and have oversight responsibilities over land use planning throughout the country.

“(3) The National Land Commission may perform any other functions prescribed by National legislation.”

It is therefore my view that public land falls within the administrative control of the National Land Commission, safeguarding it from abuse of the kind associated with history. I therefore do hold so.

WHETHER INJUNCTIONS CAN BE ISSUED AGAINST THE GOVERNMENT UNDER ARTICLE 23

The ***Government Proceedings Act Cap 40 Laws of Kenya. Section 16 (2) of the Government Proceedings Act*** provides as follows:-

“The court shall not in any civil proceedings grant any injunctive or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government”.

Article 23 of the Constitution of Kenya gives the courts the authority to uphold and enforce the bill of rights. The High Court and Courts of equal status have jurisdiction in accordance with Article 165 to hear and determine application for redress of denial, violation or infringement of or threats to, a right or fundamental freedom in the bill of rights.

In any proceedings under Article 22 (or Article 70) of the constitution, a court may grant appropriate relief including an injunction. I agree with Mr. Korir that the Government Proceedings Act and Civil Procedure Act do not apply to such proceedings as it applies to purely civil proceedings commenced under the Civil Procedure Act. Moreover, the bill of rights is an integral part of Kenya's democratic state and applies to all law and binds all state organs and all persons regardless of status and therefore the remedies specified in Article 23(3) of the Constitution apply to all state organs which include the County Government of Elgeyo Marakwet. The proceedings herein are sui generis and therefore not governed by Government Proceedings Act and as submitted by Mr Korir the Government Proceedings Act is inferior to the constitution of Kenya 2010 and therefore any inconsistency between the two the Constitution prevails.

The Government Proceedings Act forbids courts from giving injunctive orders against the Government. The section quoted hereinabove extends the same protection to Government Officers. This Act was in place even before the devolved system of Government came into force. The question which then arises is whether the Act can extend to the County Governments. The County Governments are body corporates entities with power to sue and be sued. There is no provision in the ***County Government Act of 2012*** which protects them from injunctive orders. I do not think that it was the intention of the legislature that the County Governments were to enjoy the same status as the National Government. If this was to be the intention, then the Government Proceedings Act would have been amended to include County Governments. I therefore do not find that the County Governments can come under the protection of the Government Proceedings Act.

WHETHER THE RESPONDENT HAS BREACHED ARTICLE 69(1) OF THE CONSTITUTION

Article 69 (1) of the Constitution provides that the state shall ensure sustainable exploitation, mutilation, management and conservation of natural resources and ensure equitable of the accruing benefits. The applicants argue that the stadium is utilized by the athletes as a training facility and as such converting it to the governors residence would deny the people of Elgeyo Marakwet and the entire public a national heritage and a pride of a facility of such magnitude that has produced athletes of great fame to the county

and country. The applicant further argues that the governors residence is likely to pose security threat to the governor and the people of Elgeyo Marakwet. The respondent on his part argues that he is excising only 3 acres out of 23 acres for public use and not private use.

According to the definitive provisions of the Environmental and National Management and Co-ordination Act, “**sustainable development**” means development that meets the needs of the present generation without compromising the ability of future generation to meet their needs by maintaining the carrying capacity of the supporting ecosystems; **while sustainable use** means present use of the environment or natural resources which does not compromise the ability to use the same by future generations or degrade the carrying capacity of supporting ecosystem

I have considered these rival arguments and do find that it has not been demonstrated by the petitioners how the utilisation of 3 acres out of 23 acres of the Kamariny Stadium for public use affects their natural Heritage, sustainable development and sustainable use of the suit property.

In conclusion, I do find that the petitioners have satisfied this court that that the 1st respondent did not follow the right procedure in changing the user of the 3 acres of the suit property from a stadium to the governors residence as there was no public participation and that National Land Commission was not consulted despite the fact that it is the body mandated with the management of public land. I have considered the prayers sought and do find that public participation is not a right enshrined in the bill of rights but a process or a value for realization of the right and therefore cannot be enforced as a right under article 23 of the constitution. The applicants have not clearly sought the enforcement of their rights to clean and healthy environment. The rights sought to be enforced under article 69(1) of the constitution are not rights properly so called but the obligations and duties of the state and therefore cannot be enforced as rights however the state may be compelled to carry on its duties and obligations if it fails to do so. I have considered the prayers sought by the petitioners and do find that the same are not favourable in the interest of justice as the 1st respondent has expended a lot of public funds on the project and therefore issuing an order of mandamus for the demolition of the put up structures will not be in the interest of justice. Moreover, an order of permanent injunction as prayed will not be in the interest of justice. Ultimately, I do direct that in the meantime, the project in respect of the construction of the Governor's residence on **Irong/Iten/451** be stopped until the 1st respondent complies with the law of Environmental Management and Coordination Act in consultation with National Environmental Management Authority and National Land Commission to ensure that all stakeholders are consulted and that precisely there be participation of the public a structured process. This being a public interest litigation I do order that each party to bear own costs.

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF FEBRUARY, 2016.

ANTONY OMBWAYO

JUDGE