



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L PETITION NO. 1 OF 2015

GEORGE HYKE KIPLAGAT BARTENGE.....1ST PETITIONER

BEN KIPKURUI KOMEN.....2ND PETITIONER

EMMANUEL NGETUNY BORE.....3RD PETITIONER

VERSUS

ELDAMA RAVINE EDUCATION FOUNDATION.....1ST RESPONDENT

KENYA FOREST SERVICES.....2ND RESPONDENT

JUDGMENT

George Hyke Kiplagat Bartenge, Ben Kipkurui Komen and Emmanuel Ngetuny Bore (*hereinafter referred to as Petitioners*) have come to court by way of petition against **Eldama Ravine Educational Education Foundation** and **Kenya Forest Services** (*hereinafter referred to as the respondents*) claiming that they live within the surroundings of Narasha Forest comprising Block No. 8 of the Lembus Forests situate within Eldama Ravine.

That Narasha forest is an indigenous forest serving the communal interest of the community in which the petitioners reside. It also forms a section of the wider Mau catchment area which is an important water tower in Kenya. That the petitioners contend that for a long time now, this forest has been under constant threat of destruction by various groups for personal benefit. It is the petitioners' contention that destruction of the forest will have far reaching ecological consequences not just for the Eldama Ravine area where the petitioners reside but the entire country. The petitioners have recently learned that in early 2014, the 1st respondent, a private company limited by shares, has requested the 2nd respondent to excise upto 30 acres of the aforesaid forest and allocate it to the 1st respondent under the guise of setting up an educational centre for the benefit of the public.

The petitioners and other members of the petitioners' community have objected to this request for a number of reasons as follows:-

- (a) That the request to excise the land from the forest has not been in consultation with and approval of the community.**
- (b) That the proposed school is a private enterprise likely to benefit the shareholders of the**

1st respondent at the expense of the larger community.

(c) That the proposal to excise the forest is completely unnecessary as there is plenty of alternative land for the project.

(d) That the excision of the forest will have adverse ecological ramifications on the local community and the country at large.

(e) That the process has been shrouded in secrecy.

The petitioners contend that if the proposed project proceeds as intended, it will violate their right to have the environment protected both for themselves and the future generation.

The petitioners pray for a declaration that the proposed excision of Narasha forest by the 1st respondent will infringe on the duty by the 2nd respondent to protect the environment for the benefit not just the petitioners' but the entire public and that the petitioners are entitled to protection of the right to a clean, safe and sustainable environment which among others, includes the right to conserve the Narasha Forest. That order does issue barring the excision and allocation of part of the forest to the 1st respondent. They further pray for order compelling the 1st respondent to make full disclosure to the Petitioners of all the documents and processes relating to the proposed project including but not limited to all financial and Environment Impact Assessment Reports.

The petition is supported by the affidavit of **George Hyke Kiplagat Bartenge**, the 1st petitioner who states that the current petition relates to efforts to protect Narasha Forest within the Eldama Ravine area of Kenya. That the forest forms part of what is described as Lembus Forests within Rift Valley, Kenya which has been the subject of protracted attempts to destroy it by a series of private developers. That the 1st respondent, a private company applied for allocation of approximately 30 acres of the forest. The net effect of the request is to further deplete the already precarious country's forest cover which currently stands at approximately 6 percent of the land mass in Kenya well below the recommended 10%. That the request by the 1st respondent to excise 30 acres of the forest to set up a school is completely unwarranted and a threat to the ecosystem of Eldama Ravine and Kenya. That there exists more than enough land outside forest land within Eldama Ravine for such a project.

The Petitioners have given the example of Kapchochoi Secondary School located within the same locality that has offered to accommodate the 1st respondent's project if it will go towards upgrading the school. The 1st respondent's proposal to build an educational centre within the forest is purported to be for public benefit yet the project has not been the subject of any public participation. The petitioners claim that the 1st respondent has avoided to engage the petitioners and other members of the public and kept all information on the project secret contrary to the values of transparency, accountability, public participation as enshrined in the country's Constitution and the Forest Act. That at it stands now, the 1st respondent is a private company wholly owned by its shareholders and the public in general has no stake in it. That it is therefore a fallacy for the 1st respondent to hold itself out as a foundation and a clear fraud to attempt to ride on this falsehood to acquire public land reserved as a forest.

