REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

PETITION 466 OF 2006

1. Charles Lekuyen Nabori

2. Joel Ole Saaya

3. Clement Nashuru

4. Wesley Kakimon

5. Edward Tamar

6. Ngamia Rangal Lemeiguran

7. Shaolin Leriche Meguran

8. Samson Lereya Kakimon

9. Samantita Samaria Lengigaa

10. Stanley Leterewaa

VERSUS

Respondents

1. The Honourable Attorney General

2. The Minister for Environmental and Natural Resources

3. National Environmental Management Authority

4. The Country Council of Baringo

JUDGMENT NO.2

I: PROCEDURE

1. The petitioners in this constitution reference are all residence of Ng'ambo location, Marigat Division of Baringo District within the Rift Valley. They are communal land owners of land within the said Marigat Division which is a semi arid area.

2. They originally filed suit against the Attorney General and the Minister of Environmental and Natural Resources sometime in 2006 being Hccc115/06 by way of a plaint.

3. Their grievousness then was that the government of Kenya had introduced a noxious weed known as Prosopis Juliflora to their area. This weed has run amok through its growth and had interfered with the petitioners right and way of life.

4. By a Preliminary Objection raised by the status that the suit against the Attorney General could not stand and due to that technicality the petitioners' withdrew the said suit[1] on 21 August 2006.

5. The petitioners then opted to file a constitution reference instead of filing another suit.

6. This constitutional reference was thereafter referred to the Hon. The Chief Justice on 26 March 2007 who thereafter nominated Aganyanya J, Ang'awa J and Rawal J to constitute a three judge bench, who are also the judges in the newly formed Land and Environmental Law Division.

7. The parties were heard on their submission on 20,21 June 2007, 17,18 July 2007. Judgment was reserved to be delivered by notice after the court vacation.

II: Constitution Reference

8. The advocate for the petitioner alleged that the Government of Kenya together with the Food and Agriculture Organization (FAO) (not party to these proceeding) introduced a noxious weed known as Prosopis Juliflora within the Ng'ambo location, Marigat Division area of the Rift Valley Province some time in the 1980's.

9. The residence were misled to believe that the said Prosopis Juliflora would cub desertification provide fodder and wood fuel. Instead, after 20 years or so the said plant has overgrown and rapidly spread through out the area. In the process, the plant has chocked up the indigenous plants causing a loss of the pasture land, loss of livestock, blockage of roads, foot paths and rivers. The residence explained the destruction of their economic base. The plant has thorns that are poisonous and is harmful to human beings. Livestock that eat of the plant lose their teeth and thereafter starve to death.

10. The Residence made a complaint with the Public Complaints Committee that is provided within the Environmental Management Co-ordination Act. This complaint No.67/2005 was originally filed by the:-

Community Museums of Kenya Ltd

Against

The Kenya Forestry Research Institute (KFRI)

The Forest Department and the Food and Agriculture Organization (FAO)[2].

11. The outcome and recommendation of the said Public Complaints Committee was favourable to the Petitioner. The Community Museum of Kenya brought the complaint on behalf of the Il Chanus (Njemps) Community. It is therefore appropriate at this stage to give a brief outline of the said report and recommendation.

A) Background of report

12. The plaint Prosopis Juliflora was alleged to have been introduced to the Baringo District by the Kenya Government through the Kenya Forestry Research Institute KEFRI, Forest Department and the Untied Nations Agency Food and Agriculture Organization (FAO).

13 This plant belonged to the family leguminousease (mimosoidae) or mesquite

A perennial deciduous thorny shrub or small three 12 meters high and 1.2 in diameter." [The plaint] has a thick brown or blackish thorny bark and evergreen leaves sweet scented yellow/green flowers."

"the tree takes 15 years to mature."

14. It was unclear, to the committee, when exactly prosopis Juliflora was introduced to Kenya. From their report the committee were of the opinion that this may have been sometime in 1973 at the Baobab farm in Bamburu North Coast, Kenya. This farm was originally a quarry to remove coral stones for purposes of making cement by the Bamburi cement company. It used various plants to see which were the best to reclaim the quarry land.

15. From the publications before this court, it seems that this plant may have been introduced to Africa, Senegal in1800 and possibly to Kenya in 1979. Nonetheless in Garissa the plant was introduced by a field worker named "Mathenge", hence the nick name "Mathege". Others called the plant Algarob and in some other parts of Kenya it is named Msumari Ya Norad (The nail of Norad).

16. The effected areas where this plant is found is

Baringo

Bura

Garissa

Mandera

Marsabit

Mwingi

Taita Taveta

Tana river

Turkana and Wajir

17. The good intention of introducing the said plant in the semi –arid areas of Kenya was to curb soil erosion, provide wood fuel, poles for construction industry and for purpose of planting in quarries to reclamation area. The advantage was therefore to introduce tree cover, soil cover and also provide a good soil binding to reduce the soil erosion.

18. The committee responded to the complaint of the people in Bringo by making on site visits, consultative meetings and held public hearings. They also undertook research. Their findings was that this plant was

"A weed that invaded grazing land forming dense impenetrable thickets and that . . . gradually replaces acacia and prevents growth of pasture. The plant has tap root system that extends to 30 meters or more helping it absorb much of the soil moisture, [and therefore] chocking other plants"

19. The life of the pastoral community was:-

19.i). Evidenced by not able to fetch water from lake

Baringo due to the colonization of the weed at the shores of the lake

19.ii) The livestock economy was weakened because, livestock feed on the pods and leaves of the weed. This affected the livestock teeth and constipation leading to death. Meat from the livestock had a bad taste and not suitable for sale.

