



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ELC PETITION NO. 2 OF 2021

(FORMERLY NYERI ELC PETITION NO. 2 OF 2021)

**IN THE MATTER OF: ARTICLES 2, 3, 19, 20, 21, 22, 23, 42, 69,
70, 165(5) (b) AND 258 OF THE CONSTITUTION OF KENYA 2010;**

AND

**IN THE MATTER OF: SECTION 13 OF THE ENVIRONMENT
AND LAND COURT ACT NO. 19 OF 2011;**

AND

**IN THE MATTER OF: CONTRAVENTION OF ARTICLE 2, 3,
42, 69 AND 70 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

AFRICAN CENTRE FOR CORRECTIVE

AND PREVENTIVE ACTION.....1ST PETITIONER

KELVIN MUGAMBI KUBAI.....2ND PETITIONER

JOHN KIUNJURI.....3RD PETITIONER

GABRIEL NGATA.....4TH PETITIONER

DUNCAN KARIUKI.....5TH PETITIONER

ALICE GATERE.....6TH PETITIONER

EARNEST NGEERA.....7TH PETITIONER

AND

LOLLDAIGA HILLS LIMITED.....1ST RESPONDENT

THE COMMANDING OFFICER,

BRITISH ARMY TRAINING UNIT KENYA.....2ND RESPONDENT

BRITISH ARMY TRAINING UNIT KENYA.....3RD RESPONDENT

AND

KENYA WILDLIFE SERVICE.....1ST INTERESTED PARTY

KENYA FOREST SERVICE.....2ND INTERESTED PARTY

RULING

1. The African Centre for Corrective and Preventive Action, a non-governmental organisation, presented this petition to court on 29/3/2021 as a champion of environmental rights, and as a representative of the local community of Lolldaiga, to challenge the alleged violation and infringement of their right to a clean and healthy environment by the Respondents. The 1st Respondent is a limited liability company with a registered office in Nanyuki, Laikipia County. The 2nd and 3rd Respondents are the British Army Training Unit in Kenya (BATUK), a permanent training support mainly based in Nanyuki and its Commanding Officer.

2. The 1st Interested Party, was added to the suit as the state corporation under the Wildlife (Conservation and Management) Act which formulates policies regarding the conservation, management and utilisation of wildlife in Kenya. The 2nd Interested Party was described as a state corporation responsible for the management of forests on water catchment areas for purposes of water and soil conservation, carbon sequestration and other environmental services.

3. The Petitioner averred that the 1st Respondent was the owner of Lolldaiga Hills Ranch, a livestock ranch and wildlife conservancy occupying approximately 49,000 acres of land in Laikipia County. The ranch is home to a wide range of wildlife including rare Grevy's zebras, leopards, wild dogs, elephants and over 400 species of birds. The conservancy is used as a military training ground by British Soldiers, which according to the Petitioners is done under the authority of the 2nd and 3rd Respondents.

4. The Petitioners' claim is that on or about 25/3/2021, while on the training grounds known as Lolldaiga Hills, officers of the 3rd Respondent caused a huge fire that ravaged more than 10,000 acres of land causing massive damage to flora, fauna and the people living in close proximity to the ranch. Further, that following the fire, residents of Lolldaiga and wildlife in that area were forced to flee from the area because howling hot winds continued to blow over the Lolldaiga Hills.

5. The Petitioners claimed that the Respondents had admitted that the fire occurred during an exercise conducted by the 2nd and 3rd Respondents. The Petitioners blamed the 2nd and 3rd Respondents for failing to take appropriate measures to protect human health and the environment from the massive fire which they claimed ravaged Lolldaiga Hills Ranch. They asserted that the Respondents were under a duty to conserve and protect the environment with a view to sustaining it for future generations. The Petitioners contended that as a result of the fire, massive amounts of carbon dioxide, carbon monoxide and other toxic and poisonous fumes were emitted into the environment which aggravated the adverse effects of climate change besides posing harm to human health and the environment generally. They claimed that the toxic fumes settled on the vegetation in Lolldaiga and beyond which could lead to drought.

6. The Petitioners sought various orders against the Respondents pursuant to Articles 23, 42, 69 and 70 of the Constitution of Kenya and the Environmental Management and Co-ordination Act (EMCA) including an order to compel the Respondents to restore the environment and compensation for the victims of the pollution and other incidental losses which they claim were caused by the fire.

7. Through the application dated 27/5/2021, the 2nd to 7th Petitioners sought to be joined to the suit on the ground that they are residents of Lolldaiga and that the joinder would allow a complete settlement of all the questions in the proceedings. The 2nd Petitioner deponed in the affidavit in support of the application for joinder that Lolldaiga Hills was home to about 1000 members of the Lolldaiga community who had consented to join the suit to advocate for the protection of their right to a clean and healthy environment. The court allowed that application on 3/6/2021 following which the petition was amended on 16/7/2021 to include the additional petitioners. The rest of the petition and the prayers sought remained substantially the same as those in the original claim.

8. The 2nd and 3rd Respondents brought the application dated 27/4/2021 under Rule 5 (d) (i) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 seeking to have the petition dated 29/3/2021 struck out. In the alternative, they sought to be struck out from the petition and to have the time within which they are required to respond to the petition suspended.

9. The application was made on the grounds that BATUK is a unit of the British Army, which is a component of the Ministry of Defence and falls under the Secretary of State for Defence of the United Kingdom of Great Britain and Northern Ireland (“the UK Government”) and that it therefore has no legal entity separate from the UK Government. Further, that as a foreign sovereign State, the UK Government does not consent to submit to the jurisdiction of this court.