The petitioners state that so far as the petitioners and the general community are aware, the project has not been subjected to any Environmental Impact Assessment and that it is therefore necessary that the court intervenes to issue orders to put the project on hold pending consultations by all stakeholders.

The petition is accompanied with a Notice of Motion praying that the court be pleased to issue orders to prevent the 2nd respondent from excising sections of the Narasha Forest for purposes of allocating it to the 1st respondent pending hearing and determination of the substantial petition.

The application is based on grounds that the respondents are in the process of unlawfully excising part of Narasha Forest and that the process will violate the petitioners' right to protection of the environment under the constitution. The supporting affidavit is a replica of the affidavit in support of the petition.

The 2nd respondent filed a replying affidavit sworn by Laura Yego who states that she is the legal officer of the 2nd respondent and therefore competent to swear this affidavit and that the 2nd respondent is a statutory body established under the Forests Act Cap. 385 Laws of Kenya to provide for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-economic development of the country. That the 2nd respondent is not aware of any attempts to excise Narasha forest or any part thereof for private use as alleged by the petitioners herein neither has it participated in the illegal alienation of forests contrary to the law as alleged or at all. The 2nd respondent receives numerous applications by persons seeking to be allocated parts of forests all over the country for both private and public use. Every application is considered and if the same is merited, the 2nd respondent shall follow the laid down legal procedures to excise any part of the forest as espoused in the Act.

She states that through the District Forest Officer, Koibatek Sub County, the 2nd respondent received an application from the 1st respondent requesting allocation of 30 acres of land for Eldama Ravine Centre for Excellence. That she confirms that the application by the 1st respondent has not been considered and no decision has been made over the same to date. That the application by the 1st respondent shall be considered just like all other applications once the 1st respondent submits all the requisite documents and the due process of the law shall be adhered to by the 2nd respondent in arriving at any decision thereof and that the suit herein is premised on mere apprehension and no tangible evidence has been adduced to confirm that the 2nd respondent has any intentions of allowing or rejecting the 1st respondent's application to excise part of the forest as alluded to by the petitioners. That the petition is shrouded in untenable ambiguity and the same is not clear as to whether the petitioners are attacking the 1st respondent's submission of the application or the procedure of granting the application. That further, the petitioners have not demonstrated any of their Constitutional rights that have been violated by the submission of the application by the 1st respondent or the receipt of the application thereof by the 2nd respondent. Neither have they established infringement of any class rights, communal rights or any statute as alleged in the petition to constitute a justifiable controversy.

She confirms that the 2nd respondent has no intention of excising Narasha forest or any forest consisting of Nembus forests for that matter as alleged by the petitioners without limiting itself to the confines of the law as required. It is not the business of the 2nd respondent to dissipate forests or illegally allocate state forests as purported herein by the petitioners and that the 30 acres of the land is a huge mass of land whose value is over Kenya Shillings Five Hundred Million (KShs.500,000,000/=) and the process of allocating it to a private or public body under the Act cannot be conducted in secrecy as alleged by the petitioners herein. The Forest Act Cap. 385 provides for an elaborate, open and consultative process that must be observed before the land can be excised, if at all. That contention by the petitioners is out of ignorance of the provisions of the law and is therefore premature, baseless and misleading. It is clear from the petition and its annexures that the petition herein is brought in bad faith, for private gain and is politically motivated. It intends to usurp the role and powers of the 2nd respondent as well as intimidate the 2nd respondent from discharging its statutory duties as mandated in the Act.

The 1st respondent filed a replying affidavit through Kiplagat Cheruiyot, its director stating that the entire notice of motion application dated 18th February, 2015 and or purported petition does not disclose any or any reasonable cause of action against the 1st respondent. That the 1st respondent has never applied to the 2nd respondent to the allocated land for any use and that it is in the public domain that the Honourable Moses Lessonet MP, Eldama Ravine Constituency, Baringo County vide a letter dated 25th March, 2014 requested the Director of Kenya Forest to allocate Eldama Ravine Constituency 30 acres of Narasha Forest to build a public high school to be named Uzalendo School. On 7th August, 2014, the Director of Kenya Forest Service declined the Honourable Moses Lessonet's request and directed that such request should be made to the Mau Forest Conservation Committee. On 8th August, 2014, the Honourable Moses Lessonet made a request to Mau Forest Conservation Committee to allocate Eldama Ravine Constituency 30 acres of Narasha Forest to build a public high school. On 24th October, 2014, the Mau Forest Conservancy Committee wrote to the Honourable Moses Lessonet rejecting his request for allocation of 30 acres of Narasha Forest Eldama Ravine Constituency. That clearly from the annexure marked GHKB3 attached to the Petitioners' petition the Honourable Moses Lessonet has never requested for land on behalf of the 1st respondent and there is no legal basis for using the 1st respondent herein.