19.iii) Research indicates the plant causes allergy, asthmatic and inflammation of the lungs to human beings. Their health was at risk due to this plant. The prick from thorns immobilizers both the livestock and people.

19.v) The local community are constraint in the management and control of the weed due to lack of basic information of the plant. Their local grazing area has been colonized between Lake Bogoria and lake Baringo.

20. The committee were of a view that this could become a national disaster and in their words "warrants urgent intervention measures to address this problem".

21. They therefore recommended:-

21.i). The Minister of Agriculture under powers given to declare the Prosopi Juliflora plant a noxious weed. The suppression of Noxious Weed Act Cap. 325, Laws of Kenya refers. They said further part of the weeds should be forbidden and treated as a dangerous plant.

21.ii). The community should participate in the eradication of the plant through land demarcation. The plant should be harvested for charcoal "with the supervision of the forest officer" to ensure there is no desertification.

21.iii). The Minister for Environment and National Resources lift the ban on the utilization of

Prosopis products "to be facilitated by the National Environmental Management Authority and implemented by the Forest Department and other relevant lead agencies."

22.i). Recognizing that the plant was introduced to Kenya before the commencement of the Environment Management and Co-ordination Act, nonetheless the Government of Kenya and the authority should commission an assessment study.

Section 42(1) (d) (of EMCA) gives the Director General powers to deny approval or introduce the planting of specimen either alien or indigenous in rivers, lake and wetlands.

22.ii). Requiring the Minister of Agriculture to declare the weed noxious.

22.iii). Allowing public participatory process in eradicating the weed.

22.iv). Ensuring a comprehensive policy document by the Government of Kenya is in place for the Management of Prosopis Juliflora. As Kenya lacks a comprehensive policy on the introduction of alien plant species.

22.v) Political good will is required.

22.vi) Whereas eradication of the weed may be difficult emphasis should be placed on capacity building for the community, co-ordination between the relevant institution to formulate a strategic management control of the plaint.

23. The committee concluded that the Government of Kenya in consultation with the National Environmental Management Authority takes full responsibility to ensure that:

"Every Kenyans right to a clean healthy environmental [is upheld]"

This right goes along with the duty to protect and conserve the environment and kept it clean.

24. Only four out of seven committee members signed this report. One of the committee member is a counsel to this case representing the government of Kenya.

B) Effects – Director General

25. Though the Community were happy with this report delivered on the 13 May 2005, they in effect sat back awaiting action from the Government of Kenya. The then Director General of the National Environmental Management Authority published an article called:

"The Environment

"A saviour plant becomes

a dreadful noxious, colonizer weed "Prosopis."

Prof Ratemo Michieka Phd EBS

where he outlined the dangers of the weed and how the authority has powers under section 42 (1) (d) to declare the plant unwanted.

26. This article appeared in the Kenya Times Wednesday Magazine; The Standard Newspapers of April 5 2006 and The East African (the daily Nation) of Monday February 7 2005 and stated in summary:-

"That the community whom he interviewed or obtained information from stated that the plant has thorns and grew in large thickets. If pricked, one can be highly poisoned and have their limb amputated. Animals such as goats have their teeth fall off, where in extreme instances the seed germinates in the generates in the goats stomach. In other reports, animals such as pigs do not have a problem in digesting the seeds from this plant. Cows and goats most certainly have a problem. He found children who ate the pods, to overcome hunger, the seeds are not digestible causing operations to be done for the seeds to be removed. He further reported that the thickets caused by the plant invades the peoples' homestead. Many persons have to migrate to find green pastures for their animals.

C) Effects – The Minister of Environment and Natural Resources

27. In the Parliamentary debate of July 20, 2006, the Minister for Environment and Natural Resources responded to questions as to how the Ministry was going to deal with the problem. The Minister stated that his Ministry did receive technical support from "Food and Agricultural Organization (FAO) in 2004 to undertake a pilot study on integrated management and control of the plant in Baringo District involving the local community. The activities included "the mechanical control of the plant by thinning, pruning and killing of the tree stump and [by way] of biological control". The minister reassured parliament that the Minister was working on "a comprehensive strategy to the property control and sustainable management of the Prosopis Juliflora tree."

28. The effected area though included Turkana, Tana River, Garissa, Isiolo, Mandera, Meru, Taita Taveta amongst others and besides Baringo, He admitted that:-

"I have admitted that this is a serious problem in the country. That is why we are in the process of declaring it a national disaster, so that the country can focus on proper measures to fight the invasive tree." (Emphasis supplied)

29. Further, the Minister disclosed to Parliament that there is a research being carried out by the Kenya Forestry Research Institute (KEFRI) that shows on how other biological factors to neutralize the tree can be introduced. He further admitted that the plant was introduced in good faith and as it worked well in South America. The Food and Agricultural Organization (FAO) had recommended the plant to the Government of Kenya to be planted in arid and semi-arid lands (ASALS). To the minister, this plant had now become "a situation of nature gone wild." The ministry has instead been concentrating on research on how to deal with the tree. A sum of Ksh. 3 billion was required to deal with the problem. He was also exploring ways the trees can be used to produce charcoal.

D: Effects – The community

30. The Ministry through the Kenya Forestry Research Institute (KEFRI) held workshops by having specialized class room training to train project facilitator. They undertook training on how to have field demonstration of the management of the natural stands of Prosopis, various forms of timber to be sworn and working of their equipment used. Illustrating, how the pod may be used to make pod flour utilized in ugali, chapatti, mandazi, cake, tea or porridge.

Illustrating, how the plant may be eradicated by thinning, pruning, killing of stumps by burning or using dry animal manure.

31. The community would form themselves into groups and apply for a loan or grant to undertake the work of elimination. They would fill a self financed forms. Field school proposal form for purposes of eradicating Prosopis. The chair, secretary and treasurer would sign on behalf of the group.