10. In addition, the 2nd and 3rd Respondents contended that the allegations made in the petition arose out of a military training exercise carried out by the British Army pursuant to a Defence Cooperation Agreement between the Government of Kenya and the UK Government and that military training is a governmental act for which the UK Government is entitled to claim immunity from the jurisdiction of the Kenyan courts. Further, that as an officer of the British army and agent of the UK Government, the 2nd Respondent was also covered by sovereign immunity.

11. The 2nd and 3rd Respondents’ application was supported by the affidavit of Brigadier Lucinda Caryl Westerman, the Defence Adviser for Kenya, Tanzania and Seychelles who is also the Head British Defence Staff, East Africa sworn on 26/4/2021. Brigadier Westerman deponed that as a sovereign State, the UK Government did not consent to submit to the jurisdiction of this court and to be impleaded in these proceedings.

12. The 1st Respondent supported the 2nd and 3rd Respondents’ application through the replying affidavit of its General Manager Harry Hanegraaf, sworn on 5/5/2021. He averred that the 1st Respondent was the registered owner of Lolldaiga Hills Ranch, which he described as a 49,000-acre livestock ranch and wildlife conservancy in Nanyuki. He supported the striking out of the petition in its entirety.

13. Mr. Hanegraaf deponed that since the petition was solely premised on the allegation that the 3rd Respondent caused a huge fire on the 1st Respondent’s property, the claim would not be sustainable against the 1st Respondent if the court were to uphold the invocation of sovereign immunity by the 2nd and 3rd Respondents. Further, that in the absence of the 2nd and 3rd Respondents on account of the immunity of the UK Government, the nexus between the 1st and 3rd Respondents with regard to the allegations in the petition would not be capable of being referred to in the course of these proceedings, which would render the petition devoid of any substratum.

14. The 1st Petitioner opposed the application for the striking out of the petition through the replying affidavit of its Director, James Mwangi Macharia sworn on 12/5/2021. He deponed that this court did not have jurisdiction to hear and determine the issue of sovereign immunity. He contended that the deponent of the affidavit in support of the application was not authorised to swear the affidavit on behalf of the UK Government and urged the court to dismiss the application for not being supported by an affidavit.

15. In the event that the court found that the deponent of the supporting affidavit was duly authorised to swear it on behalf of the UK Government, the 1st Petitioner prayed that Brigadier Westerman be joined to the petition as a Respondent for the fair hearing and determination of the petition. The 1st Petitioner contended that state immunity is not absolute and that the 2nd and 3rd Respondents cannot invoke immunity in a matter where they have consented to the jurisdiction of the court.

16. Further, it contended that pursuant to the Defence Cooperation Agreement which came into force on 11/10/2016, the 2nd and 3rd Respondents are subject to, and should abide by and respect the Constitution, laws and regulations of Kenya. That as such, Kenya was conferred with jurisdiction to handle civil claims and liabilities arising from activities within the territory of Kenya including environmental activities which are in violation of the Constitution. It also contended that the 2nd and 3rd Respondents are enjoined by

the Defence Cooperation Agreement and the Conventions on Jurisdictional Immunities to act in good faith and pay compensation where they are found liable for causing injury, death, loss or damage to people and property. It argued that as such the application invoking sovereign immunity is designed to defeat the ends of justice contrary to the Defence Cooperation Agreement. The 1st Petitioner urged the court to take judicial notice of the fact that this was not the first matter in which the applicants had submitted to the jurisdiction of a court of equal status.

17. In the further affidavit which he swore on 21/06/2021, Brigadier Westerman annexed a letter from the British High Commissioner in Kenya to the Environment and Land Court (ELC) at Nyeri dated 17/06/2021 authorising the Brigadier to swear affidavits in this matter on behalf of the UK Government. Brigadier Westerman reiterated in the further affidavit that the UK Government had not consented to the jurisdiction of this court while pointing out that through their Advocates, the 2nd and 3rd Respondents entered appearance in this case under protest. A copy of the Defence Cooperation Agreement was annexed to the affidavit to buttress the assertion that there was no clause in the agreement which conferred jurisdiction on Kenyan courts to hear and determine claims against the UK Government.

18. The application was canvassed through written submissions which parties highlighted orally in court. The submissions of the 2nd and 3rd Respondents dated 25/6/2021 mainly dealt with the issue of sovereign immunity. It was submitted that a foreign sovereign state cannot be subjected to the jurisdiction of a host state with respect to official acts unless the foreign sovereign state submitted to the jurisdiction of the host state's courts. They relied on **Halsbury's Laws of England, Butterworths, 4th Edition, Vol 18(2) paragraph 824**; and on the decisions in **I Congreso del Partido [1981] 2 All ER 1064**; **Littrel v United States of America (No. 2) [1994] 4 All ER 203**; **Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa [1982-1988] 1 KAR 135** and **Unicom Limited v Ghana High Commission [2016] eKLR**.

19. The 2nd and 3rd Respondents contend that the Petitioner's complaint arises out of a military training exercise carried out by the British Army in Kenya which is an act within the sphere of government sovereignty since it involved the preparation of a sovereign state's armed forces to defend the nation and protect various national interests. They further contend that third parties such as local communities ought to make claims under the Defence Cooperation Agreement which sets out the procedure for compensation of local communities where the UK Government is found liable for causing damage to the persons or property of local communities in Kenya.

20. The submissions which the 1st Respondent filed on 26/7/2021 mainly supported the 2nd and 3rd Respondents' prayer to have the petition struck out. It contended that the petition would not be sustainable against it if the 2nd and 3rd Respondents were struck out of the proceedings on the basis of sovereign immunity because the acts alleged to have given rise to the petition would be rendered incapable of reference in these proceedings and the court would therefore not benefit from the evidence of the 3rd Respondent's officers. The 1st Respondent relied on the decision in **Uchumi Supermarket Limited v Toigoi Investment Limited [2016] eKLR** where the Court of Appeal concurred with the High Court that Section 3 of the Fire Prevention (Metropolis) Act 1774 was applicable in Kenya and would absolve a landowner of liability where it was proved that the fire began accidentally and was not caused by negligence. It argued that in the absence of evidence on how the fire was caused, this court would not be in a position to determine whether the 1st Respondent can rely on the protection afforded by Section 3 of the Fire Prevention (Metropolis) Act 1774. In this court's view, the 1st Respondent should have taken up this point separately and not in the submissions dealing with state immunity.

