



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NUMBER 47 OF 2010

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF INDIVIDUALS UNDER THE BILL OF RIGHTS OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 21, 22(1), (2), (4), 23, 24, 28,
29(C), 40,43(B) AND 63 OF THE CONSTITUTION**

AND

IN THE MATTER OF ARTICLES 2(5), (6) OF THE CONSTITUTION

AND

**IN THE MATTER OF ARTICLES 1, 8(2) (B), 9, 10, 18, 26, 28, 33, 37, 42, 43 AND 46
OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDEGENOUS
PEOPLE (UNDRIP)**

AND

**IN THE MATTER OF HISTORICAL AND CURRENT INFRINGEMENT OF THE
CULTURAL AND ECONOMIC RIGHTS OF THE MAASAI COMMUNITY OF
CORNER BARIDI IN NGONG AS INDEGENOUS PEOPLE WITHIN THE
MEANING OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF
INDEGENOUS PEOPLE (UNDRIP)**

AND THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF PROTECTION FROM DEPRIVATION OF PROPERTY
AND THEIR ANCESTRAL LAND**

BETWEEN

**LEDIDI OLE TAUTA &
OTHERS.....PETITIONERS**

AND

**THE ATTORNEY GENERAL.....1ST
RESPONDENT**

**KENYA FOREST SERVICE.....2ND
RESPONDENT**

**KENYA ELECTRICITY GENERATING COMPANY
LIMITED.....INTERESTED PARTY**

R U L I N G

Introduction and Background

The Petitioners commenced the suit herein against the Respondents by way of a Petition dated 2nd September 2010. The Petitioners' claim is that they have been the lawful residents of the Olteyiani Sub-location by virtue of being the sons of their fore/ancestral fathers who were the owners of the suit land. It is contended that when Kenya was declared a protectorate around 1897 through the East African Order in Council, the British Imperial Government extended to the protectorate the 1894 Indian Land Acquisition Act which was used to compulsorily acquire land for the railway line and the ten mile strip either side of the railway line.

While stating that land occupied by the Native Maasai Africans was not available for acquisition by the Commissioner pursuant to the Crown Lands Ordinance of 1902, the Petitioners contend that in total disregard of this restraint, the British government alienated to European settlers 614,213 acres of Maasai land. It is the Petitioners case that the protectorate administration acquired the land occupied by native Maasai by entering into agreements with the Maasai community.

According to the Petitioners, pursuant to the Anglo-Maasai agreements signed between the Maasai and protectorate government on 15th August 1904 and 4th April 1911, the Maasai people vacated all the area and land known as Nairobi County and settled on Ngong Hills and surrounding areas. It is the Petitioners averment that the Maasai have been living in the said area as a community practicing their culture and sustaining their economic lifestyle for decades.

The Petitioners contend that in 1949, Ngong Hills were gazetted as crown land which was subsequently degazetted in 1963 and re-gazetted under trust land under the jurisdiction of Ol Kejuado County Council. The Petitioners aver that in 1992, the then President Daniel Arap Moi directed Ol Kejuado County Council to declare the land for human settlement and for grazing purposes.

Petitioner's Case

It is the Petitioners case that further to the declaration, the then District Commissioner Kajiado District together with the entire council members created 18 public utility plots

which were to be managed by the Council in trust. It is averred that in 2005, the then President Mwai Kibaki confirmed to the Maasai that the land is rightfully and lawfully held by the Petitioners and directed the Ministry of Lands to issue title deeds. The Petitioners contend that pending the issuance of title deeds, they are still entitled to legitimate ownership by virtue of the native title deed bequeathed to them through successive inheritance from their fore fathers.

The Petitioners aver that as indigenous people, they are entitled to the protection of the Constitution and that their eviction would offend their fundamental rights and freedoms under the bill of rights. The Petitioners have thus sought the following prayers:

1. Conservatory orders restraining the Respondents, their agents, servants and or employees from encroaching on the suit land until the matter is heard and determined by the court

2. Declaration that the Petitioners and the Maasai community of Ngong Hills are entitled to all that piece of land known as Ngong Hills measuring approximately 577 hectares or thereabouts as it is community land solely belonging to the Petitioners of the Maasai community.

3. A permanent injunction to restrain the Respondents or any other party from interfering with the Petitioners and the Maasai of Ngong Hills from their ownership, occupation, use and interest over the suit land or otherwise from evicting or attempting to evict the petitioners and other residents from the suit land or from issuing title deeds or in any other way alienating the suit land other than to the Petitioners and other residents.

4. An order that the said land is community land and/or held under native title in terms of Article 63(1) and (2) of the Constitution of Kenya belonging to the Petitioners, successors and other bonafide Maasai residents.

5. An order directed to the government of Kenya to immediately survey the suit land and proceed to issue title deeds to the Petitioners and other bonafide Maasai residents of Ngong Hills or of the suit land.