32. Amongst the members of the groups trained were some of the petitioner in this constitution case. What the Government of Kenya was saying was that they indeed were taking action and had not sat back and done nothing.

33. The community were impatient and wished to see a grater participation by the government by way of commitment of funds to eradicate the plant, by way of compensation to each

household and by way of being given a better right to life.

34. I would now wish to look at each argument put forward by the parties who wish to be and were heard on their point of view.

III: <u>Petitioners</u>

The Petitioners' case is that the respondents failed in their duties: The particulars being:-

(a) Knowingly allowing the introduction of the weed while knowing or ought to have known its impact on the environment in the long term.

(b) Failure to take measures to safeguard further damage and/or address the problem of the weed on the environment and on the people.

(c) Failing to take measures at policy level to eradicate the shrub despite the outcry of the affected people.

(d) Introducing the weed without any counter measures to its adverse effects.

(e) Failing to monitor the spread and impact of the weed in time to check its further adverse effects and thus prevention in time.

(f) Failing to compensate the affected parties for losses occasioned and/or addressing its problems.

(g) Introducing the plant recklessly and carelessly without proper research and/or analysis on its future consequences.

(h) Not taking into account the devastating effects of the plant as proven in countries or origin before sanctioning its introduction in the petitioners land.

(i) Failing to introduce alternative management measures which would have prevented further spread.

Because of the Government failure/negligence the Petitioners hold the Government of Kenya liable for the loss, suffering and massive damage to the environment and their livelihood.

The continued decimation of natural biodiversity in the affected areas continues unabated contrary to Kenya's obligations as a party to the international conventions particularly to the Convention on Biological Diversity of 1992, to which Kenya is a party.

The Petitioners' hold the 3rd respondent liable for failing in its statutory duties as enunciated under its establishing Act – THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, 1999 (EMCA).

(a) Failed to carry an Environmental impact assessment and audit of the effects of the weed Prosopis Juliflora on the petitioners' land.

(b) Has ignored and continues to ignore the devastating consequences of this plant on the environment and the livelihood of the Petitioners.

(c) Failed to advise the Government of Kenya of the entered to act swiftly to prevent further environmental degradation as a result of Prosopis Juliflora.

(d) Has not taken any action or at all with the problem of Prosopis Juliflora in Kenya.

(e) Failed to research, monitor and/or highlight the problem of the weed Prosopis Juliflora on the petitioners' land and other affected.

As a result of this statutory failure by the 3rd Respondent, the plight of the Petitioners and all other affected groups has not been addressed by the Government and/or other concerned bodies and thus the Petitioners have been caused to suffer irreparably.

(a) That the Petitioners, through the Community Museums of Kenya a non governmental organization, lodged a complaint with the 3rd Respondent's Public Complaints Committee registered as Pccc Complaint No.67 of 2005 against KEFRI and FAO on the destructive of the weed Prosopis Juliflora, wherein the said committee carried out investigations into the effects of the weed and in its findings affirmed the Petitioner's claim herein and recommended inter alia that the weed be eradicated. The said recommendations have, however, not been implemented.

(b) The Petitioners state the land is the core of their culture and provider of their material needs and economic base and that since the devastating invasion of Prosopis Juliflora, they have been reduced into paupers and they and the generations to come are threatened of eviction from their ancestral land by the Prosopis Juliflora taking over their entire landscape.

(c) The Petitioners further state that the Respondents have breach all international conventions on Environment and Development and will continue to do so unless this Honourable Court intervenes.

(d) That Golden Rule on Environment is prevention and unless the Respondents swiftly act on the problems associated with the invasion of Prosopis Juliflora, the Petitioners see a bleak future in the affected areas of the Republic.

(e) That despite numerous admissions by the Respondents and its agents on the adverse

effects of Prospis Juliflora on the ecology, people's livelihood and massive losses of livestock, the Respondent have persistently refused to act to address the problem. Instead, some of the recommendations at managing the noxious weed are not only feeble and inadequate in the circumstances, but would also increase environmental pollution e.g. charcoal burning.

(f) The Petitioners state that unless this Honourable Court comes to their aid, the uncontrollable spread and destruction occasioned by the introduction and perpetuation of the weed Prosopis Juliflora will go on unabated to the detriment of the petitioners putting their very livelihood and survival at stake.

(g) Further that the Respondents are likely to continue with their studious silence on the effects of the weed Prosopis Julifora to the detriment of the Petitioners.

(h) The adverse effects, disastrous consequences, serious injury and irreparable damage occasioned by the weed Prosopis Juliflora to the petitioners and to generations yet unborn are evident and incontrovertible.

(i) The Petitioners have a clear and constitutional right to a balance and healthful ecology and are entitled to protection by the state in its capacity as the parens patriae.

(j) The Petitioners state that at the hearing of this Petition they will seek leave of the court to lead evidence to demonstrate the loss to the environment and to their socio-economic livelihood resulting in massive poverty directly as a result of Prosopis Juliflora and will accordingly seek for damages and compensation against the Respondents.

35. The petitioners prayed for judgment against the respondents on the following declaration:-

35(a) A declaration that the fundamental right to life as protected and envisaged by section 70 and 71 constitution of Kenya comprises, consists and translates to the right and entitlement to a clean and healthy environment free from pollution of any kind that is detrimental to human health, wealth and or socio-economic well being and ultimately the human life.

35 (b) A declaration that the right to a clean and healthy environment is a fundamental attribute of people and the aggression to the environmental occasions by the weed Prosopis Juliflora amounts to the breach of this right which this Honourable court is empowered to address and remedy accordingly.

