



**Skyship Company Limited & 3 others v Kenya Civil Aviation Authority; National Environment Management Authority & 2 others (Interested Parties) (Environment & Land Petition E001 of 2023) [2024] KEELC 3996 (KLR) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3996 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND PETITION E001 OF 2023**

**CG MBOGO, J  
MAY 21, 2024**

**BETWEEN**

**SKYSHIP COMPANY LIMITED ..... 1<sup>ST</sup> APPLICANT  
AFRO ECO-ADVENTURES LIMITED ..... 2<sup>ND</sup> APPLICANT  
ADVENTURES ALOFT KENYA LIMITED ..... 3<sup>RD</sup> APPLICANT  
BALLOON SAFARIS LIMITED ..... 4<sup>TH</sup> APPLICANT**

**AND**

**KENYA CIVIL AVIATION AUTHORITY ..... RESPONDENT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED PARTY  
NAROK COUNTY GOVERNMENT ..... INTERESTED PARTY  
ISHARA AIR BALLON SAFARIS LIMITED ..... INTERESTED PARTY**

**RULING**

1. Before this court for determination is the Notice of Motion Application dated 18<sup>th</sup> July, 2023 filed by the petitioners/applicants herein and it is expressed to be brought under Articles 22 (2) (c) and 23 (3) (c) of the Constitution of Kenya, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules seeking following orders: -
  1. Spent
  2. Spent



3. That pending the hearing and determination of the main petition, this court be pleased to issue conservatory order against the respondent by way of staying the decision of the respondent to grant the 3<sup>rd</sup> interested party an Air Service License for one (1) year with effect from 18<sup>th</sup> May, 2023 as published in the Kenya Gazette Notice Number 6959 of 22<sup>nd</sup> May, 2023.
4. That the costs of this application be in the cause.
2. The application is premised on the grounds inter alia that, Article 70 (3) of the Constitution, by exempting an applicant who seeks to uphold the right to a clean and healthy environment under Article 42 from the requirement of demonstrating that he has incurred loss or suffered injury.
3. The application is supported by the affidavit of Paramjeet Mihajan, director of the 3<sup>rd</sup> petitioner sworn on even date. The 3<sup>rd</sup> petitioner deposed that on 5<sup>th</sup> October, 2022, the Chief Park Warden, Maasai Mara National Reserve invited all balloon operators for a consultative meeting on 13<sup>th</sup> October, 2022 to discuss issues related to compliance to operate and fly over Maasai Mara National Reserve, and identify a centralized take off and landing areas for all balloons to reduce the level of environmental degradation that is currently being experienced within the reserve. He deposed that the stakeholders met at Sekenani Chief Warden's camp, where the consultative meeting was held, and that among the resolutions was that the air balloon operators significantly scale down their activities especially around Pose Plains with the aim of conserving the eco system and preventing further degradation of the environment.
4. He further deposed that the 2<sup>nd</sup> interested party set out to collect information from key industry players including air balloon operators and that the respondent on 21<sup>st</sup> December, 2022 published in the Kenya Gazette the particulars of an application by the 3<sup>rd</sup> interested party for issuance of an Air Service License. That together with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners and other stakeholders including the 2<sup>nd</sup> interested party, they made written representations objecting to the grant and a public hearing was conducted on 13<sup>th</sup> January, 2023 at the respondent's auditorium for purposes of determining the application by the 3<sup>rd</sup> interested party.
5. The 3<sup>rd</sup> petitioner deposed that the 1<sup>st</sup> interested party wrote to the stakeholders of the Maasai Mara National Reserve confirming that it had not granted any approvals to the 3<sup>rd</sup> interested party, and that following the publication of the Maasai Mara National Reserve Management Plan 2023-2032, the respondent opted to defer its decision on the issuance of the Air Service License to the 3<sup>rd</sup> interested party. Further, it was deposed that without any communication on the resolution of the circumstances that caused the deferral of the decision to issue the license, the respondent instead published its decision granting the Air Service License to the 3<sup>rd</sup> interested party.
6. According to the 3<sup>rd</sup> petitioner, the respondent disregarded the dictates of the zonation and visitor use scheme provided in the management plan including prescriptions for balloon operations. Further, that the 3<sup>rd</sup> interested party failed to consider the operating base in Olkiombo Pose area is in fact two different places or areas within the national reserve which was in contravention of Regulation 19 (1) (c) of the Civil Aviation (Operation of Aircraft for Commercial Air Transport) Regulations 2018, and Regulation 19 of the Civil Aviation (Rules of Air) Regulations 2018.
7. The 3<sup>rd</sup> petitioner deposed that the respondent ignored directives from the 1<sup>st</sup> and 2<sup>nd</sup> interested parties to scale down activities due to overcrowding, and potential adverse effects to the environment. That the action of the respondent to publish the gazette notice of 22<sup>nd</sup> May, 2023 and thereafter issue the 3<sup>rd</sup> respondent with a one-year license was in contravention and violation of the Constitution under Articles 10, 69 (1) (a), (e), (g), (h), (d) and 69 (2). Further, that the said actions contradict the express provisions of Sections 26, 27, 30, 35 and 44 of the Wildlife (Conservation and Management) Act,