21. The 1st Respondent further submitted that the residents of Lolldaiga had an alternative mechanism for redress provided by Articles 11 and 23 of the Defence Cooperation Agreement. It relied on the case of **Grays Jepkemoi Kiplagat v Zakayo Chepkonga Cheruiyot [2021] eKLR** which cited the decision of Lenaola J (as he then was) in **Patrick Mbau Karanja v Kenyatta University (2012) eKLR** where he struck out the constitutional petition. The 1st Respondent argued that that decision was instructive on the point that the constitutional interpretative mandate of the court should not be invoked where other remedies lie. It urged the court to strike out the petition.

22. Through the submissions filed on 27/07/2021, the 1st Petitioner brought out two issues for determination by the court, that is, whether this court has jurisdiction to entertain this application and whether the 2nd and 3rd Respondents should be struck out of the petition. On the first issue, it was submitted that this court does not have jurisdiction to entertain the application. The 1st Petitioner relied on the decision in **Lillian 'S' v Caltex Kenya Limited [1989] eKLR** as quoted in **Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & Another [2021] eKLR** and **Republic v Karisa Chengo & 2 Others [2017] eKLR**.

23. It buttressed this argument with Article 162(2) (b) of the Constitution of Kenya and Section 13 of the Environment and Land

Court Act (ELC Act) and contended that while exclusive, the jurisdiction of the Environment and Land Court (ELC) is limited to the areas specified in those provisions, none of which concerned the issue of sovereign immunity. The 1st Petitioner argued that this application should have been made in the High Court and was quick to add that the application was not transferrable to the High Court for hearing and determination since the practice had been held to be illegal. It relied on the decision in **Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 others [2019] eKLR**.

24. On the second limb, the 1st Petitioner submitted that this petition is one on violation of environmental rights and that the ELC was properly seized of the case. It relied on the case of **Unicom Limited v Ghana High Commission [2016] eKLR** on this point. It was further argued that granting immunity to the 2nd and 3rd Respondents for deliberate actions leading to environmental degradation would run contrary to public policy and reliance was placed on the decision in **Tononoka Steels Limited v Eastern and Southern Africa Trade and Development Bank [1999] eKLR**.

25. Further, it argued that sovereign immunity is not absolute and cannot be invoked when the 2nd and 3rd Respondents already consented to the jurisdiction of Kenyan courts through the Defence Cooperation Agreement which provides that the 2nd and 3rd Respondents are subject to and should abide by and respect the Constitution, laws and regulations of Kenya. It further argued that the agreement confers on Kenya jurisdiction to handle civil claims and liabilities arising from activities in its territory, which includes environmental activities in violation of the Constitution. It contended that although the 2nd and 3rd Respondents claim that their cause of action arose out of a military training exercise, it is a matter of general notoriety that the fire was caused by agents of the 2nd and 3rd Respondents who tested positive for cocaine.

26. The 1st Petitioner contended that subject to Section 31(1)(a) of the Privileges and Immunities Act, the immovable properties situated in Lolldaiga for which the Petitioners seek restorative orders were not protected by immunity since the land was not held by the 2nd and 3rd Respondents on behalf of the UK Government. In making this argument, the 1st Petitioner mixed up the doctrines of diplomatic and state immunity, which in essence are different.

27. It was also argued that the Respondents had not discharged their burden of proof by providing evidence that the 2nd Respondent is a unit of the British Army with no legal entity separate from the UK Government and that the 3rd Respondent was also immune. The 1st Petitioner concluded its submissions by urging this court to decline to strike out the petition because doing so would effectively dismiss the Petitioners' case without it being heard on merits. It relied on Rule 5(a) and (b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

28. The 2nd to 7th Petitioners' submissions filed on 13/7/2021 summarised six main points for determination by this court, which are whether the 2nd and 3rd Respondents enjoy absolute state immunity; whether the 2nd and 3rd Respondents have consented to be bound by Kenyan laws; whether the Respondents can raise state immunity as a defence after consenting to be bound by the laws of the host nation; whether the 2nd and 3rd Respondents are bound by Kenyan laws and international statutes on environmental management; whether the Inter-Governmental Liaison Committee established under the Defence Cooperation Agreement inhibits the right to a fair hearing of the petition; and whether the ELC has jurisdiction to determine the present application.

29. The 2nd to 7th Petitioners submitted that the application is of an international nature and that the applicable law should derive from the hierarchy established in Article 38 of the ICJ Statute which states that the court shall apply international conventions, whether general or particular, establishing rules expressly recognised by the contesting states. They also submitted that the maxim of *lex posteriori derogat lex priori* was relevant to this dispute.

30. The Petitioners argued that the 2nd and 3rd Respondents waived their right to state immunity and submitted to the Kenyan jurisdiction through Article 6(1) of the Defence Cooperation Agreement which states that the Visiting Forces shall be subject to and abide by the laws and regulations of the Host Nation at all times. Further, they contended that Article 6(2) and Article 6(3) only conferred the Service Authorities of the Visiting Nation jurisdiction over criminal and disciplinary proceedings and therefore the current dispute is beyond the purview of the Service Authorities of the Visiting nations. They urged that the Service Authorities only had jurisdiction over property which belonged to the Visiting Forces as stipulated in Article 6(4)(a) of the Agreement and added that the property of visiting forces was to be administered according to the laws of the receiving state.