6. Exemplary damages and costs of the Petition.

The 2nd Respondent's response.

The 2nd Respondent opposed the Petition through 2 replying affidavits both sworn on 14th September 2010 by Mr. David Kahuria Mbugua who is the Chief Executive Officer and Philip Kipkiyeni Kosgei, the Forester in Charge, Ngong Hills Forest Station. The 2nd Respondent contends that it holds and manages Ngong Hills Forest measuring approximately 3077.0 hectares which is a government forest having been gazetted as a forest area vide Legal Notice No. 90 of 1985.

The 2nd Respondent contends that the Petition is not specific on the land in question since the Petitioners have sought orders relating to unspecified 577 hectares of land alleged to be community land. The 2nd Respondent further contends that the Petitioners have not sufficiently identified themselves and established that they are solely Maasai of Olteyian-sublocation with exclusive occupation and use of the forest historically or currently. According to the 2nd Respondent, some of the identity cards exhibited in support of the claim indicate that the holders are from sub-locations other than Olteyian namely Kipeto, Olooseos, Kiserian, Ewuaso and Keekonyokie sub-locations which are way from the alleged land.

The 2nd Respondent avers that no basis has been laid in support of the claim as the Petitioners have not demonstrated a historical and current infringement of their cultural and economic rights. According to the 2nd Respondent, the Petitioners had not established that they were indigenous people under the United Nations Declaration on the Rights of Indigenous People (UNDRIP) and the Constitution of Kenya. It is the 2nd Respondent's averment that the historical account set out in the Petition is unsubstantiated and self serving as it disregards the common history of all Kenya people while paying little regard to the benefits of Kenyan nationhood thereby inviting a future that is inequitable and disorderly.

According to the 2nd Respondent, there has been no degazettement of the forest to allow for any settlement. It is the 2nd Respondent's case that

the forest is public land and is therefore not available to the Petitioners as individuals or as a community. According to the 2nd Respondent, the forest is public land for public good which supersedes any claim by the Petitioners as individuals and as a community.

The 2nd Respondent contends that the forest is an important environmental resource and it is of great environmental significance as a catchment area, wildlife habitat, biodiversity Center, carbon sink, electricity generation site through wind energy and as a navigation and communication site where security, aviation, mobile phone, radio and televisions installations have been erected on the hill of the forest.

While stating that it is the body mandated to conserve and maintain all state forests, the 2nd Respondent contends that it is required by law to ensure the protection and sustainable use of forests. The 2nd Respondent admits to having issued vacation notices dated 11th May 2010 requiring the illegal settlers and inhabitants to vacate the forest within 21 days. It is contended that on 30th August 2010, the operation to remove the illegal settlers was thwarted by hostility

and violence exhibited by the illegal settlers and that the situation was quelled by the Ngong District Commissioner and Maasai elders in the area.

The 2nd Respondent denied that the Petitioners are entitled to a native title deed as alleged and avers that the concept of native title deed which is unknown and alien to Kenyan law cannot defeat the constitutionally enshrined principles of land policy or the constitutional duty of the state to ensure public order in the use of land and forests in particular. According to the 2nd Respondent, the forest is surrounded by large settlement area where human habitation was confined prior to the encroachment which was triggered by political promises.

The 2nd Respondent contends that following adjudication and issuance of individual title deeds, the area has acquired a diverse cultural, economic and social character which ethnic diversity is not reflected in the Petition herein. The 2nd Respondent avers that the land in question is not community land as it does not meet the criteria established under Article 63(1) and (2) of the Constitution. It is the 2nd Respondents contention that the orders sought by the Petitioners would require degazettement of the forest which the Court has no powers to do since degazettement or alteration of boundaries requires approval by resolution of parliament.

The Interested Party's case

Kenya Electricity Generating Company Limited (**KENGEN**) by an application dated 11th June 2014 applied to be enjoined as an interested party to the proceedings and to be granted leave to file a replying affidavit to the petition. The interested party was enjoined to the proceedings and granted leave to file pleadings. The interested party's case is that the 2nd Respondent on 1st July 2010 granted it a special user license to develop a wind farm within the Ngong Forest for the production of electricity. The interested party averred that it had invested large sums of money on the project and that its special use license stood to be affected if the petitioners were to be granted the orders that they seek. The interested party denied that the petitioners would be entitled to the orders that they seek in the petition.

The Preliminary objection by the 1st Respondent

The 1st Respondent has filed a notice of preliminary objection dated 19th July 2013 raising five grounds of objection namely:-

1. That the suit as drawn and filed does not disclose any joint facts or material issues in commonality to the Petitioners since they do not own any identifiable property in common and/or jointly.

2. That the suit as drawn and filed indicates issues that concern ownership of land which is not an issue under the constitutional law forum but under the Land and Environment Court as created by the Constitution.

3. That further to paragraph 2 above, the suit ought to be heard by the Environment and Land Court since it may need viva voce evidence.