Section 7 (1) (bb), (cc) and (5) of the *Civil Aviation Act* No. 21 of 2013, Regulation 19 (1)(c) of the *Civil Aviation (Operation of Aircraft for Commercial Transport) Regulations* 18 and 19 of the *Civil Aviation (Rules of Air) Regulations* 2018.

8. The 3<sup>rd</sup> petitioner further deposed that the respondent in ignoring to the request by the petitioners to furnish them with reasons for its decision to grant the license to the 3<sup>rd</sup> interested party, was in ignorance of the requirements of Sections 5 and 6 of the *Fair Administrative Action Act*.
9. On the 21<sup>st</sup> November, 2023 the 3<sup>rd</sup> interested party filed its replying affidavit in opposition to the application sworn on even date by Pilot Sakaitere Naurori. The 3<sup>rd</sup> interested party deposed that on 8<sup>th</sup> January, 2018, it wrote to the 2<sup>nd</sup> interested party expressing interest to operate Hot Air Balloon within the Maasai Mara National Reserve which was approved on 19<sup>th</sup> February, 2018 with instructions to obtain all the necessary approvals before commencing the operation. Further, that as part of obtaining the necessary approvals, the 3<sup>rd</sup> interested party conducted an Environmental Impact Assessment Study and prepared a report which was acknowledged by the 1<sup>st</sup> interested party on 23<sup>rd</sup> February, 2022. That on 8<sup>th</sup> April, 2022, the 1<sup>st</sup> interested party issued the 3<sup>rd</sup> interested party with EIA license No. NEMA/EIA/PSL/18345 after it was satisfied that the operation of the proposed Hot Air Balloon did not pose any threat to the environment at the Maasai Mara National Reserve.
10. The 3<sup>rd</sup> interested party further deposed that the environmental concerns raised by the petitioners were addressed in the EIA project report and that any grievance, dispute or complaint on the issuance of EIA license for the proposed project must first be made to the National Environment Tribunal in the first instance before approaching this court. Further, that the petitioners have not lodged any appeal or complaint against the decision of the 1<sup>st</sup> interested party challenging the issuance of the EIA license as required under Section 129 of the *Environmental Management & Coordination Act*. It was deposed that upon obtaining all the required approvals, the 3<sup>rd</sup> interested party applied to the respondent for the Air Service License and on 27<sup>th</sup> March, 2022, the 3<sup>rd</sup> interested party wrote to the respondent expressing its intention to operate Hot Air Balloon within Maasai Mara National Reserve and sought for authorization and license. Further, that the 3<sup>rd</sup> interested party submitted its application for Air Service License which was acknowledged on 4<sup>th</sup> October, 2022 and it was directed to submit executed license agreements for the aircrafts that would be used in the air service operation.
11. The 3<sup>rd</sup> interested party further deposed that it received a letter informing them of public participation meeting on 13<sup>th</sup> January, 2023 which the petitioners also attended and made representation. That the respondent after considering its application and the representations made by the public, approved their application for a period of one year effective from 18<sup>th</sup> May, 2023 which was communicated vide letter dated 19<sup>th</sup> May, 2023. It was deposed that the respondent has the power and discretion to determine whether or not to issue an Air Service License, and that any person who is aggrieved by a decision of the respondent in exercise of any power under the *Civil Aviation Act* must first lodge a complaint or grievance before the National Civil Aviation Administrative Review Tribunal. Further, that the issuance of EIA license and the Air Service License to the 3<sup>rd</sup> interested party followed due process, and was issued in accordance with the provisions of the law.
12. The 3<sup>rd</sup> interested party deposed that the petitioners have not exhausted the mandatory statutory remedies provided under the law, and that the petition is not motivated by environmental concerns but malice to ward off competition in the Hot Air Balloon business as can be seen from the Board Resolution annexed to the application.
13. The respondent filed its reply to the application through the affidavit of Emile Arao, Director General at the Kenya Civil Aviation Authority sworn on 14<sup>th</sup> March, 2024. The respondent deposed that the