31. On the third issue the Petitioners submitted that even though the United Nations Convention of Jurisdictional Immunities of States and Their Property had not come into force, being a signatory, the UK was under a duty to act in good faith to ensure the intents and purposes of the convention were not defeated as provided under Article 18 of the 1969 Vienna Convention on the Law

of Treaties. That as such the Respondents were barred from raising state immunity in this petition.

32. The Petitioners contended that in light of the multifarious conflicts and issues arising from the activities of the Visiting Forces in Kenya, the consent to be bound by the laws of Kenya formed the major basis for the people of Kenya to enter into the Defence Cooperation Agreement with the UK. They argued that no principle of international law, nor decided case nor dictum of jurists authorised a sovereign military to consent to be bound by the rules of a host nation for their benefit and then claim to be sovereign and throw out that consent when they incur liability to third parties and communities in the host state.

33. On the fourth issue, the Petitioners submitted that the involvement of the Inter-Governmental Liaison Committee in this petition went against the rules of natural justice, specifically on the right to be heard by an unbiased tribunal and to fair trial because the Committee is made up of senior military officers of the 2nd and 3rd Respondents without community representatives. They relied on Lord Wright's decision in **General Medical Council v Spackman [1943] 2 All ER 337** which was cited in **R v Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007**.

34. On whether the ELC has jurisdiction to determine the present application, the 2nd to 7th Petitioners submitted that this court was only empowered to address issues that touch on the environment and land and that the issue of state immunity is not within the purview of the ELC. They argued that the applicants should have sought the leave of this court to canvass this issue before the High Court and thereafter deposit the ensuing judgment in this court. They relied on Section 13(1) of the ELC Act and the decisions in **The Owners of Motor Vessel Lilian 'S' v Caltex Oil (Kenya) Ltd [1989] KLR 1; Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others, Application No. 2 of 2011** and **Republic v Karisa Chengo & 2 Others [2017] eKLR**. Nevertheless, they emphasised that since the petition relates to environmental protection, the ELC has jurisdiction to handle the petition under Article 162(2)(b) of the Constitution and Sections 13(1) and 13(2)(a) of the ELC Act.

35. In addition to the above, the Petitioners argued that the instant application runs contrary to environmental protection as enshrined in Article 8 of the Defence Cooperation Agreement and that it is in breach of the duty to maintain and observe good community relations imposed by the Defence Cooperation Agreement. Further, they contended that the application defeats the international obligations and duties imposed upon Kenya on climate change and sustainable environmental management.

36. Further, they argued that the application is intended to cover up injustices and illegalities perpetrated by the 2nd and 3rd Respondents in the course of their training for over three decades in an un-gazetted water catchment and conservation zone. Moreover, that it was blind to the plight of members of the community who are made vulnerable by the environmental pollution since it does not provide any mitigating or adoptive measures to foster food security and restore the environment among other imminent challenges facing the community.

37. In the submissions filed on 27/9/2021 in reply to the 2nd to 7th Petitioners' submissions, the 2nd and 3rd Respondents' reiterated that this court has jurisdiction to determine whether the petition dated 29/3/2021 can be sustained against the 2nd and 3rd Respondents when the UK Government has asserted state immunity and has not submitted to the jurisdiction of the court. They relied on the decision of the UK Supreme Court in **Belhaj & Another v Straw & Others (Rev 1) [2017] UKSC 3**.

38. The 2nd and 3rd Respondents argued that the authorities which the Petitioners relied on dealt with instances where a party approached the wrong court to determine substantive issues which that court lacked jurisdiction to deal with. They also contended that the Employment and Labour Relations Court (ELRC), which is also a specialised court has heard and determined objections based on state immunity in the cases of **Ishak Mohamed v Libyan Embassy [2016] eKLR** and **Elkana Khamisi Samarere & Another v Nigerian High Commission [2013] eKLR** where the objections were upheld. They submitted that those authorities demonstrated that courts established under Article 162(2) of the Constitution of Kenya can and do determine whether a suit can be sustained against a party where an objection of state immunity is raised.

39. The 2nd and 3rd Respondents protested that the Petitioners had improperly introduced new evidence in their submissions regarding the allegation that officers of the 3rd Respondent were under the influence of cocaine during the fire incident. They faulted the Petitioners for failing to produce evidence to support those allegations and pointed out that by referring to those allegations in the submissions, they denied the 2nd and 3rd Respondents an opportunity to respond to the allegations through affidavits or cross examination of the deponent. They urged the court to disregard the allegations contained in paragraph 20 of the 2nd to 7th Petitioners' submissions and page 6 of the 1st Petitioner's submissions and cited the case of **Republic v Chairman Business Premises Rent Control Tribunal & another ex-parte Hekima College [2014] eKLR** on this point.

40. The 2nd and 3rd Respondents conceded that state immunity is not absolute but maintained that state immunity applies to this case because the circumstances fall within the doctrine of international law which postulates that courts will not entertain actions against foreign states with respect to sovereign acts. They urged that the principle of sovereign immunity had been affirmed by Kenyan courts in the case of **Ministry of Defence of the United Kingdom v Joel Ndegwa [1982-1988] 1 KAR 135** and added that the case of **Unicom Limited v Ghana High Commission [2016] eKLR** which the 1st Petitioner relied on actually supported the 2nd and 3rd Respondents' case. That decision quotes the decision of Lord Denning in **Rahimtoola v Nizam of Hyderabad [1958] A.C. 379** where he held in part as follows:

"If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so..."

The Respondents maintained that the Petitioners' complaint arose out of a military training exercise carried out in accordance with the Defence Cooperation Agreement, which is an international transaction between two sovereign nations and as such it fell within the instances where the court should grant immunity if it is asked to do so.