4. That the Petitioners have not identified any particular property which their property rights have been violated against as per Article 40 and they are burdening the Court to identify for them their property and thereafter declare it theirs.

5. That a deprivation of a right is distinct and inherent and cannot be exercised together.

Submissions by the parties

The preliminary objection was canvassed by way of written submissions which were highlighted before the Court on 17th February 2015. The 1st Respondent in its submissions dated 20th February 2014 and filed in Court on 24th February 2014 argued that the case of **Anarita Karimi Njeru vs. The Republic (1976-1980) KLR 1272** settled the principle that a person alleging contravention of a constitutional right must set out the right infringed and the manner in which the right is alleged to have been infringed. Counsel submitted that deprivation of a right is distinct and inherent and cannot be exercised together and that the Petitioners have not demonstrated that each of them is entitled to a part of the land or as a community right.

According to the 1st Respondent, there was no nexus between the Petitioners and the Maasai of Ngong Hills under which title they were seeking the orders. Counsel submitted that there was no indication whether the Petitioners were seeking a community or group right or whether they were registered as a society. It was submitted that there was no indication that **Ledidi Ole Tauta** was given authority to represent a community or the basis on which he swore the affidavit in support of the petition.

While submitting that the Petitioners had not specified any particular property in which their property rights had been violated under Article 40, the 1st Respondent argued that the Petitioners were burdening the court to identify and demarcate for them the 577 hectares and thereafter declare it theirs. Reliance was placed on the case of **Mumo vs. Trusted Society of Human Rights Alliance & 5 others Nairobi CA No. 290 of 2012** where the court held that a person who moves the court for judicial redress in public interest cases must be acting *bona fide* with a view to vindicating the cause of justice and that where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person.

In further submission, the 1st Respondent argued that the 577 hectares of land alleged to be community land is part of 3077.0 hectares legally gazetted as Ngong Hills Forest, held and managed by the 2nd Respondent. Counsel submitted that there has been no degazettement of

the forest to allow any human settlement. It was contended that the forest has been subject to illegal invasion and encroachment on the basis of alleged political promises for purported settlement of landless people. The 1st Respondent averred that the Petitioners have no lawful claim of ownership of the 577 hectares of land.

Counsel further submitted that the Petitioners individually and as alleged Maasai community of Olteyan sub-location within Kiserian location Ngong Hills had not demonstrated that they are indigenous people who were all born and brought up in Olteyan sub location and that their ancestors were owners of their ancestral land. It was submitted that the historical account set out by the Petitioners of their cultural and economic rights as the Maasai does not justify illegal human settlement and encroachment of Ngong Hills Forest.

According to the 1st Respondent, the historic account by the Petitioners was not founded on any research, records or documented events but rather, it was a word of mouth statement which could not be relied on. It is the 1st Respondent's submission that no government decisions to relocate the community or gazette notices were produced. Counsel urged that the Petitioners' claim should be viewed in a larger context while taking into account the interests of the public. It was submitted that the government had a plan to extend the forest cover in the country and restore proper climatic conditions for the benefit of all the citizens.

The 1st Respondent argued that the Petitioners had not demonstrated the allegations that the government deprived them the most fertile lands which formed their basic resource for sustenance, self advancement as a people and the continuity of their community. Counsel submitted that the 577 hectares is part of Ngong Hills Forest and therefore, public land which should be safeguarded for the common good of all Kenyans including the Maasai community.

While submitting that the issue in this suit revolves around ownership and occupation of land, the 1st Respondent stated that this matter can only be determined by viva voce evidence and further, that the suit should not have been filed as a constitutional petition. It was submitted that the Petitioners had not shown any valid title granting them rights to occupy the alleged community land. Counsel contended that the petition concerns ownership of land which is not under the constitutional and human rights mandate but under the Land and Environment Court created under the Constitution.

The 1st Respondent argued that a constitutional petition cannot determine ownership and occupation of land and reliance was placed on the case of **Sangani Investment Ltd vs. The Officer in Charge Remand and Allocation Prison Misc Application No. 99 of 2006** and **R vs. Attorney General & another Exparte Samuel Kazungu Kambi (2012)eKLR** where the court held that judicial review proceedings is not a forum where disputes on ownership of land can be adjudicated and determined since such disputes require viva voce evidence and cross examination of witnesses which is not allowed in judicial review proceedings. Counsel submitted that the principles of law applied in the cited judicial review cases affect constitutional petitions and were therefore applicable to this case.

While submitting that the Petitioners had not identified any suit parcel or a part thereof which they own, the 1st Respondent contended that the Petitioners had not identified the coordinates and the extent to which the individual parcels or community land extends. Counsel made reference to the case of **Rashid Odhiambo Aloggoh and 245 others vs. Haco Industries**

CA No. 110 of 2001(UR) where the Court of Appeal held that it was the duty of the court to determine whether or not the allegations, if proved amounted to a contravention of the constitutional provisions on which the appellants relied.