present application is not premised on allegations of denial, violation or threatened violation of the Bill of Rights and there is no basis for issuance of the conservatory orders sought. Further, that the 3<sup>rd</sup> interested party has not commenced operations, and consequently, there is no prejudice that would occur upon the petitioners if the conservatory orders are not granted. It was also deposed that the 3<sup>rd</sup> interested party ought to pay for the license fee, where after a risk assessment is conducted before they can commence operations which is yet to be done.

14. The respondent further deposed that these proceedings were triggered by the publication of the gazette notice dated 22<sup>nd</sup> May, 2023 following the 3<sup>rd</sup> interested party's application on 21<sup>st</sup> December, 2022 which upon review, caused to be published in the Kenya Gazette. It was deposed that Regulation 25 (2) of the *Civil Aviation (Licensing of Air Services) Regulations, 2018* provides for representation in writing where in favour of, or against the application. Further, that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners lodged objections to the license application on various grounds; including that the Narok County Government had asked them to limit hot air balloon operation over conservancy areas, that the 3<sup>rd</sup> interested party operations would cause hazard to other air operators and pose harm to the Mara ecosystem, and that the 3<sup>rd</sup> interested party had no technical experience in balloon operations. Further, that the 4<sup>th</sup> objection lodged by the Narok County Government contended that no Environmental Impact Assessment Report and license had been issued by the National Environmental Management Authority to enable them make an informed decision.
15. The respondent further deposed that before the scheduled public hearing dated 13<sup>th</sup> January, 2023, the 4<sup>th</sup> petitioner withdrew its objections citing that the operations of the 3<sup>rd</sup> interested party will have minimal to no negative impact on the environment or reserve infrastructure. It was deposed that during the public hearing conducted on 13<sup>th</sup> January, 2023, the petitioners made their respective submissions and the respondent sought further information from the 3<sup>rd</sup> interested party that necessitated the deferral of its decision which was published through gazette notice no. 2773 dated 23<sup>rd</sup> February, 2023 published on 3<sup>rd</sup> March, 2023. Further, that the 3<sup>rd</sup> interested party responded to the concerns raised by the respondent by providing approvals from the National Environmental Management Authority and the Narok County Government and having considered all representations, relevant information and supporting documents, it was satisfied that the 3<sup>rd</sup> interested party had met the requirements of the regulations by the National Environmental Management Authority.
16. The respondent deposed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners sought to be furnished with reasons for the issuance of the license, which reasons were issued vide letters dated 14<sup>th</sup> July, 2023, dispatched via email. Further, that the respondent complied with all the requirements of *Fair Administrative Action Act* and that it was never invited to the consultative forum despite being the sole aviation regulator and issuer of Air Service License to all balloon operators in the Mara. Further, that the development of the Maasai Mara Management Plan did not bar the respondent from processing new applications and at the time the application for issuance of Air Service License was made, the Maasai Mara National Reserve Management Plan 2023-2032 did not exist.
17. The respondent deposed that it has been solely regulating the Airstrip, and no risk arises with the operation of the 3<sup>rd</sup> interested party or any other balloon operations in the area. That if there was any risk with linear of aerospace between the airstrip and the air balloon operations, even the petitioners would not be operating their balloons. Further, that there was no requirement to suspend issuance of Air Service License to new applicants during the development of the Management Plan 2023-2032. The respondent further deposed that the management plan limiting the number of operators offering hot air balloon services is contra statute, and against the mandate of the respondent