35. (c) A declaration that the introduction of the weed Prosopis Juliflora to Ng'ambo location of Marigat Division of Baringo District of Kenya in or about 1982 and the continued unabated spread of the weed was and is a clear contravention of the three fold statutory and international acknowledged principles on protection and conservation of environment namely:-

i) The Sustainable Development Principle

ii) The Polluter pay principle . . .

iii) The Precautionary principle

35(d) A declaration that the introduction of the weed Prosopis Juliflora . . . amounted to and

still amount to the breach of the petitioners right to sustainable development as envisaged and set out in the Environmental Management and Coordination Act 1999.

35 (e) A declaration that the petitioners right to life as set out in Section 71 of the Constriction has been compromised by the introduction of weed Prosopis Juliflora to warrant this honoruable courts intervention.

35.(f) A declaration that the introduction of the weed Prosopis Juliflora has caused and continues to cause more harm than good to the environment and to harmful effects and damages far surpass any reasonable beneficial use that it could be put to and it thus ought to be treated with expediency.

35.(g) A declaration that the weed Prosopis Juliflora has occasioned direct loss in human life, livestock, pasture lands, poor health all culminating in poverty/depreciation of the socio-economic well being of the petitioners and other residents of Marigat Division of Baringo district.

35.(h) A declaration that in light of the pollute pays principle the 1 and 2 respondents are directly liable for the loss occasioned to the petitioners and other residents of Marigat Division of Baringo District by the introduction of the weed Prosopis Juliflora.

35.(i) That the weed Prosopis Juliflora be declared a noxious weed in the same category with other weeds set out in the suppression of noxious weeds Act Cap 325 Laws of Kenya.

35.(j) A declaration that the failure by the respondents to take affirmative steps towards eradication of the weed/plaint prosopis juliflora amounts to breach of the right to own property and from compulsory denial of that right as set out in section 75 of the constitution of Kenya due to the invasive nature of the weed.

35.(k) An order compelling the implementation of the Public Complaints Commission recommendation with respect to the complaint on Prosopis Juliflora in Pccc No.67 of 2005 between Community members of Kenya and Kenya Forestry Research Institute and Food Agricultural Organization.

35(l) A direction that (FAO) Food Agricultural Organization do jointly with the Government to undertake in the implementation of any order that the court may issue.

35(m) An environmental restoration order be issued against the respondents directing them to restore the environment to the state in which it was prior to the introduction of the weed by:-

i) Total eradication of weed Prosopis Juliflora

ii) Plantation of indigenous and environmental friendly trees and grasses

35(n) An order that a commission comprising of technical and local experts be appointed under terms and references to be set out by this Honourable court inter alia to:-

i) Asses and quantify the loss visited upon the document and to the residents of Baringo District by the weed Prosopis

ii) Assess and quantify the loss resulting from death of livestock, loss of pasture lands,

farm lands, playing fields, riparian lands and loss of homes and other social amenities.

iii) Assess injury to persons and commensurate awards and make a funding and report to court to assessments and funding.

iv) Assess and ascertain the injuries occasioned to individuals resident in the area affected by the weed Prosopis Juliflora and re-commend commensurate monetary compensation thereto.

v) Complete its task within sixty (60) days} of appointment.

a) An order of compensation for damages based on the funding of the Commission

b) Exemplary damages

c) Costs in this petition

d) Any other/further relief that his honourable court may deem fit and just go grant."

36. The arguments put forth by the petitioners is that Proposis Juliflora is in effect a noxious weed. It was introduced into the petitioners area of Marigat Division, Baringo District in 1982. The said plant takes 15 years to mature. The 15 – 20 years have come and the plant has wrecked havoc for the people who are basically pastolist, some fisher men and very few do substance farming. The plant has caused flooding and over growing of free areas.

37. This plant was introduced by the 1st and 2nd respondent as a project which in effect is not denied. Realizing the effect of the said plant weed which has had a very negative to the environment and residence as a whole.

38. The petitioners argument is that despite a report from the Public Complaints Commissioner of the Environmental Management Co-ordination Authority, Act, the Government of Kenya and the Environmental Management Co-ordination Authority have failed to do something about it.

39. This constitution reference is to in effect declare that the right to life by the petitioners have been comprised. The government has failed in his duty by failing to implement the Public Complaints Committees recommendation that the Minister of Agriculture do declare the plant a noxious weed. The Minister of Environmental and Natural Resources Admitted in Parliament that the Government of Kenya and the World Food Program were in effect responsible of introducing the plant. They – the Government require 3 billion shilling to control the plaint.

40. The Government of Kenya has failed in its duty by failing to pay attention to the international instruments that Kenya ratified, being The Convention of Biological Diversity 116/92 which requires that each country party shall as far as possible as appropriate.

"(f) Rehabilitated and restore degraded ecologic

Article 8 b

Prevent the introduction control of spices which threaten the ecosystem".

41. The Petitioner went further to state that their constitutional rights have been contravened. They seek this courts declaration that the right to life as embodied in the constitution be interpreted to mean the right to a healthy environment free from pollution of every kind. As it is, injuries sustained from a thorn penetrating flesh – causes loss of limbs for humans. There is loss of livestock due to loss of teeth of the livestock.

42. The petitioners further emphasizes that there are principles that leads the Government of Kenya to apply.

The first is:-

i) Public participation and development plans

ii) The government of Kenya embodied the public participation of the introduction of the plant. They wish to control now the plant and public participation is important.

iii) Cultural and social principles are required to be applied by the community.

iv) The life style of the community has changed considerably due to the interference of the plant with their patrol land.

v) The principles of sustained development and or inter generational and inter generational equity. This means that the present generation should ensure that in excising right to beneficial rise of the environment it be so done for future generations.

vi) The polluter pay principle should apply. The Government should be held accountable and made to pay for this wrong.