41. The 2nd and 3rd Respondents maintained that the Petitioners' argument that the Defence Cooperation Agreement between Kenya and the UK Government is equivalent to a waiver of state immunity was not correct. They argued that an examination of Article 6(1) of the Agreement shows that it refers to Visiting Forces and not the UK Government and therefore it cannot be used to argue that the UK Government had submitted to the jurisdiction of this court. They argued that the Petitioners failed to refer to Articles 6(2) to 6(18) which set out an elaborate process on how certain crimes should be dealt with. Further, that Article 11 provides for Civil Claims and Liabilities and sets out an elaborate procedure for third parties to make claims under the Defence Cooperation Agreement. They maintained that nothing in those articles amounted to the UK Government submitting to the jurisdiction of this court.

42. Further, they contended that the Privileges and Immunities Act cited by the 1st Petitioner provides for diplomatic and consular relations and the immunities of diplomatic agents and did not apply to state immunity. On this point, they relied on the decision in **Deva Samat Keshwala & 10 others v Talk Investments (K) Ltd & another [1995] eKLR** where Githinji J (as he then was) held as follows:

"In support of the application Mr. Le Pelley for the second defendant has drawn to the attention of the court the difference between state immunity and diplomatic immunity for which I am grateful.

In the circumstances I am satisfied that there is a clear error of law apparent on the face of the ruling and that error lies in the application of the law on state immunity (restrictive doctrine) to diplomatic immunity contrary to clear provisions of the Privileges and Immunities Act."

43. They urged that Article 31(1) of the Vienna Convention on Diplomatic Relations as adopted by the Privileges and Immunities Act of Kenya does not apply to state immunity as the 1st Petitioner argued. Further, they pointed out that the United Nations Convention on Jurisdictional Immunities of States and their Property which the 2nd to 7th Petitioners referred to in the arguments had neither been signed nor ratified by Kenya for it to form part of Kenyan law under Article 2(6) of the Constitution of Kenya. The court agrees that this is the correct position.

44. Having considered the application, the affidavits filed together with the annexures and the submissions of the parties, the court has identified three main issues for determination in this application. These are whether the court has jurisdiction to determine the instant application; whether the 2nd and 3rd Respondents are protected by sovereign immunity from the jurisdiction of Kenyan courts; and lastly whether the Petitioners should first exhaust the other dispute resolution mechanisms before moving the court in conformity with the doctrine of exhaustion.

45. Does this court have jurisdiction to determine this application" The Petitioners argued that this court lacked jurisdiction to make that determination pursuant to Article 162 of the Constitution and the ELC Act and contended that this aspect should have been referred to the High Court for determination. The decisions which all the parties cited on the issue of jurisdiction confirm the position that it is the court in which the objection to jurisdiction is raised which must first determine whether it has the requisite jurisdiction to handle the dispute and if it finds that it does not, then that court is required to down its tools or in some instances transfer the matter to the court vested with jurisdiction to handle the matter.

46. In the case of **International Centre for Insect Physiology and Ecology (ICIPE) v Nancy Menally [2018] eKLR** it was held that diplomatic immunity from legal process would form the basis of a preliminary objection which the court had to first pronounce itself on before hearing the dispute.

47. The argument by the 2nd to 7th Petitioners that the Respondents should have sought leave to transfer the instant application based on state immunity to the High Court for determination and for the High Court to thereafter remit its decision to this court does not hold water. The practice where cases are first transferred to a second court purely for purposes of that court determining whether the first court has jurisdiction to deal with an aspect of the case and then have the case returned to the first court would certainly create an absurdity besides increasing the case backlog and the costs of litigation. The court agrees with the 2nd and 3rd Respondents that it has jurisdiction to determine the objection by the UK Government to be impleaded in these proceedings based on the doctrine of state immunity.

48. The second issue which forms the substratum of the application by the 2nd and 3rd Respondents is whether the UK Government waived immunity and consented to submit to the jurisdiction of this court. The fact that the 2nd and 3rd Respondents are agents of the UK Government is not in dispute, what is contested is whether as such they are immune from these proceedings based on the doctrine of sovereign immunity. The court agrees with the 2nd and 3rd Respondents that as a unit of the British Army, BATUK has no legal entity separate from the UK Government. However, it is part of the Armed Forces for whose benefit and training the UK Government and the Kenyan Government entered into and implemented the defence cooperation agreement.

49. For purposes of determining this application asserting the immunity of the UK Government from the jurisdiction of this court, this court can only take at face value, the Petitioners' allegations of damage to the environment and losses suffered by the community as a result of a fire incident which they claim was started by the British Army Officers on 25/3/2021 in the military training grounds in Lolldaiga. Findings of fact will have to be made at a later date on whether indeed there was a fire in Lolldaiga Hills as the Petitioners claim, whether it was caused by British Army Officers, how far the fire spread and the actual damage it caused to the environment and to the Lolldaiga community.

50. On the one hand, the 2nd and 3rd Respondents contend that the UK Government has not consented to the jurisdiction of this court in this matter and that a foreign sovereign state cannot be subjected to the jurisdiction of a host state with respect to official acts unless the foreign sovereign state submits to the jurisdiction of the host state's courts. On the other hand, the Petitioners contend that the 2nd and 3rd Respondents waived their right to state immunity and submitted to the jurisdiction of Kenyan courts through Article 6(1) of the Defence Cooperation Agreement.

51. Immunity is defined in the 10th edition of Black's Law Dictionary as any exemption from a duty, liability or service of process especially such an exemption granted to a public official or governmental unit. Sovereign immunity is defined as a government's immunity from being sued in its own courts without its consent or a state's immunity from being sued in federal court by the state's citizens; which is also termed as government immunity. The dictionary defines "to waive" as to abandon, renounce or surrender a claim, privilege or right; or to give up a right or claim voluntarily. It goes further to add that ordinarily to waive a right one must do it knowingly. "To waive" is also defined as to refrain from insisting on a strict rule or formality or to forgo.