- and the regulatory regime for issuance of Air Service License where there exists substantive law for purpose of environmental management and conservation.
18. The respondent further deposed that the NEMA letter dated 13<sup>th</sup> February, 2023 has never been served on the respondent, and it came to know of its existence once it was attached to the application. Further that the petitioners have not brought forth in this court an Environmental and Social Impact Assessment Report showing degradation of the environment and the gazette notice in issue enjoys the presumption of legality and constitutionality. Further, that there is no evidence that the grant of conservatory orders sought would enhance constitutional values and objects specific to the rights and freedoms in the Bill of Rights. In addition, that the petition is disguised as a violation and infringement of the rights to a clean and healthy environment, access to information, fair administrative action when it actually seeks monopoly of only four balloon operators in Olkiombo area which is against the Competition Act.
  19. In conclusion, the respondent deposed that an order prohibiting the respondent from issuing fresh licenses to operate aircraft in Olkiombo/pose area of the Maasai Mara National Reserve in eternity is illegal, and unconstitutional and this court has no jurisdiction to grant such orders.
  20. On the 22<sup>nd</sup> February, 2024 the 3<sup>rd</sup> petitioner herein filed a further affidavit in response thereto sworn on 22<sup>nd</sup> February, 2023 (sic). The 3<sup>rd</sup> petitioner deposed that the 3<sup>rd</sup> interested party was duly registered on 9<sup>th</sup> November, 2021, and the said entity cannot possibly engage the 2<sup>nd</sup> interested party three calendar years before it was incorporated. Further, that since the approval and license from the 2<sup>nd</sup> interested party is fundamental to obtaining any further approvals and licenses, the whole process leading up to the respondent granting, and the subsequent gazettement of the Air License Service to the 3<sup>rd</sup> interested party is premised on an illegality, hence null and void ab initio.
  21. The 2<sup>nd</sup> interested party filed its replying affidavit to the application sworn on 10<sup>th</sup> April, 2024 by John Mayiani Tuya, the County Secretary. The 2<sup>nd</sup> interested party deposed that the petitioners rights as well as the general public right to clean and healthy environment has been violated, and infringed by the respondent as there was a moratorium issued by the 2<sup>nd</sup> interested party to put a hold to the Environmental Impact Assessment applications including new balloon operations until the Maasai Mara Management Plan is endorsed, and approved by relevant stakeholders which would ensure environmental conservation and address the environmental concerns within the reserve. Further, that other entities sought similar approvals from the 2<sup>nd</sup> interested party but the same was declined due to serious environmental concerns.
  22. The 2<sup>nd</sup> interested party deposed that pursuant to the meeting held on 13<sup>th</sup> October, 2022 with key stakeholders in the Maasai Mara Reserve, it was resolved that balloon operations be scaled down specifically around Pose Plains based on the serious environmental concerns raised. It was also deposed that the 2<sup>nd</sup> interested party distanced itself from the purported approval issued to the 3<sup>rd</sup> interested party on 19<sup>th</sup> February, 2018. It was further deposed that on 5<sup>th</sup> January, 2023, the County Executive Committee Member Trade, Cooperative Development, Tourism Development wrote to the respondent on the application by the 3<sup>rd</sup> interested party for an Air Service License. That the said letter was in objection to the application on the grounds of the ongoing development of the Maasai Mara Management Plan to regulate activities within the reserve.
  23. The 2<sup>nd</sup> interested party further deposed that the Pose Plains is seriously overcrowded by other operators which poses safety, and environmental concerns, and it could not have approved the issuance of license to the 3<sup>rd</sup> interested party which thus violated or threatened the constitutional provisions on the right to clean and healthy environment as anchored in the Constitution. Further, that the danger posed by the issuance of the license deserves immediate remedial attention and/or redress by the court



pursuant to the provisions of Article 70 of the Constitution, and it is in the best interest of the public and as a direct result of the violation or further threatened violation of the Constitution that the orders sought by the petitioners are granted.