It was submitted that since the issue of ownership had not been settled, the court cannot proceed to determine the fundamental rights of the Petitioners if any, on the subject matter. Lastly, it was submitted that the Petitioners cannot validly claim ownership of any part or at all of Ngong Hills Forest and the 1st Respondent urged the court to dismiss the suit with costs.

The 2nd Respondent in its submissions dated 17th April 2014 supported the preliminary objection and contended that since the prayers in the petition are about use, occupation and ownership of Ngong Hills, the suit ought to have been filed and heard by the Environment and Land Court. Reference was made to Article 165(5) (b) and 162(2) and (3) of the Constitution and it was submitted that the Environment and Land Court Act was enacted to give effect to Article 162(2) of the Constitution.

Counsel for the 2nd Respondent submitted that the Environment and Land Court which has the same status as the High Court deals exclusively with matters relating to the use, occupation of and title to land which are the crux of the instant petition. It is the 2nd Respondent's submission that being a court with the status of the High Court, the Environment and Land Court has powers to interpret the Constitution and protect the fundamental rights and freedoms alleged to have been violated. Reference was made to the case of **The Owners of Motor Vessel "Lilian S" vs. Caltex Oil Kenya Ltd (1989) KLR 1** where the Court of Appeal held *inter alia* that jurisdiction is everything and that without jurisdiction, a court has no power to make one more step. The 2nd Respondent stated that the Court has no jurisdiction over this petition instituted in the Constitutional and Judicial Review Division of the High Court.

In further submission, the 2nd Respondent averred that since the Petitioners allege violation of fundamental rights and freedoms, they were under a duty to plead their case with particularity. For this submission, the 2nd Respondent relied on the case of **Anarita Karimi Njeru vs. The Republic (1976-1980) KLR 1272** where the Court established the principle that a person seeking redress from the High Court on a matter which involves reference to the Constitution should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.

It was argued that the principle in the **Anarita Karimi Njeru** was clarified in the case of **Trusted Society of Human Rights Alliance vs. Attorney General & 2 others, Petition No. 229 of 2012.** Counsel submitted that the Petitioners had failed to meet the test as they had not identified the exact property they were calling the Court to protect. It was submitted that the orders sought by the Petitioners lack specificity as they sought a declaration in respect of all that parcel of land known as Ngong Hills measuring approximately 577 hectares or thereabout without reference to any demarcation or specific location.

It was further submitted that the Petitioners had sought an order directing the government of Kenya to immediately survey the suit land and proceed to issue title deeds to them. Counsel argued that constitutional protection of the right to property only arises when the Petitioner

can prove ownership of the property under the relevant laws which essentially must begin with identification of the property in question and the persons who lay claim to it.

The 2nd Respondent argued that with the petition as framed, the Court is not able to tell the specific land in Ngong Hills which the Petitioners lay claim to and that the Petitioners had not established their commonality of interest and further, that they had not identified themselves as a distinct group of Maasai residents with claim to community land.

The 2nd Respondent further submitted that the Petitioners had not fulfilled the requirements of Article 63 of the Constitution. Counsel argued that for a claim of community land to hold, Article 63(1) requires clear identification of communities in terms of ethnicity, culture or community which the Petitioners had failed to demonstrate. It was submitted that Articles 63(2), (3) and (4) set out the various qualifications of community land and the persons to whom it belongs which qualifications the Petitioners had also failed to meet.

Counsel argued that no Act of Parliament had declared the land to be community land and that on the contrary, Ngong Hills Forest is a gazetted forest area and a state forest under the Forest Act and therefore, that it is public land under Article 62(1)(b) and (g) of the Constitution. It is the 2nd Respondent's submission that the suit property is not lawfully held, managed or used by the Petitioners as community forests, grazing areas or shrines and further, that the orders for demarcation and issuance of title sought points to individualized claim of the land which is inconsistent with community forest, grazing area or shrines.

In further submission, it was contended that the land is not ancestral land and land traditionally occupied by hunter-gather communities since the Petitioners had not claimed to be such hunter-gatherer community or to bear such ancestry. Counsel contended that the suit property was not held as trust land by the county government but that it was a forest which legally vests in the 2nd Respondent and as public land under the Constitution.

The 2nd Respondent argued that any declaration or orders that the suit property is community land would be inconsistent with the Constitution and further, that Ol Kejuado County does not lawfully hold title to the forest or any part of it as alleged by the Petitioners. The 2nd Respondent reiterated that Ngong Hills Forest measuring 3077 hectares is a gazetted forest which is clearly demarcated and not open to occupation and or settlement by any person.

Counsel submitted that the 2nd Respondent's title to the forest cannot be defeated at all by a claim that is not specific as to the identity of the land in question and the persons claiming. Lastly, it was submitted that the petition lacks basis under the Kenyan law and further, that the Petitioners do not own any identifiable property and are not an identifiable group capable of being constitutionally protected.