43. Indeed the three principle were elaborated in the case law of Waweru v Republic (2006) I KLR (E & L) 677 (Nyamu, Mohamed Emukulle JJ).

44. The applicable international instruments relied on case:-

i) Stockholm declaration of Human Environmental 1972

ii) The Rio Declaration on Environment and Development 1992.

Kenya has since enacted the National Environmental Management Co-ordination Act that has domesticated the International Instrument to our National law.

IV: Respondents 1 and 2

45. In reply, The respondents 1 and 2 deny that they are responsible for the plant. The petitioners must prove to this court that the government is responsible.

46. The Minister for Environment and Natural Resources depended on an affidavit in reply stating that the Government has in effect taken steps to arrest the situation. The plaint was introduced to the area by individuals and institutions. The evidence though shows that the Minister admitted introducing the said plaint in 1982 to the area but this was before the 1999 Act No.8 on the Environmental Management Co-ordination Act. Infact the Secretary General has

powers to declare and not permit the said plant to be introduced under section 42 of the act.

47. The respondents 1 and 2 relied on the case law of Rashid Allogoh & Others v Haco Industries CA 110 of 2001 to support the fact that the petitioners must prove their allegations that the 1 and 2 respondents introduced the said Prosopis Juliflora to the area and that the same has adverse effect on the environment.

48. The respondents 1 and 2 then went into technicalities. The first being that the jurisdiction of the court was not invoked. That "the Fundamental Rights of the individual are . . . restrains on the arbitrary exercise of the power of the state in relation to any activity an individual can engage in".

49. The respondent has not transgressed on the petitioners rights. The petition must be clear for the court to determine that constitution issue.

50. In the case law of

Stephen Kinotho & Others

v

Attorney General

Misc application 833/04

And in the case law of

Rev Dr. Timothy Njoya & Others

V

The Attorney General

Hc Misc App.82/2004 OS

51. The two cases prove that relief sought by the Petitioners do not in effect, have any constitutional basis. Namely, relief's No.35 b,c,d,f,g,h,k,h,m and as outlined above. Even if proved, the relief's do not amount to violations of the constitutional principle cited.

52. Relying on the Njoyas case (supra) that stated.

"As regards the objection that the summons raises matters of statutory as opposed to Constitutional interpretation and adjudication we would agree that any relief sought which does not involve the interpretation of the constitution or the enforcement of fundamental rights is misplaced in a constitutional court."

Therefore only declaration 35(e) and 35 (j) have in effect be relied on. The rest of the prayers should be struck out. The prayers relied on being:-

35(e) A declaration that the petitioner right to life as set out in section 71 of the constitution

has been compromised by the introduction of the weed Prosopis Juliflora to warrant this honourable courts intervention.

35(f) A declaration that the failure by the respondents to take affirmative steps towards eradication of the weed/plant Prosopis Juliflora averments to breach of the right to our property and from compulsory denial that right as set out in section 75 of the constitution of Kenya due to the incurable nature of the weed.

53. Another argument was that damages cannot be adjudicated in a constitution reference but by way of plaint. See the case law of:

Inge Anna Ida Brown v The Minister of Road & Other

Hccc1298/03

54. Further as to the interpretation of the wording on the right to life it must be given a plain, clear meaning without any ambiguity

see the case laws of:

Republic v EL Mann (1969) EA 357.

55. As to the right to property, the constitution speaks not of the right to property but the right to protection from compulsory acquisition of property or any interest in property or an right only to depreciation of property must be willful in nature. Though the plants are on the land the petitioners are able to utilize the plant to their benefit and without any interference or assistance from the respondent.

56. When looking at the International Convention, they do not apply to Kenya unless they are incorporated in the municipality laws. He referred to the case law of:

i) Sallon v Commissioner of Excise 1966

3 WL 1223

ii) Rose Moraa v G.A Odhiambo & Another

Hccc1351/07 (OS)

And Cherry v Commission (168) IWLR 242

56. In reality, they argued, the Prosopis Juliflora as a fact, cannot be eradicated. It can nonetheless be used on a positive way to sustain development, control climate change and reduce green house grasses in the atmosphere.

57. Forest from the plant will abound and it was argued that the exploitation of the plant would be the most convenient solution.

58. Finally, on the issue of compensation to the community none can be made to the petitioners. They are not entitled to it. See the case law of Rowlings v Takara Properties [1989] LRC Constitution 561.

IV) Argument by the 3rd Respondent

59. The Petitioners accused the 3rd respondent for failure to take out an assessment and or audit of the environment. The

3rd respondent argued that they have no obligations to do this, more so, because the act came into force in 1999.

60. Despite this fact, the 3rd respondent nonetheless visited the said site, carried out research and conducted a public awareness campaign.

61. Though the right to life is important they argued, it was seen as being unwarranted due to "the country's' stage of development". What this court found surprising is when they stated that "The right to a clean environment is subject to availability of funds."

62. To them, the plant was introduced with good intentions and as it cannot be eradicated completely, something is being done about the problems and the respondent is active and alive to the situation.

C. Issue before the constitution court.

63. The respondents raise issues as to:-

i) Whether the petition is competent in form and contents.

ii) Whether the Petitioners have shown any violation of their fundamental rights"

iii) If so, whether the petitioners rights as alleged are breached"

iv) Whether the remedies sought for are available to the Petitioners.

v) Whether the Petition is competent in form and contents"

64. The respondents 1 and 2 argued that as this is a constitution reference the court is only permitted to interpret two declarations being:-

i) A declaration that the fundamental right to life as protected and envisaged by section 70 and 71 of the constitution.

ii) A declaration that failure by the respondents to take affirmative steps towards eradication of the weed/plaint amounts to breach of right to any property and from compulsory denial of that right as set out in section 75 of the constitution of Kenya due to the invasive nature of the weed.