24. The petitioners filed their written submissions dated 17<sup>th</sup> April, 2024 where they raised one issue for determination which is whether the conservatory orders are merited? On this issue, and while citing the case of Board of Management of Uburu Secondary School versus City County Director of Education & 2 Others [2015] eKLR, they submitted that the respondent failed to take into consideration the prescriptions of the Maasai Mara National Reserve Management Plan as expressly required by law. The petitioners submitted that the plan explicitly underscores the importance of deliberate measures to safeguard the environment in relation to ballooning activities as elaborated in the plan. Further, it was their submission that the prescriptions ought to have been within the reasonable contemplation and knowledge of the respondent at the time of deciding to grant the Air Service License to the 3<sup>rd</sup> interested party.
25. The petitioners further submitted that had the respondent undertaken due diligence to determine the authenticity of the purported approval from the 2<sup>nd</sup> interested party as required by law, it would have realized that the approval and no objection was purportedly issued to an entity by the name of Ishara Air Balloon which is an entity separate and distinct from the 3<sup>rd</sup> interested party Ishara Air Balloon Safaris Limited, registered well over three calendar years after the issuance of the approval and no objection. Further, that the respondent has not presented any evidence to allude to any coordination efforts in the form of due diligence to confirm the authenticity of the purported approvals or licenses issued to the 3<sup>rd</sup> interested party.
26. The petitioners submitted that the objections raised were blatantly disregarded by the respondent despite raising serious environmental concerns, such as those raised by the 2<sup>nd</sup> interested party as the custodian of the reserve. Further, that the respondent's action of granting the impugned air service license without full compliance with the provisions of Article 47 of the Constitution is a clear demonstration that the respondent in discharging its duties was motivated by other factors other than those stipulated in Article 69 (1)(h) of the Constitution.
27. The 2<sup>nd</sup> interested party filed its written submissions dated 26<sup>th</sup> April, 2024 where it raised one issue for determination which is whether a conservatory order should issue against the respondent. On this issue, the 2<sup>nd</sup> interested party submitted that the petitioners are entitled to the enforcement of their fundamental rights through the court where a breach is alleged to have occurred, is continuing or is likely to occur. While relying on the cases of Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 Others [2014] eKLR and Centre for Rights Education and Awareness (CREAW) & 7 Others versus Attorney General [2011] eKLR, the 2<sup>nd</sup> interested party submitted that the petitioners have laid out a *prima facie* case on the legality and constitutionality of the issuance of the Air Service License, and which petition further raises serious constitutional violations.
28. The 2<sup>nd</sup> interested party further submitted that it is clear from the onset that before the issuance of the now impugned Air Service License, serious environmental concerns were raised to the respondent by both the petitioners and the 2<sup>nd</sup> interested party. Further, that the respondent acted without coordinating with the relevant government agencies and considering representations from key stakeholders as provided, which was contrary and in violation of the Constitution. It was submitted that if the orders sought are not granted, it would mean the issued Air Service License shall remain in force, and the hot air balloon services shall remain in operation in violation of the Constitution further exposing the environment to degradation and imminent threat.



29. The 2<sup>nd</sup> interested party submitted that the public interest considerations tilts towards the granting of the orders sought to protect the rights to clean and healthy environment as provided in the Constitution.
30. The 3<sup>rd</sup> interested party filed its written submissions dated 6<sup>th</sup> May, 2024, where it raised one issue for determination which is whether conservatory orders should be granted by this honourable court. On this issue, the 3<sup>rd</sup> interested party submitted that the petitioners have not presented proof and evidence of any infringement of right, and having been aggrieved that they were denied aviation licenses to operate hot air balloons on account of failure to meet the requisite standards is not a ground to raise a prima facie case.
31. The 3<sup>rd</sup> interested party further pointed out a new development which has arisen where the petitioners have lodged an appeal at the National Civil Aviation Administrative Tribunal Appeal No. E001 of 2023, is an outright abuse of the judicial process as the petitioners are forum shopping in two different fora hoping to get orders favourable to them. The 3<sup>rd</sup> interested party relied on the cases of Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 Others [2014] eKLR, Application 5 of 2014, Isaiah Luyara Odando & Another versus Kenya Revenue Authority & 6 Others; Nairobi Branch Law Society of Kenya (Interested Party) [2022] Constitutional Petition E374 of 2021, Nkunja versus Magistrates and Judges Vetting Board & Another (Petition 154 of 2016) [2016] KEHC 7269 (KLR) (Constitutional and Human Rights)(20 May 2016)(Ruling) Petition 154 of 2016, Mrao Limited versus First American Bank of Kenya Limited & 2 Others [2003] eKLR and Mui Coal Basin Local Community & 15 Others versus Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR, Constitutional Petition Nos. 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).
32. I have considered the application, the replies thereof, the written submissions filed by the petitioners, and the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties as well as the authorities cited. In my view, issue for determination is whether the petitioners have made out a case for grant of conservatory orders pending the hearing and determination of the petition.
33. The law on conservatory orders is now well settled. In Centre for Rights Education and Awareness (CREAW) & another versus Speaker of the National Assembly & 2 others [2017] eKLR the court stated as follows: -
- “A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”
34. Article 23 of the Constitution of Kenya as read with the provisions of Article 165 and Rule 23 of the Constitution of Kenya (Protection of rights and Fundamental Freedom) Practice and Procedure Rules, 2013, (also referred to as “the Mutunga Rules”) grants this court power to hear and determine an application for conservatory order or interim orders in order to secure the subject matter in dispute. Rule 23 of the Mutunga Rules provides: -
- “1) Despite any provision to the contrary, a judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim order.