The Interested Party also supported the preliminary objection in its submissions dated 4th August 2014. It was argued that the suit herein which relates to ownership of land should have been filed under the Environment and Land Court and not as a constitutional petition in the Constitutional and Judicial Review division of the High Court. Counsel submitted that the Environment and Land Court is established under Article 162(2) of the Constitution to determine disputes relating the environment and the use and occupation of land and title to land.

It is the Interested Party's submission that Article 165(5)(b) of the Constitution expressly states that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of courts contemplated in Article 162(2) of the Constitution. Counsel submitted that the suit herein is a petition which has not invoked the mandate of the Environment and Land Court in terms of Article 162(2) of the Constitution and therefore, that the Court lacks jurisdiction to entertain it. Reliance was placed on the Court of Appeal decision in the case of **The Owners of Motor Vessel "Lilian S" vs. Caltex Oil Kenya Ltd(1989)KLR** and it was argued that similarly, the Environment and Land Court has no jurisdiction to entertain the suit herein which as drawn is a constitutional petition.

It was further submitted that whereas the Petitioners herein have alleged that land known as Ngong Hills measuring approximately 577 hectares or thereabout is community land belonging to them, they failed to demonstrate in their pleadings that the land in question meets the requirements of community land under Article 63(2) of the Constitution.

Counsel submitted that the Petition does not disclose with any degree of particularity the property the petitioners allege to be the suit land and further, that it would be impractical to enforce the orders sought since the suit land as stated in the petition is unidentifiable in law.

The Petitioners in submissions dated 20th May 2014 conceded that under the Constitution, the High Court has no jurisdiction to entertain land matters which jurisdiction is exclusively vested in the Environment and Land Court. The Petitioners submitted that this case was not a land dispute *per se* and but rather, a constitutional petition alleging violation of fundamental rights enshrined in the Constitution. Counsel argued that land which is protected under Article 40 of the Constitution falls within the meaning of property espoused under Article 260.

The Petitioners referred the Court to Articles 22(1), 23(1) and 165(3)(b) and submitted that being a petition alleging the infringement of fundamental rights, it cannot be said that the High Court has no jurisdiction to handle it. It is the Petitioners' submission that throwing out the petition at this stage will amount to a violation of their rights to seek the protection of the Court to safeguard their constitutional rights.

In further submission, the Petitioners argued that the suit herein was instituted before the establishment of the Environment and Land Court. Counsel submitted that whereas the Environment and Land Court Act No. 19 of 2011 came into operation on 30th August 2011, the petition had been filed almost an year before. The Petitioners argued that even in 2011, the Environment and Land Court existed only in statute and had not been operationalised. It is the Petitioners' submission that they could therefore not have been expected to file their case in a court which only existed in statute or wait until the court was operationalised for them to move to enforce their rights.

While submitting that such a interpretation would only serve to defeat the ends of justice, the Petitioners made reference to section 30 of the Environment and Land Court Act and argued that the dispute herein was referred to the Chief Justice under Article 165(4) of the Constitution to constitute a bench of uneven number of judges since substantial questions of law have been raised.

In respect to the objection that a deprivation of a right is distinct, inherent and cannot be exercised together, it was submitted that under Article 22 of the Constitution, a person can institute a suit on behalf of another person, group or class of persons. The Petitioners relied on the cases of **Njova & 6 others vs. Attorney General & another**(2004)AHRLR 157(KeHC 2004) and **Rangal Lemeiguran & others vs. Attorney General & others** **HC Misc Civil Application 305 of 2004** for the proposition that it would be a violation of a group of individual rights where there is denial of a right to be heard whether individually or through representatives.

According to the Petitioners the objection that the suit as drawn does not disclose any joint facts or material issues in commonality and that they had not identified the land in issue was improperly raised as the points are imprecise, muddled up and not based on pure law. Counsel submitted that the points require the ascertainment of facts and they go into disputed facts which include questions as to whether the Petitioners are members of the Maasai community and whether they are the lawful owners of the land in Ngong Hills where they reside.

It was submitted that the issue of title and ownership which the court has been called to determine cannot be dismissed or settled by way of a preliminary objection and the Petitioners relied on the case of **Mukhisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd** (1969) EA 696 where it was held that a preliminary objection raises a pure point of law and cannot be raised if a fact has to be ascertained or if what is sought is in the exercise of judicial discretion.

While submitting that the Petitioners had invoked the Constitution seeking that the land they had lived on be vested in them, Counsel contended that the Petitioners' right was derived from their inheritance of ancestral land. Reference was made to the case of **Mabo & another vs. The state of Queensland and another** (1989) HCA 69; 166 CLR 186 for the proposition that there was a concept of native title at common law and that the source of native title was the traditional connection to or occupation of the land. The Petitioners submitted that in the light of the issues raised in the Petition, the Respondents have no claim whatsoever over Ngong Hills and they urged the Court to dismiss the preliminary objection.