65. The rest of claim ought to be struck out as they do not comprise constitutional issues as required by law. The Petitioners have to show procedurally that as applicants they must be precise and to the point in relation to section 60,65 and 84 of the constitution so that the

respondent knows he exact nature of the case before them. (Stephen Kimotho & Others v Attorney General & Others Hccc 83/04, Nyamu J referring to Cyprian Kubia v Stanley Kamaya Mwendwa Misc. application 612/02 Khamoni J). The nature of a case must be set out with reasonable degree and precision of what is being complained: (Aanaritta Karimi Njeri v Republic 1979 KLR 154) a petition should therefore not throw general section of the constitution to court and claim that they are right (Dr. Korwa Adan & Others v attorney General Misc.666/90). In the case law of Rev. Dr. Timothy M. Njoya & Others v Attorney General (supra) where in a Preliminary Objection the matters that had been raised were of statutory interpretation and not of constitution interpretation that can be entertained by a constitution court. The prayers sought by the Petitioners, they argued are therefore an abuse of the process of court. The correct statute that is in place to deal with the matter in issue is the Environmental Management Co-ordination Act EMCA and the Civil Procedure Act. The former act deals with the issue of Environment. The Petitioners by coming to the constitution court oust the jurisdiction of the court.

66. Though we may agree with the authorities relied on that matters of statutory interpretation are not matters for the constitution court but may be dealt elsewhere, there are nonetheless two declarations mentioned alone that the respondents conceed are matters of interpretation by the constitution court. These are the fundamental rights to be as protected and envisaged by section 70 and 71 of the constitution and the breach of the right to own property and compulsory denial of that right as set out in Section 75 of the Constitution of Kenya which we will examine.

The Right to life

67. I am are aware that the rights under the Environmental Management Co-ordination Act (EMCA) Section 3(i) states deals the right to life is the same as embodied in section 84 of the Constitution of Kenya. Each Kenyan is entitled to the right of life, a

right to a clean and healthy environment. The respondents claim the petitioners failed to show that their right had been violated and or breached and therefore the petitioners have no remedies available to them. The Petitioner on the other had have shown how the Prosopis Juliflora has misplaced the populace interfered with the development and social life style. The respondent have therefore failed to put in place a management program or make the crisis a national issue.

68. The respondents 1,2 and 3 claim that they should not be responsible for the plaint as they were not aware of it or its introduction was done before the EMAC Act was enacted.

69. From the submissions before his court and affidavits thereon it ahs been established that the plant Prosopis Juliflora has played havoc to the lives of the Petitioners and others thus depriving them of sustainable development and the right to life.

70. The respondents 1 and 2 recognized the Petitioners were claiming a communities rights which in the past had not always been upheld in the interpretation of the Right to Life. In the case Law of Francis Kenai v Attorney General Hccc238/99 (OS) involving the Ogiek Ethnic Community who wee evicted from the forest by the Government, the constitution court (Oguk, Kuloba JJ) 23 March 2000) held that the said Ogiek Community had no right to be in the forest as part of their cultural rights and were correctly evicted. Their constitution reference was dismissed.

In a similar case from India Telles and Others v Bombay Bin Co. & Another (1987) R C)Constitution) 35.

71. The respondent want this court to interpret the right to life and its violation as described in the case law of Republic v El Mann (supra). That the constitution on the right to life having no ambiguity should be interpreted in its ordinary sense. They argued that the Petitioner must show and demonstrate that there is a right to life that has been violated. For example the Petitioners waited and watched a plant grown for the last 20 years and did nothing. There is ther4efore no factual evidence to show that the respondents wish to deprive the petitioner their rights to life.

72. The Petitioner had asked this court to interpret the words the "the right to life" as protected and envisaged y section 70 and 71 of the constitution to mean the entitlement of a clean and healthy environment free from pollution of any kind that is detrimental to human health, wealth and or socio-economic well being and ultimately he human life." The respondents object and state that a clean and natural sense meaning should be given. My findings on this will be addressed further below.

The right to property.

73. In the second aspect is the right to own property. The respondent state the Petitioerns have no a right. The court should only grant the rights under section 75 (J) of the Constitution and nothing else.

74. The constitution deals with trust land especially so under section 114, 116 and section 120 of the constitution. Non of the Petitioners they argued show they hold trust land, they cannot therefore have a right to claim and hold land under the constitution. Further the Petitioner had earlier field a suit being Hccc115/06 whereby they withdrew the same and made no claim to the property. The claim to property should not be made under this constitution reference. The land acquisition Act 295 deals with compulsory acquisition of property. This is controlled. Under section 75 no property can be compulsory acquired except in given situation. The fact that the plant/weed has taken over the Petitioners land does not amount to compulsory acquisition. The prime purpose and interpretation of section 75 of the constitution is to acquire property compulsorily from one person to another. The land is still there. It is therefore not true that the Government acquired the land for the last 20 years. According to the respondents, the report of the Public Complaints Committee is a policy matter under section 5 of EMCA Act. This reports should not have been placed to court for interpretation.

75. The third respondents besides claiming the incident occurred before the enactment of EMCA, a new legislation is that the proper proceeding for he Petition is not under he constitution but under the act. They argued that fundamental rights are guaranteed and secured by he state. The claim herein is against a statutory body which cannot be made on fundamental rights. Rights are personal. Any orders made by he court can only be made to the Petitioner who are before court.