- 2) Service of the application in sub rule (1) may be dispensed with, with leave of the court.
  - 3) The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record with leave of the court, by substituted service within such time as may be limited by the court.”
35. The principles to be applied in granting conservatory orders were outlined by the Supreme Court in the case of *Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 Others*, Supreme Court Application NO. 5 of 2014 [2014] eKLR, where the court held that: -
- “(85) These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the court has given the green light.
  - (86) “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 supplicant’s 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.” (Emphasis added).
36. The applicable principles for the grant or refusal of conservatory orders were reiterated by J.L. Onguto, J in the case of *Board of Management of Uburu Secondary School versus City County Director of Education & 2 Others* [2015] eKLR as follows:
- (i) The need for the applicant to demonstrate an arguable *prima facie* case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
  - (ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
  - (iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
  - (iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
37. From the above, it is also clear that the purpose of conservatory orders is to maintain status quo pending the hearing of the main petition and without going into the merits of the petition.



38. The petitioners in this case contended that the respondent failed to take into considerations the prescriptions of the Maasai Mara National Reserve Management Plan 2023-2032, and instead published its decision granting the Air Service License to the 3<sup>rd</sup> interested party. According to the 3<sup>rd</sup> petitioner, the respondent disregarded the dictates of the zonation and visitor use scheme provided in the Management Plan including prescriptions for balloon operations. Further, that the 3<sup>rd</sup> interested party failed to consider the operating base in Olkiombo Pose area is in fact two different places or areas within the national reserve which was in contravention of Regulation 19 (1) (c) of the [Civil Aviation \(Operation of Aircraft for Commercial Air Transport\) Regulations](#) 2018, and Regulation 19 of the [Civil Aviation \(Rules of Air\) Regulations](#) 2018.
39. The petitioners further contended that the respondent ignored directives from the 1<sup>st</sup> and 2<sup>nd</sup> interested parties to scale down activities due to overcrowding, and potential adverse effects to the environment. That the action of the respondent to publish the gazette notice of 22<sup>nd</sup> May, 2023 and thereafter issue the 3<sup>rd</sup> respondent with a one-year license was in contravention and violation of the [Constitution](#) under Articles 10, 69 (1) (a), (e), (g), (h), (d) and 69 (2). Further, that the said actions contradict the express provisions of Sections 26, 27, 30, 35 and 44 of the [Wildlife Conservation and Management Act](#), Section 7 (1) (bb), (cc) and (5) of the [Civil Aviation Act](#) No. 21 of 2013, Regulation 19 (1)(c) of the [Civil Aviation \(Operation of Aircraft for Commercial Transport\) Regulations](#) 18 and 19 of the [Civil Aviation \(Rules of Air\) Regulations](#) 2018.
40. In opposing the claims made by the petitioners, the 3<sup>rd</sup> interested party gave a summary of its application process leading up to the issuance of the license which included obtaining all the necessary approvals. The 3<sup>rd</sup> interested party stated that it conducted an Environmental Impact Assessment Study and prepared a report which was acknowledged by the 1<sup>st</sup> interested party on 23<sup>rd</sup> February, 2022, and that on 8<sup>th</sup> April, 2022, the 1<sup>st</sup> interested party issued the 3<sup>rd</sup> interested party with EIA license No. NEMA/EIA/PSL/18345 after it was satisfied that the operation of the proposed Hot Air Balloon did not pose any threat to the environment at the Maasai Mara National Reserve.
41. According to the 3<sup>rd</sup> interested party, the environmental concerns raised by the petitioners were addressed in the EIA project report and that any grievance, dispute or complaint on the issuance of EIA license for the proposed project must first be made to the National Environment Tribunal in the first instance before approaching this court. Further, that the petitioners have not lodged any appeal or complaint against the decision of the 1<sup>st</sup> interested party challenging the issuance of the EIA license as required under Section 129 of the [Environmental Management & Coordination Act](#).
42. The 3<sup>rd</sup> interested party further argued that the petitioners have not exhausted the mandatory statutory remedies provided under the law, and that the petition is not motivated by environmental concerns but malice to ward off competition in the Hot Air Balloon business as can be seen from the Board Resolution annexed to the application.
43. The respondent on the other hand maintained that these proceedings were triggered by the publication of the gazette notice dated 22<sup>nd</sup> May, 2023 following the 3<sup>rd</sup> interested party's application on 21<sup>st</sup> December, 2022 which upon review, caused to be published in the Kenya Gazette. The respondent argued that Regulation 25 (2) of the [Civil Aviation \(Licensing of Air Services\) Regulations](#), 2018 provides for representation in writing where in favour of, or against the application. Further, that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners lodged objections to the license application on various grounds, and that the 4<sup>th</sup> objection lodged by the Narok County Government contended that no Environmental Impact Assessment Report and license had been issued by the National Environmental Management Authority to enable them make an informed decision.