That he has been advised by their Advocates on record, which advice he verily believes to be true, that there is no legal basis for commencing this action when indeed the 2nd respondent had declined to the Honourable Moses Lessonet's request for allocation of 30 acres of Narasha Forest to Eldama Ravine Constituency. That he has further been informed by their Advocates on record, which information he verily believe to be true that is a proper case for dismissal as the Petitioners are being malicious and only interested in misleading the Court to grant orders in vain.

That he has further been informed by their Advocates on record, which advice he verily believe to be true, that a limited liability company can only have a maximum of 7 Directors and that the Petitioners are aware that the 1st respondent is a company limited by guarantee and that is the reason why it has 11 Directors as confirmed on the Petitioner's own annexure marked "GHKB3".

That the Petitioners' suit is based on rumours particularly the annexure marked "GHKB10" which refers to Nakuru County instead of Baringo County and 100 acres instead of 30 acres that the Honourable Moses Lessonet had requested for.

On the 20th March, 2015, the 1st respondent filed a Notice of Preliminary Objection that:

1. ***There is no suit upon which the Notice of Motion application dated 18th February, 2015 is based.***
2. ***There is no reasonable cause of action against the 1st respondent disclosed in the purported Petition dated 18th February, 2015.***
3. ***That the purported petition and or application amounts to abuse of the court process and should be dismissed with costs to the 1st respondent.***

On the 13.4.2015, the petition filed a supplementary affidavit stating that while the 1st respondent denies ever applying for land from the 2nd respondent, there is ample evidence that in fact this application has been lodged. That on 29.1.2014, the Ministry of Education, Science and technology wrote to the District Forest Officer, Koibatek Sub County confirming that there was a request for allocation of 30 acres of forest land lodged by the 1st respondent. It only takes plain reading to understand that this constitutes an attempt by the 1st respondent to acquire portions of the disputed forest. The District Forest Officer, Koibatek to whom the letter is addressed is an officer working with the 2nd respondent. In a report appearing in the Standard Newspaper on 10.3.2015, the National Council of non-governmental organizations confirmed that indeed, a Mr. Moses Lessonet had applied to the 2nd respondent for allocation of the disputed forest land to the 1st respondent.

This court made directions that the preliminary objection be argued as a point of in the Notice of Motion.

The petitioners argues in their submissions that the preliminary objection is misplaced as the motion is premised on the petition filed pursuant to provision of Article 42 and 70 of the Constitution that provide for a justiciable right to clean and safe environment. The petitioners further argue that the right to approach court arises not only when it is violated by who when it is threatened to be violated. The petitioners argue that they have a known cause of action and that the petition is not an abuse of the process of court. The petitioners further argues that there is a real threat of the respondents to interfere with the ecosystem of Eldama Ravine by encroaching on Narasha Forest through unlawful excision of part of the forest in order to establish a school.

The 1st respondent argues that she has never applied for allocation of the forest as alleged and that there is a difference between Eldama Ravine Education Foundation and the Honourable Moses Lessonet the MP, Eldama Ravine Constituency.

The 2nd respondent submits that there is no specific provision of the constitution that has been breached and or violated by the 2nd respondent to warrant this petition and that there has been no breach of the public duty established by the Forest Act Cap. 385, Laws of Kenya and therefore, the application is premised on the apprehension.

The 2nd respondent further argues that the court is a wrong forum as one of the complaints is that the Environment Impact Assessment of the project has not been carried out as envisaged by the Act. Lastly, that the petition is an abuse of the court process.