76. The EMCA, the third respondent claim that they have not failed in their duty nor taken a back seat. They had been involved and are doing something about the situation.

77. As to the international instrument the declaration made by the Petitioners does not fall under "Customary International law". They are "soft law" and as such are not binding.

78. They went on to argue that Kenya has limited resources. Another argument raised by the 3rd respondent is that the rights of individual are subject to public interest (see Martha Karua v Radio Afric Ltd t/a KISS FM and another.) They implied that there was no public interest in this matter. They further resisted the settling up of a commission to enquire to the losses enquired by the community because no evidence of any losses has been demonstrated.

V) Findings of the court on the interpretation of the constitution of Kenya

79. The matter before us involves the environment and how the evasion of a plant has effected a whole community, a minor tribe in Kenya that they require this courts interpretation of the constitution.

80. We wish to state, that from the submission made from the parties supported by various affidavits, publication and letter annexed herein the following facts have been established without any reasonable doubt:-

Letter dated 13 June 2006 from the Permanent Secretary, Ministry of Environment and Natural Resources to the acting Director General National environment Management Authority NEMA Kapili road, Nairobi

80.1 "That the Government of Kenya and Food Agriculture Organization (FAO) introduced Prosopis Juliflora an alien plant species into the Kenyas ASALs in the late 1970s and early 1980. The project was implemented by (KEFRI) Kenya Forest Research Institute and the Forest Department.

The project was well intended and aimed at averting potential shortages of fuel food and other wood products as well as rehabilitating degraded lands.

[THAT] . . . later on, the species began evading other land use systems particularly, river courses, (irrigation) on canals lakes, swamp and farmlands causing serious devastations of these important habitation and ecosystems through colonization.

The Ministry has attempted to address this situation but due to a number of impending factors – our efforts had not been fully successful.

. . . only logical option is to constitute a committee to address this problem."

80.2. Ministerial statement to Parliament made on 20 June 2006. The Minister of Environment and Natural Resources (Prof Kibwana)

"I wish to inform you that my Ministry introduced the prosopis juliflora tree, a native of Southern America in the 1970s. The main reason for this introduction was to assist in the rehabilitation of the arid and semi-and lands. In addition, it was meant to provide fodder, shade, firewood and building polls. It was also to assist in honey production and act as wind breakers in arid areas which include Turkana, Baringo, Tana River, Garissa, Isiolo Mandera, Meru and Taita Taveta districts among other"

The tree has lately become a threat to the dry land ecosystem. It has invaded human and livestock health and also interfered with the infrastructure such as roads, foot paths and watering point among others . . . currently we are in the process of declaring it a national disaster

which will solicit support from various sectors geared towards addressing he problems in Kenya.

My Ministry received technical support from Food and Agricultural Organization [FAO] in 2004 to under take a pilot study on integrated Management and control of the plaint in Baringo District involving local Communities.

80.3. Letter from the office of the FAO of the UN Representative in Kenya 20 February 2003

"It is true that trees Prosopis Species were introduced to Baringo from other areas of Kenya under the FAO/GOK Cooperative program which was signed by both parties in July 1982 . . . . Prosopis species were introduced in Baringo to provide fuel wood. The project was implemented by a team of Ministry of Environment and National Resources Officials in the department of Forestry. Kenya Forest Research Institute (KEFRI) of the same Ministry was also involved in the project.

. . . efforts are being made to address the problem of unchecked speed Prosopis Juliflora not only in Baringo but also in other areas where the problem is even worse. . . . KEFRI has produced various reports . . . [that] gives recommendation and the way forward in an attempt to contains the species one of these documents is a cabinet paper that is being finalized.

80.4. Recommendation of the Public Complaints Committee of the Environmental Management and Co-ordination act (1999) EMCA.

Section 42 (1) (d) gives he Director General Powers to give or deny approval to introduction or planting of specimen either alien or indigenous in rivers, lake or wetlands after an Environmental impact assessment.

The government of Kenya and FAO who introduced the plant to Kenya should, with the collaboration of the authority commissioner an assessment study on the Environmental impact of the species and the impact of its eradication.

81. It has been the admission of the Government of Kenya that the said plant was introduced to Kenya in 1980's with an agreement signed in 1982 between the Government of Kenya and the Food and Agriculture Organization. The Minister of Environment and Natural Resources admitted as much in his parliamentary statement on the subject.

82. The plant takes 15 to 20 years to mature. Once matured it becomes so noxious that it most certainly effects the life style of animals/livestock and humans.

83. In the Acting Secretary Generals annexure Publication (3rd respondent) a scientist research co-coordinator in 2005 by the name of Samson Bakea produced an interview article on the benefits of the plant with his Namibian counter part. That the plant has its short coming. That prosopis nonetheless is here to stay and that communities must learn how to live in harmony.

In 2006 – a year later Samson Bakea wrote an article raising an alarm at the alien invasive species know:-

"Prosopis Juliflora – a highly aggressive plant, invades all areas produce millions of seeds and shade leave per plant yearly".

"Latama Camara – cruse of India, producing large and dense thickets if unchecked can cause ecologic havoc.

Eichonia crassipes (water hyaccnth) sinks into water and affects the water quality especial in shallow areas. Activated, from nutrients such as phosphates and nutrients from industrial wastes.

He recommended, inter alia that there be:-

i) Enforcement of Laws on alien species

ii) ----------

iii) Clearing and removal of alien plants from land

iv) ---------

v) Public awareness campaign.

84. This constitution court rejects the argument by the three respondents that they were not aware nor were they responsible in introducing the plant Prosopis of Juliflora to the semi arid areas of Kenya. They did in fact introduce the plant, albeit for good intention, which has since created havoc in the life style of the indigenous people of the area.