Analysis and determinations

The issue for determination is whether the 1st Respondent's preliminary objection has merit and should be upheld. The first and fourth preliminary objections are interrelated and will be addressed together. The 1st Respondent argues that the Petitioners do not own any identifiable property in common and/or jointly and further, that the Petitioners have not identified any particular property in respect of which their property rights have been violated against as per Article 40.

The Petitioners aver that the suit property is ancestral land which was dispossessed from their forefathers during the colonial days. The Petitioners allege that the British Imperial Government compulsorily acquired land occupied by Native Maasai Africans which was not available for acquisition and alienated 614, 213.0 acres of Maasai land to European settlers.

The Petitioners have sought *inter alia* a declaration that they together with the Maasai community of Ngong Hills are entitled to all that piece of land known as Ngong Hills

measuring approximately 577 hectares or thereabouts and have sought an order directing the government to immediately survey the suit land and issue title deeds to them and other bonafide Maasai residents of Ngong Hills.

The Petitioners have further averred that as indigenous people, they are entitled to the protection of the Constitution and that their eviction would offend their fundamental rights and freedoms under the bill of rights. No particulars of the alleged violations and the manner of the alleged infringements have however, been pleaded. The Petitioners have also not cited the provisions of the Constitution which they allege are threatened with violation. It is well established that a petitioner who seeks redress under the Constitution must state his claim with precision by reference to the provisions of the Constitution violated and the manner of the alleged violation. This principle was established in the case of **Anarita Karimi Njeru - vs- Attorney General, (1979) KLR 154** where the Court held:

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

The principle in the **Anarita Karimi** Case(supra) was re-affirmed by the Court of Appeal in the case of **Mumo Matemu -vs- Trusted Society of Human Rights Alliance and others, Nairobi Civil Appeal No. 290 of 2012** where it was stated as follows:

"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in **Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."**

Applying the test established in the case of **Anarita Karimi Njeru –vs- Attorney General (supra)** as amplified in the case of **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & Others (Supra)** to the facts of this case it is our view that the petition lacks any specificity such that it is merely of a general nature in that it fails to identify with precision the

particular property to which the Petitioners lay claim. Save for stating that they are entitled to 577 hectares of the suit land, the Petitioners have not specified which portion of the 3077.0 hectares gazetted as Ngong Hills Forest they lay claim to. We are satisfied that the petition suffers serious lack of precision and that it is practically not possible for the Respondents to know what the specific claim by the petitioners is such that even if the petitioners claim was to be upheld it would invite a further exercise of determining what the claim relates to. We uphold grounds 1 and 4 of the 1st Respondent's preliminary objection.

The other objections raised are in relation to the jurisdiction of the Court. The 1st Respondent argued that since the issues raised in the Petition concern ownership of land, the suit ought to have been filed in the Land and Environment Court which has exclusive jurisdiction to deal with land issues. The 1st Respondent also contended that the suit ought to be heard by the Environment and Land Court since it may need *viva voce* evidence.

Article 162(2)(b) of the Constitution made provision for the establishment by Parliament of a Court with the status of the High Court to hear and determine disputes relating to the environment, use and occupation of, and title to land. The Environment and Land Court Act No. 19 of 2011 was enacted to give effect to Article 162(2) (b) of the Constitution. It is not disputed that the instant petition was filed before the enactment of the Environment and Land Court Act which established the Environment and Land Court. The Petitioners can therefore not be faulted for having filed their suit in the Constitutional and Judicial Review division of the High Court.

The Petitioners relied on Articles 22(1), 23(1) and 165(3)(b) to submit that the Petition which alleges the infringement of fundamental rights was properly before the High Court. Whereas the jurisdiction to determine whether there has been a violation of any of the rights under the Bill of Rights is vested in the High Court under Article 165(3) (b), the said jurisdiction is subject to clause (5) which prohibits the High Court from exercising jurisdiction over matters falling within the province of the courts established under Article 162(2).

Courts have been faced with applications raising objections on their jurisdiction to entertain suits on matters falling within the jurisdiction of Courts established under Article 162(2). The practice has however, been not to dismiss the suits but to transfer them for hearing on merits at the right forum. See **Samson Onyango Ngonga vs. Public Service Commission & 5 others (2013) eKLR** and **United States International University vs. Attorney General, Constitutional Petition No. 170 of 2012,**

The Petitioners also contended that since substantial issues of law had been raised, the dispute herein was referred to the Chief Justice under Article 165(4) of the Constitution to constitute a bench of uneven number of judges. Pursuant to directions issued on 18th December 2012, the Hon. Chief Justice empanelled a three Judge Bench to hear the instant Petition. The issue for determination would thus be whether the composition of the Bench goes to the jurisdiction of this Court to hear and determine the dispute.