44. The respondent deposed it has never been served with the letter from the National Environment Management Authority dated 13<sup>th</sup> February, 2023, and it came to know of its existence once it was attached to the application. The respondent argued that the petitioners have not brought forth in this court an Environmental and Social Impact Assessment Report showing degradation of the environment and the gazette notice in issue enjoys the presumption of legality and constitutionality. Further, that there is no evidence that the grant of conservatory orders sought would enhance constitutional values and objects specific to the rights and freedoms in the Bill of rights. It was also deposed that the petition is disguised as a violation and infringement of the rights to a clean and healthy environment, access to information, fair administrative action when it actually seeks monopoly of only four balloon operators in Olkiombo area which is against the Competition Act.
45. The 2<sup>nd</sup> interested party in its replying affidavit argued that the petitioners rights as well as the general public right to clean and healthy environment have been violated and infringed by the respondent as there was a moratorium issued by the 2<sup>nd</sup> interested party to put a hold to the Environmental Impact Assessment applications including new balloon operations until the Maasai Mara Management Plan is endorsed, and approved by relevant stakeholders which would ensure environmental conservation and address the environmental concerns within the reserve. Further, that other entities sought similar approvals from the 2<sup>nd</sup> interested party but the same was declined due to serious environmental concerns.
46. In applying the principles cited in the authorities above, and considering the facts of the subject matter in this case; it appears that the respondent failed to take into consideration of the Maasai Mara National Reserve Management Plan which seeks to give prescriptions on air balloon services operating within the Maasai Mara National Reserve. There has been contention as to the issuance of license to the 3<sup>rd</sup> interested party by the respondent which would not be duty of this court to delve into at this stage. Most importantly, is the risk said to be posed to the environment as a result of the said issuance that is at stake.
47. I do note that the license was granted vide gazette notice dated 22<sup>nd</sup> May, 2023 which was to take effect from 18<sup>th</sup> May, 2023 for a period of one year. The said license would in essence lapse on 17<sup>th</sup> May, 2024 which is already past. It would therefore be in vain to issue orders where the subject matter has been overtaken by events as there is nothing to stay.
48. Arising from the above, the notice of motion dated 18<sup>th</sup> July, 2023 lacks merit and the same is dismissed. Parties to bear their own costs.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 21<sup>ST</sup> DAY OF MAY, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**21/05/2024.**

In the presence of: -

Mr. Meyoki Pere – C.A