52. Sovereign or state immunity is a principle of customary international law by virtue of which a sovereign state cannot be sued before the courts of another sovereign state without its consent. State immunity protects a state and its property from the jurisdiction of the courts of another state based on the concept of equality of states. Jurisdictions have adopted either the absolute or restrictive approaches to state immunity. The absolute approach entails a foreign state enjoying total immunity from being sued or having its assets seized by a foreign court even in commercial matters. In the restrictive approach, a foreign state is only immune in relation to activities involving an exercise of sovereign power which means a state can be sued and may have its assets seized in a foreign court in commercial or private matters.

53. In **Principles of Public International Law, 6th Edition, Ian Brownlie** writes at page 321 as follows:

"It is helpful to distinguish two principles on which sovereign immunity rests. The one, expressed in the maxim *par in parem non habet jurisdictionem*, is concerned with the status of equality attaching to the independent sovereign: legal persons of equal standing cannot have their disputes settled in the courts of one of them. This principle is satisfied if a sovereign state waives its immunity: the consent given upholds the status of equality. If there is a subject matter over which the national courts of the other state may properly exercise jurisdiction *in rem* or if there is a basis for acquiring jurisdiction *in personam*, then jurisdiction follows consent....."

54. The other principle on which immunity is based is that of non-intervention in the internal affairs of other states. The rationale for jurisdictional immunity rests on the dignity of the foreign nation, its organs and representatives, and on the functional need to leave them unencumbered in the pursuit of their mission (See **Principles of Public International Law, 6th Edition, Ian Brownlie** page 322).

55. States can waive immunity. Waiver of immunity may occur in a treaty, in a diplomatic communication, or by actual submission to the proceedings in the local court. (See page 335 of **Principles of Public International Law, 6th Edition by Ian Brownlie**). According to Brownlie, under Sections 2 and 9 of the State Immunity Act 1978 of the UK, immunity is denied when there is a prior written agreement to submit to the jurisdiction and when there is a written agreement to submit to arbitration (See page 336). Malcolm N. Shaw wrote in his book- **International Law, 5th Edition** at page 660 that Section 2 of the State Immunity Act of the UK provides for loss of immunity upon submission to the jurisdiction either by prior written agreement or after the particular dispute has arisen.

56. The 2nd and 3rd Respondents contended that the military training exercise carried out by the British Army in Kenya was an act within the sphere of government sovereignty since it involved the preparation of a sovereign state's armed forces to defend the nation and protect various national interests. While the court agrees with the finding of Lord Denning in the *Rahimtoola case* that the court should grant immunity if it is asked to do so where the dispute brings into question the legislative or international transactions of a foreign government or the policy of its executive, it is not persuaded that starting a massive destructive fire, which the Petitioners allege the British Army Officers did while in the Lolldaiga military training grounds, would form part of military training or that it would form a sovereign act for that matter.

57. The Petitioners' contention is that the officers of the 3rd Respondent acted outside the scope of sovereign immunity when they caused a huge destructive fire in Lolldaiga Hills during their military training. If the Petitioners were to prove that, then the actions of the culpable officers would be individual and not sovereign acts of the UK Government. For the functional immunity to apply, the officer must have been acting in an official capacity on behalf of the State. The court doubts that the defence would be available to an officer who exceeds the scope of his authority. In this court's view, any act that was not performed on behalf of the State or one which does not constitute an official act is excluded from State immunity.

58. The court notes that the decisions in **Ishak Mohamed v Libyan Embassy [2016] eKLR** and **Elkana Khamisi Samarere & Another v Nigerian High Commission [2013] eKLR** were made by the ELRC in cases involving diplomatic immunity and not state immunity. None of the parties furnished the court authorities showing how the issue of state immunity is to be dealt with in light of international obligations of States to protect and conserve the environment. In **Cases & Materials on International Law by Martin Dixon & Robert McCorquodale, Fourth Edition, Oxford University Press**, the writers observed at page 454 that international environmental law challenged many fundamental concepts of traditional international law. That it puts new limits on State sovereignty and creates greater responsibilities for States. They opined that protection of the environment includes the prevention and prohibition of additional kinds of damage, and the preservation and rational use of the environment.

59. The case of **Belhaj & Another v Straw & Others (Rev 1) [2017] UKSC 3** which the 2nd and 3rd Respondents relied on concerned the alleged complicity of UK authorities and officials in various torts, alleged to have been committed by other states in overseas jurisdictions. The facts of the *Belhaj case* are distinguishable from the facts of this case because in this case where there was a cooperation agreement between the UK Government and the Kenyan Government with specific provisions on jurisdiction over civil claims and liability arising from the activities in either nation's territory under the agreement.

60. The court agrees with the 2nd and 3rd Respondents that there is a distinction between state immunity and diplomatic immunity as E. M. Githinji J (as he then was) affirmed in **Deva Samat & 10 Others v Tolk Investments Limited (K) Ltd & Another [1995] eKLR** while allowing the application for review of his earlier decision. The Judge had erroneously applied the law on state immunity to a case touching on diplomatic immunity. Diplomatic immunity is a practical necessity that allows the proper functioning of diplomatic missions while state immunity is grounded in the inherent equality of states. Since Kenya has not ratified the United Nations Convention on Jurisdictional Immunities of States and their Property which the Petitioners referred to in the arguments, nothing turns on this point.