85. This is a public interest case that touches on all concerned and would most certainly have an impact in future on the country and society as a whole.

In another case of :-

Telles and Others

V

Bombay Bin Co & Another

(1987) RC (Constitution) 35

Poor slum dwellers were being evicted from the city of Bombay. The action by the municipality was held to be correct. Their claim was also dismissed.

86. In this constitution reference, the respondent argued that the rights to life and its violation should then be interpreted as described in the case law of Republic v EL Mann (supra). Section 71 has no ambiguity. It should be interpreted it in the ordinary sense.

87. They further, submitted that/the petition have to demonstrate that there is a right to life the there been violated. Here you have a situation where people watch and see a plant grow for 20 years and want the court to include it in its interpretation of life. There is therefore no factual evidence to show that the respondents wished to deprive the petitioner of their rights to life. Why have they waited 20 years".

88. As to section 71 of the constitution on the aspect of depriving of life this should not have been interpreted liberally. The constitution should be interpreted as to what it means. It is the literal meaning that is required to be given to the term, "the right to life."

Right to property

89. The second concept is the right to own property. According to the respondents there is no such rights. The court should only grant the rights under section 75(j) of the constitution and nothing else. The constitution deals with trust land, especially so under section 114, 116 to section 120 of the constitution. As non of the petitioner do not show that they hold trust land they cannot therefore have no right to claim and hold land under the constitution. It therefore raises the question of locus. Their earlier court case Hccc115/06 – a case under EMCA duly withdrawn made no claim to property should not be claimed herein.

90. Thirdly, the concept of compulsory acquisition is controlled, whether the Land Acquisition Act cap 295 under section 75 of the constitution no property can be compulsory acquired except in a given situation. It is not admitted by the respondents that the fact the weed has taken over the petitioners land amounts to compulsorily acquisition. The prime purpose and interpretation of section 75 of the constitution is to acquire property compulsorily from one person to the other. The land in effect is still there. It is not true the Government had been acquiring the land for the last 20 years.

91. The report of the Public Complaints Committee is a policy matter under section 5 of the EMCA act. This report should not have been placed to court for interpretation.

92. The respondents added through respondent No.3 that the EMCA Act is a new legislation. The proper proceeding for the petitioner is not under the constitution but under the act.

93. Fundamental rights are guaranteed and secured by the state. This is a claim against a statutory body which cannot be made on fundamental rights. Rights are personal. Any orders if made by the court can only be made to the petitioners who are before court.

94. EMCA – the 3rd respondents had not failed in their duty nor taken a back seat. They had been involved and are doing something about the situations.

95. The declaration therefore made by the Petitioner is not customary international law. They are soft law and as such are not binding. Further, Kenya has limited resources to implement the declarations.

96. The Respondents emphasized that rights of individuals are subject to public interest. See Martha Karua v Radio Afric Ltd t/a KISS FM & Another. They implied that there was no public interest in this matter.

97. When it comes to the setting up of a commission, one should not be set up as there has been demonstrated no evidence of losses by the respondent.

VI: Finding of the court on the

Interpretation of the Constitution of Kenya

98. The constitution of Kenya guarantees the fundamental rights of individuals. Chapter V of the Kenya Constitution embodies the provisions contained in the Universal Declaration on Human Rights of 1948 by the United Nations.

99. As a constitution court, the respondents call upon us to interpret this constitution in its literal sense and not to give it its broad meaning that is sought by the petitioner.

100. I find that the constitution should not be static but must grow in its interpretation. It is an instrument that should not be restrospective but progressive.

(i) <u>Locus</u>.

The respondents raised issues as stated earlier on the Petition as being incompetent in form and content. That the petitioners failed to show that their rights have been violated and or breached and therefore the petitioners have no remedies available to them.

The main section of the constitution touches on section 60,70,71 and 75 as read with section 84 of the constitution.

The Petitioners reliance of EMCA section 3(1) is embodied in section 84 of the constitution.

They state they have a right to (i) <u>sustainable Development</u>

Each Kenyan are entitled under the constitution and under the environmental Act EMCA to a right to life, a right to a clean and healthy environment. The Prosopis Juliflora plant has seen the populace being misplaced and the development and social life style being interpreted. Their right to develop and improve their life style has been curtailed by the introduction of this plant. The government has failed in its task to put in place a management program or made it a national issue. The Petitioners have had their rights infringed when they have been deprived of the sustainable development.

ii) <u>Polluter must pay.</u>

The principle of polluter must pay is upheld whereby the government of Kenya is held accountable of its actions made twenty years earlier or more knowingly or not. There is a duty of care and accountability by the Government of Kenya to be taken. The government made a mistake in introducing a noxious plant. Though their intentions may have been good the results which has been negative must be remedied by the government of Kenya.

I would interpret the "Right to life" using a broad meaning in this case that includes the right to be free from any kind of detrimental harm to human health, wealth and or socio economic well being.

The effect of the said plant has effected the right to the Petitioners accessing their properties. This has curtailed of the Petitioner from the breach of the right to own their property.

iii) That the Government of Kenya be held accountable in damages caused by the introduction of Prosopis Juliflora to the region.

v) That the Ministry of Environment is to produce a policy working paper on the management and eradication of the plant and present this to Parliament within 60 days for debate and interpretation.

vi) That the costs of this constitution reference be hereby awarded to the Petitioners and be paid by the respondent 1, 2 and 3.

Dated this 11th Day of December 2007 at Nairobi.

M.A. ANG'AWA

JUDGE[1] Samason Lereya & Others v The Attorney General & Others

Hccc 115/06, (Aluoch, Kubo,Mugo JJJ)

[2] PCC No.67/05