In the case of **Kenya Medical Research Institute vs. Attorney General & 3 others (2014) eKLR**, the competency of a three Judge Bench was challenged on grounds that constituting a Bench of High Court Judges mixed with an Industrial Court Judge to hear a matter within the Constitutional Petition 47 of 2010 | Kenya Law Reports 2015

jurisdiction of the Industrial Court was unconstitutional. The Court held that the Chief Justice is free to appoint any Judge of the High Court or a Judge of the Court with the status of the High Court to hear any dispute under Article 165(4) of the Constitution. To enable us to make a determination on the issue whether or not this court has jurisdiction to deal with the matter we set out hereunder and consider the relevant constitutional provisions and the relevant provisions of the Environment and Land Act.

Under article 165(3) the High court has unlimited jurisdiction (subject to Clause (5) to hear and determine any matter.

Article 165 (3) of the constitution provides:

(3) Subject to Clause (5) the High Court shall have:-

(a) unlimited original jurisdiction in criminal and civil matters,

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened,

(c) -----

(d) Jurisdiction to hear any question respecting the interpretation of this constitution including the determination of-

(i) the question whether any law is inconsistent with or contravention of this constitution,

(ii) -----

(iii) -----

(iv) -----

Article 165(5) provides thus:-

(5) The High Court shall not have jurisdiction in respect of matters:-

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution, or

(b) falling within the jurisdiction of the courts contemplated in Article 162(2).

The courts contemplated under Article 162(2) were to hear and determine disputes relating to-

a. Employment and labour relations, and

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

The jurisdiction and functions of these courts was to be determined by parliament. The Environment and Land court Act No. 19 of 2011 under section 13 makes provision for Jurisdiction of the Environment and Land Court established under Section 4 of the Act.

Under section 13(2) the court has power to hear and determine disputes relating to environment and land, including disputes:-

- a. **relating to environmental planning and protection trade, climate issues, land use planning, title tenure, boundaries, rates, rents valuations, mining, minerals and other natural resources,**
- b. **relating to compulsory acquisition of land,**
- c. **relating to land administration and management,**
- d. **relating to public, private and community land and contracts, chooses in action or other enforcements granting any enforceable interests in land, and**
- e. **any other dispute relating to environment and land.**

Section 13(3) in our view confers jurisdiction on the Environment and Land Court to hear and determine matters relating to breach or violation of rights or fundamental freedoms relating to the environment and land under Articles 42, 69 and 70 of the Constitution.

Section 13(3) of the Environment and Land Court Act provides:-

(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 the environment and land under Articles 42, 69 and 70 of the Constitution.

Having regard to the Constitutional provision under Article 165(3) (b) and section 13(3) of the Environment and Land Court it is our view that in Constitutional matters touching on the violation and/or infringement of the fundamental bill of rights and freedoms in as far as the same relate to the environment and land both the High Court and the Environment and Land Court have concurrent jurisdiction to deal with such matters and in our view a party can bring such matters either before the High court and/or before this court. Thus we find that this court has the jurisdiction to deal with the petition before us and we disallow the ground of objection that this court has no jurisdiction to hear and determine this matter.

The last objection taken by the 1st Respondent was that a deprivation of a right is distinct and inherent and cannot be exercised together. This particular objection is without merit considering the provisions of Article 22 of the Constitution. It is our view that having regard to the provisions of Article 22 of the Constitution a member of the community acting on his behalf and others could properly file the petition.

Article 22 of the Constitution provides:-

" 22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:-

- a. a person acting on behalf of another person who cannot act in their own name;
- b. a person acting as a member of, or in the interest of, a group or class of persons;
- c. a person acting in the public interest; or
- d. an association acting in the interest of one or more of its members.

Article 22(2) (b) of the constitution does allow an individual or group of individuals to institute court proceedings claiming breach of a right or fundamental freedom in the Bill of Rights and therefore the petitioners were entitled to bring these proceedings on behalf of all the other community members.

Question of public interest

The parties particularly the Respondents glossed over the issue of public interest as relates to the land that is presently a gazetted forest and which the petitioners claim a portion thereof. There is no contest that the land claimed by the petitioners falls within the Ngong Hills Forest gazetted as such in 1985 and now falls under the Management of the Kenya Forest Service under the provisions of the Forest Act, 2005. Under section 20 of the Forest Act 2005, all forests other than private and local authority forests are vested in the state. Section 20 of the Forest Act provides:-

“20. All forests in Kenya other than private and local authority forests are vested in the state subject to any rights of user in respect thereof which by or under this Act or other written law, have been or are granted to any other person”.

The Kenya Forest Service under the provisions of section 4 of the Forest Act which sets out its functions is inter alia charged with the responsibility of managing all state forests and to protect all the forests in Kenya in accordance with the provisions of the Act.

At the time of instituting the present petition, the petitioners knew and were aware that Ngong Hills Forest was a Gazetted state forest and that the same was exclusively under the management of the Kenya Forest Service and therefore there could be no dealings with the forest land without the sanction of the Director of the Kenya Forest Service, the Board of the Kenya Forest Service, and the Minister responsible for forestry. The Kenya Forest Service is entrusted the responsibility to manage state forests on behalf of the public for the benefit of all Kenyans.