61. What is at the heart of this application is the Defence Cooperation Agreement between the Government of the Republic of Kenya and the Government of the United Kingdom of Great Britain and Northern Ireland concerning defence cooperation. The agreement makes provisions on the nature and extent of the cooperation including its aim, scope, implementation, environmental

protection, jurisdiction, provision of training areas, civil claims and liabilities, investigation procedures for accidents, protection of information and community relations.

62. It is necessary to highlight the salient provisions of the Agreement which are relevant to this application. In the preamble of the agreement, the Government of the Republic of Kenya and the Government of the United Kingdom of Great Britain and Northern Ireland recognise that the defence cooperation shall be in accordance with their respective national policies and international best practices and shall not conflict with their domestic law or impair their commitments on the international sphere. Under Article 3, one of the areas in which these parties were to pursue the goal of defence cooperation is the protection of the environment.

63. Article 5 on the implementation of the agreement stipulated that all the activities under the agreement would be implemented in conformity with the domestic law in force in the host nation, which in the context of the 3rd Respondent means Kenyan law while for Kenya Defence Forces undertaking training in the UK it would mean the UK law.

64. Article 6 on jurisdiction reads in part as follows:

(1) Visiting Forces shall be subject to, abide by and respect the Constitution, laws and regulations of the Host Nation at all times.

(2) The relevant authorities of the Host Nation shall have jurisdiction over any member of the Visiting Forces, the Civilian Component or dependants for any criminal offence committed in contravention of any law of the Host Nation, customary international law, treaty or any agreement to which the Host Nation's Government is a party, save for instances where under this Agreement such jurisdiction is expressly conferred on the Service Authorities of the Sending Nation.

65. Article 6(4) set out the instances where the Service Authorities of the Sending Nation would have jurisdiction over a member of the Visiting Forces who committed certain specified offences. Service Authorities are defined in the Agreement as the authorities of either party empowered by law to exercise command or jurisdiction over the Armed Forces. The Article sets out an elaborate mechanism on how offences committed in the Host Nation would be dealt with and the role the Inter-Governmental Liaison Committee would play in dealing with those offences. The court agrees with the 2nd and 3rd Respondents' assertion that Article 6 does not apply to the claim made in petition which is in the nature of a civil claim.

66. Article 8 set out obligations regarding environmental protection and enjoined both the Host Nation and the Visiting Forces to ensure protection, preservation and restoration of the environment comprised of the Training Areas and the Service Establishments. The Visiting Forces were required to avoid acts that may negatively impact human health and safety and the environment generally. There is no doubt that a fire would cause serious irreversible damage to the environment and negatively impact human health and safety. This clause confirms that while engaging in the military training, the UK Government and the Government of Kenya had obligations to protect each other's legitimate interests and not to cause environmental damage in each other's territory. Both States owe each other a duty to avoid environmental harm.

67. Article 11 of the Agreement is what is germane to this claim and was worded thus:

(1) The Host Nation shall have jurisdiction for civil claims and liabilities arising from activities in its territory under this Agreement. Each Party waives any claim it may have against the other Party or the Armed Forces or personnel of the other Party for injury (including injury resulting in death) suffered by its Armed Forces personnel or for damage to or loss of property owned by the Armed Forces if such injury, death, damage or loss was caused by the acts or omissions of the other Party in the course of Official Duty in connection with this Agreement.

(2) The relevant authorities of both Parties shall cooperate in the carrying out of all necessary investigations into all third party claims, and in the collection and production of evidence, including the seizure and the handing over of objects connected with such a claim.

(3) Where it is established that the Visiting Forces, their members, Visiting Forces employees or agents are legally liable for such a claim, the relevant authorities of the Host Nation shall submit a report to the relevant authorities of the Sending Nation who shall pay prompt and adequate compensation to the claimants.

(4) The Parties shall cooperate in the disposal of claims for which they are responsible.

68. Looking at Article 11 (1) of the Agreement, it is evident that Kenya would have jurisdiction for civil claims and liabilities arising from activities in its territory under the agreement while the UK would have jurisdiction for civil claims and liabilities arising from activities in its territory. The allegation in the petition is that British soldiers caused a huge fire in the military training grounds in Lolldaiga, which is in Kenya. Kenya therefore has jurisdiction pursuant to Article 11 of the Agreement. The waiver of claims on the latter part of that clause would only apply to injury or death suffered by the Armed Forces personnel of either nation, or for damage to or loss of property owned by the Armed Forces if such injury, death, damage or loss was caused by the acts or omissions of the other party in the course of official duty.

69. The court is satisfied that as parties to the Defence Cooperation Agreement dated 9/12/2015 which entered into force on the date the UK Government received the *Note Verbale* dated 7/10/2016 from the Republic of Kenya, both the UK Government and the Government of Kenya waived their immunity to the extent stipulated in that agreement.

70. Article 23 required the Visiting Forces to respect and be sensitive to the traditions, customs and culture of the communities in the places where they were deployed in the Host Nation. Article 23 (3) stipulated that the Sending Nation would pay compensation within the framework of the Defence Cooperation Agreement where they were found liable for causing any death, injury, loss or damage to the persons and/or property of members of such local communities. In the court's view this clause anticipated the kind of claim brought by the Petitioners.

71. Article 24 established and gave the role of the Inter-Governmental Liaison Committee. Some of its functions include administering and overseeing the implementation of the Agreement, considering, recommending and overseeing the resolution of civil claims and liabilities under the Agreement, referring unresolved civil claims against Visiting Forces to mediation and arbitration as it deemed fit and performing any other function assigned to it by the Parties. The Committee was empowered to regulate its proceedings and formulate rules to govern its work and to co-opt persons with the necessary knowledge or skills required for the functions of sub committees.

72. Article 25 stated that all disputes related to the interpretation or implementation of the Agreement would be resolved through consultation or negotiation between the Parties through the Inter- Governmental Liaison Committee and those not resolved by the Committee would be dealt with through diplomatic channels.