I have considered the application dated 18.2.2015 and the preliminary objection raised herein and the submission filed by all parties and do find the following issues ripe for determination:

1. ***Whether the applicant/petitioner has established a prima facie case that their rights have been violated or are likely to be violated.***
2. ***Whether the 1st defendant is non-suited.***
3. ***Whether this is the wrong forum for the petition.***

1. WHETHER THE APPLICANTS/PETITIONERS HAVE DEMONSTRATED THAT THEIR RIGHTS HAVE BEEN VIOLATED OR ARE LIKELY TO BE VIOLATED

I have looked at the supporting affidavit to the petition and Notice of Motion and do find that the evidence on record is not sufficient to demonstrate that the 2nd respondent is in the process of excising forest land for allocation to the 1st respondent. The newspaper cuttings annexed have no evidential value. The request for land allocation by the Eldama Ravine Centre of Excellence, which is also referred to as Eldama Ravine Education Foundation in the exhibit marked C. H. K. - 4 in the affidavit sworn by the 1st petitioner or does not amount to a threat to violation of rights as there is a process to be followed by the 2nd respondent in excising a forest as per the Forest Act Cap. 385, Laws of Kenya.

I agree with the submissions of the 2nd respondent that the Forests Act Cap 385 vests the management of forests in the 2nd respondent and the section 28 of the Act bestows the powers to vary forest boundaries and declare that the forest shall cease to be a state or local authority forest and that there is an elaborate procedure. Indeed, the purported request by the 1st respondent was rejected by the 2nd respondent and therefore there is no *prima facie* evidence of the existence of threat to a claim eminent as envisaged in Article 42 of the Constitution. There is no evidence that the process of excision is likely to be breached and therefore the application for conservatory orders should fail on this part alone. In a nutshell the petitioners have failed to demonstrate that their rights to clean and healthy environment have been violated or are likely to be violated. I'm guided by the decisions of the Court of Appeal ***in Mumo Matemu v Trusted society of Human Rights Alliance of Kenya and Others C.A C.A NO 290 OF 2013 eKLR*** and ***Meme v the Republic 2004 E.A 124*** where it was held that where a person is seeking from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions of the constitution said to have been infringed and the manner in which they are alleged to have been infringed. The petition herein is based on a request that has been rejected by the 2nd respondent and therefore is a non-starter.

2. WHETHER THE 1ST RESPONDENT IS NON-SUITED

This court finds that it has not been established that the 1st respondent being a public company limited by guarantee has applied for allocation of land within Narasha forest. The evidence on record is that the Honourable Moses Lessonet applied for allocation of 30 acres of land which was rejected by the 2nd respondent and therefore it was not necessary to file the petition against the 1st respondent.

3. WHETHER THIS COURT IS THE WRONG FORUM FOR THE PETITION

This court holds that Article 42 of the Constitution, section 1 of Environmental Management and Coordination Act Cap 367 Laws of Kenya, and Section 13 of the Environment and Land Court Act no 19 of 2011 give the court jurisdiction to adjudicate on matter touching on a clean and healthy environment.

Article 42 provides that;

“42. Environment -

Every person has the right to a clean and healthy environment, which includes the right-

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment fulfilled under Article 70.

“70. (1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate-

(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;

(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or

(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

Section 3 of the Environmental Management and Coordination Act Cap. 367, Laws of Kenya provides for entitlement to a clean and healthy environment.

“3. Entitlement to a clean and healthy environment-

- 1. Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.*
- 2. The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.*
- 3. If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate to-*

(a) prevent, stop or discontinue any act or omission deleterious to the environment;

(b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;

(c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;

(d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

(e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.

(4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action-

(a) is not frivolous or vexatious; or

(b) is not an abuse of the court process.

(5) In exercising the jurisdiction conferred upon it under subsection (3), the High Court shall be guided by the following principles of sustainable development-

(a) the principle of public participation in the development of policies, plans and processes

Section 13 of the Environment and Land Act provides;

- 1. The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*
- 2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-*

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to land administration and management;

(c) relating to land administration and management;

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

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

- 3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*
- 4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.'*

All these provisions are construed to clothe the court with the jurisdiction to entertain all matters touching on the right to a clean environment.

In conclusion, this court finds that the petitioners have not established that their rights have been violated or are likely to be violated and therefore there is no reasonable cause of action against the 1st respondent disclosed in the Petition dated 18th February, 2015 hence ***the preliminary objection is upheld.*** The court having found that the 1st Respondent is non-suited ***the petition*** is dismissed with no order as to costs.

DATED AND DELIVERED AT ELDORET THIS 4TH DAY OF NOVEMBER, 2015.

ANTONY OMBWAYO

JUDGE