Government forests are classified under the constitution as public land. Article 62(I) g of the constitution provides:-

“62.(1) public land is:-

Government forests other than forests to which Article 63(2)(d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas”.

The Kenya Forest Service Board as the manager and custodian of state forests, is expected under the doctrine of public trust, embodied under Article 10 of the Constitution which provides for National values and principles of governance, to ensure there is sustainable development of forests in Kenya for the benefit of all citizens.

The Court takes cognisance that the issues raised in the Petition are of great public interest as they revolve around alleged community land rights where the land in issue is a gazetted forest and therefore public land under Article 62(1) (g) of the Constitution. In a ruling delivered by **Hon. Lady Justice Mumbi Ngugi** on 27th January 2012 in this matter, the Court observed that it was being called upon to consider and weigh the interests of the Petitioners as members of one indigenous community in Kenya against the wider public interest and the needs of environmental conservation in Kenya.

Article 10 (1) of the Constitution binds all state organs, state officers, public officers and all persons to observe the national values and principles of governance when applying or interpreting the Constitution; enacting, applying or interpreting any law; or implementing public policy decisions. Article 10(2) sets out the national values and principles of governance and sustainable development is among the principles enumerated.

Although enacted before the Constitution, the Environmental Management and Co-ordination Act defines sustainable development at section 2 as development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems. Protection and conservation of forests and the environment in general is therefore at the core of sustainable development.

The Court is of the view that the Petitioners claim would be contrary to the spirit of the Constitution which at Article 69(1) places the following obligations on the State in respect to the environment:

69. (1) The State shall—

(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;

(b) work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya;

(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;

(d) encourage public participation in the management, protection and conservation of the environment;

(e) protect genetic resources and biological diversity;

(f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;

(g) eliminate processes and activities that are likely to endanger the environment; and

(h) utilise the environment and natural resources for the benefit of the people of Kenya.

Article 69(2) obligates every person to co-operate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. In the the ruling deliverd in this matter by **Mumbi Ngugi, J** on 27th January 2012 the Court stated that the decision reached in this suit is bound to have far reaching consequences in view of the fact that there are many other communities in Kenya with similar historical claims which may now be vested in the public. The Petition if allowed would only benefit the Petitioners at the expense of the wider public who benefit from the forest.

Conclusions

To conclude, this court notes that Ngong Hills Forest has not been degazetted as such and its boundaries have not been varied to make it available for alienation to the Petitioners. In our view the petitioners ought to have petitioned the Minister through the Kenya Forest Service Board to consider whether any basis existed to have the Ngong Hills Forest degazetted to accommodate thier interests. The Forest Act provides a procedure and mechanism for community participation in forest management under section 46 but does not make provision for individualized ownership of land that had been brought under the operation of the Act.

We also note that the petitioners claim to the land is predicated on what the petitioners claim were historical injustices visited on the community by the colonial masters who required that they move out of what they claim were ancestral lands to pave way for white settlement. We do not think the court would be the right forum for the petitioners to ventilate thier claim which is founded on historical injustices.

The constitution acknowledged there could have been historical injustices in the manner land issues were handled by past regimes and hence among the functions and mandate of the National Land Commission established under Article 67(1) of the Contitution is to investigate historical injustices and to make recommendations for redress.

Article 67(2) (e) provides that among the functions of the National Land Commission is to:-

“(e) initiate investigations, on its own initiative or on a complaint, into present or historical land injunstances, and historical land injustices, and recommend appropriate redress”.

In our view its the National Land Commission that has the mandate to investigate into historical land injustices and make appropriate recommendations for redress. The court is not the appropriate organ to carry out the investigation and/or inquiry and where the law has made provision for a state organ or instutution to carry out a specific function that instutition should be allowed to carry out its mandate. The court should not usurp the roles of other state

institutions. We therefore are of the view, it was premature on the part of the petitioners to come to court without either exhausting the process of obtaining a degazettment of Ngong Hills Forest as a state forest under the provisions of the Forest Act and/or having the National Land Commission exercise its mandate under Article 67(2) (e) of the Constitution.

In the result as we have upheld the 1st Respondents preliminary objections under grounds 1 and 4 we accordingly find the petitioner’s petition has no merit and the same is ordered dismissed. We have acknowledged the petition raised substantial public interest issues and we accordingly make no order for costs and each party will bear thier own costs of the petition.

Ruling dated, signed and delivered this **15th** day of **April**, 2015.

.....
PAULINE NYAMWEYA

JUDGE

.....
ROSE OUGO

JUDGE

.....
JOHN MUTUNGI

JUDGE

In the presence of:

- **For the Petitioners**
- **For the 1st Respondents**
- **For the 2nd Respondents**
- **For the Interested Party**



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