73. The 2nd and 3rd Respondents argued that the Petitioners should have lodged their claim for compensation with the Inter-Governmental Liaison Committee under the Defence Cooperation Agreement. They did not confirm whether the Agreement was in the public domain. Despite anticipating that third parties may lodge civil claims under the defence cooperation, the Agreement is silent on how third parties were to present their civil claims to the Liaison Committee for compensation.

74. The Petitioners argued that the Inter-Governmental Liaison Committee established under the Defence Cooperation Agreement inhibits their right to a fair hearing without demonstrating the basis for the apprehension that they will not get a fair hearing before the Committee. Their apprehension at this stage is unfounded and lacks merit.

75. The importance which the Kenyan people attach to the environment is evident from the preamble to the Constitution and part 2 of Chapter 5 of the Constitution. Article 42 of the Constitution guarantees every person the right to a clean and healthy environment. This includes the right to have the environment protected for the benefit of present and future generations through the State meeting its obligations in respect of the environment under Article 69; and the right to the enforcement of environmental rights under Article 70 of the Constitution where a person alleges that their right to a clean and healthy environment has been violated or is threatened.

76. Some of the obligations imposed on the Government of the Republic of Kenya under Article 69 of the Constitution include ensuring sustainable exploitation, utilisation, management and conservation of the environment. The Government of Kenya was required to have due regard to these constitutional tenets regarding the protection of the environment when it entered into the Defence Cooperation Agreement with the UK Government. The Petitioners seek compensation for loss which they allege they suffered as a result of the fire in Lolldaiga Hills and is premised on these constitutional provisions. They also seek the restoration of the environment which they contend was damaged by the fire. In the court's view, this aspect of the claim resonates well with Article 8 of the Defence Cooperation Agreement regarding the obligation of the Host Nation and Visiting Forces to ensure the environment is protected and preserved.

77. Article 70 of the Constitution of Kenya mandates the ELC to enforce environmental rights and to make orders or give directions it considers appropriate to prevent, stop or discontinue acts that are harmful to the environment. In this court's view, for acts occurring in Kenya, the jurisdiction over civil claims and liabilities arising from Article 11 as well as claims relating to the protection, preservation and restoration of the environment pursuant to Article 8 of the Defence Cooperation Agreement is to be exercised by the ELC which is mandated by Article 162 (2) of the Constitution to hear and determine disputes relating to the environment and the use and occupation of, and title to land.

78. The court agrees with the 2nd and 3rd Respondents that it was improper for the Petitioners to adduce evidence through their submissions regarding how the fire was started. That evidence should have been brought through affidavits with the Respondents being given an opportunity to rebut it. The court disregarded that evidence and only considered the other aspects of the Petitioners' submissions.

79. This court has jurisdiction to deal with the claims made in the petition alleging violations of the Petitioners' rights to a clean and healthy environment and the degradation of the environment as a result of the fire that is said to have occurred on or about 25/3/2021 in the military training grounds in Lolldaiga Hills.

80. The court agrees with the 2nd and 3rd Respondents that the Petitioners ought to exhaust the dispute resolution mechanism provided in the Defence Cooperation Agreement.

81. The court makes the following orders:

a) This dispute will be referred to the Inter-Governmental Liaison Committee for resolution through the Ministries of the Government of Kenya and the Government of the UK responsible for defence.

b) The relevant authorities of the Government of Kenya and the Government of the UK shall cooperate in the carrying out of all necessary investigations into the claims made in the Amended Petition, and in the collection and production of evidence in accordance with Article 11 of the Defence Cooperation Agreement.

c) The Inter-Governmental Liaison Committee will meet in Kenya with a view to establishing whether the Visiting Forces, their members, employees or agents are liable for the claims made by the Petitioners. The Committee shall afford the Petitioners a hearing to present their case and must observe the rules of natural justice.

d) The Inter-Governmental Liaison Committee will consider, recommend and oversee the resolution of this dispute. If any civil claim against the Visiting Forces will not be resolved, the Committee will refer the unresolved civil claims to mediation and arbitration as stipulated in Article 25 of the Defence Cooperation Agreement.

e) If the Inter-Governmental Liaison Committee establishes that the Visiting Forces, their members, employees or agents are liable for the claims made by the Petitioners, then the relevant authorities of the Government of Kenya shall submit a report to the relevant authorities of the Government of the UK who shall pay prompt and adequate compensation to the Petitioners as provided in Article 11 (3) and (4) and Article 23 (3) of the Defence Cooperation Agreement.

f) If the Inter-Governmental Liaison Committee establishes that damage was caused to the environment by the fire incident on 25/3/2021 in Lolldaiga Hills and its surrounding area, and that the fire was started by the negligent acts of the Visiting Forces, their members, employees or agents as contended in the Amended Petition, the relevant authorities of the Government of Kenya and the Government of the UK shall cooperate in the restoration of the environment damaged by the fire.

g) A copy of the settlement of the dispute will be filed in court within 14 days of the date of the determination of the dispute by the Inter-Governmental Liaison.

h) This suit is stayed until the Inter-Governmental Liaison Committee resolves the matter under the Defence Cooperation Agreement. The costs of the application shall abide the outcome of the determination of the claim by the Inter-Governmental Liaison Committee.

DELIVERED VIRTUALLY AT NANYUKI THIS 10TH DAY OF MARCH 2022.

K. BOR

JUDGE

In the presence of: -

Mr. Maxwell Gichuhi for the 1st Petitioner

Mr. Kelvin Kubai for the 2nd to 7th Petitioners

Mr. Cecil Kuyo for the 1st Respondent

Mr. Lawson Ondieki for the 2nd and 3rd Respondents

Ms. Stella Gakii- Court Assistant

No appearance for the Interested Parties



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