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| Case Number: | Environment and Land Petition 33 of 2014 |
| Date Delivered: | 03 Oct 2018 |
| Case Class: | Civil |
| Court: | Environment and Land Court at Meru |
| Case Action: | Judgment |
| Judge: | Lucy Ngima Mbugua |
| Citation: | Samuel M'amaroo M' Kaura & 9 others v Meru County Government & 3 others [2018] eKLR |
| Advocates: | Mbijiwe A for 4th respondent Okango for 1st respondent |
| Case Summary: | <p>Legal procedure applicable to the designation and cessation of national reserves</p> <p>Samuel M'Amoroo M'Kaura & 9 others v Meru County Government & 3 others</p> <p>Petition No 33 of 2014</p> <p>Environment and Land Court at Meru</p> <p>Lucy N Mbugua, J</p> <p>October 3, 2018</p> <p>Reported by Beryl A Ikamari</p> <p><i>Statutes-interpretation of statutory provisions-interpretation of section 18(1) of the Wildlife (Conservation and Management Act) (repealed)-legal requirements relating to the designation of a given area as a National Reserve-whether legal requirements were complied with</i></p> |

when the Nyambene National Reserve was created vide Legal Notice No. 86 of 2000-whether the Nyambene County Council was consulted before Legal Notice No. 86 of 2000 was published-Wildlife (Conservation and Management Act) (Cap 376) (repealed), section 18(1).

Statutes-*interpretation of statutory provisions-interpretation of section 7 of the Wildlife (Conservation and Management Act) (repealed)-legal requirements relating to the cessation of a National Reserve-whether a presidential roadside declaration would suffice to revoke an intent to designate a given area as a National Reserve-Wildlife (Conservation and Management Act) (Cap 376) (repealed), section 7.*

Constitutional Law-*fundamental rights and freedoms-community rights-claim that community rights recognized in articles 27, 40 & 43 had been violated-threshold set for pleading and demonstrating how fundamental rights and freedoms had been violated-whether the Petitioners had sufficiently pleaded for and demonstrated how their fundamental rights and freedoms had been violated-Constitution of Kenya 2010, articles 27, 40 & 43.*

Relevant provisions of the law.

Wildlife (Conservation and Management Act) (Cap 376) (repealed).

Section 7

Cessation of area as a National Park, National Reserve or local sanctuary;

(1) subject to subsection (2) of this section, the Minister after consultation with the competent authority, may by order declare any National Park, National Reserve or Local Sanctuary specified thereof, shall cease to be a National Park, National Reserve or Local Sanctuary.

Section 18(1)

With the agreement of the competent authority, the minister may, by notice in the Gazette, declare any area of land to be a National Reserve.

Brief facts

The dispute related to land which had been gazetted as the Nyambene National Reserve vide Legal Notice No. 86 of 2000 dated June 6, 2000 by the then Minister of State. The Minister was exercising powers under section 18(1) of the Wildlife (Conservation and Management) Act (repealed.) The Petitioners' contention was that the gazettement was done without making the requisite consultations with the then Nyambene County Council or people at the grassroots level. The Petitioners said that the County Government of Meru and the Kenya Wildlife Service had not considered the population increase in the area and the limited grazing and farming land. They said that the contemplated Nyambene National Reserve would heighten community tensions among the clans and families who would be displaced or relocated.

Issues

1. Whether Legal Notice No. 86 of 2000 was published in compliance with the applicable law.
2. Whether a presidential roadside declaration was a sufficient mode of withdrawing an intent to designate an area as a national reserve where a gazette notice had already been issued for purposes of designating the area as a national reserve
3. Whether there was an adjudication process underway at the Nyambene National Reserve.

4. Whether community rights recognized under the Constitution had been violated in the creation of the Nyambene National Reserve.

Held

1. Section 117 (1) of the Constitution of Kenya (repealed) and section 18 of the Wildlife (Conservation and Management Act (repealed) were the applicable law at the time Legal Notice No. 86 of 2000 was published. Section 117 of the Constitution of Kenya (repealed) provided for the setting apart of Trust Land vested in a county council by that county council on certain terms for purposes which could include the designation of the land as a national reserve. Section 18(1) of the Wildlife (Conservation and Management Act) (repealed) provided that with the agreement of the competent authority, the minister had power, by notice in the Gazette, to declare any area of land to be a National Reserve.
2. No evidence was tendered to prove allegations that there were no consultations between the Minister and the Nyambene County Council as required by law before the Legal Notice No. 86 of 2000 was published. The impugned notice was clear that there were consultations between the Minister and the Nyambene County Council. In the absence of evidence to the contrary, the Court found that there were consultations between the Minister and the Nyambene County Council.
3. Section 7 of the Wildlife (Conservation and Management Act) (repealed) provided for the procedure for cessation of an area as National Park, National Reserve or Local Sanctuary. It provided that after consultations with the competent authority, the Minister had power to declare any National Park, National Reserve or Local Sanctuary to have ceased to be a National Park, National Reserve or Local

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| | <p>Sanctuary, respectively. A roadside declaration would not suffice.</p> <p>4. No evidence was tendered to show that Legal Notice No. 86 of 2000 had been withdrawn by the then President via a roadside declaration. Additionally, a roadside declaration would be of no effect as the process of revoking or withdrawing a legal notice was provided for in law. It would not be complied with when only a roadside declaration was used.</p> <p>5. The Nyambene National Reserve had not been degazetted and the land on which it was situate was not available for alienation.</p> <p>6. The Petitioners did not demonstrate that any adjudication process was taking place at the Nyambene National Reserve. The Petitioners ought to have brought the District Land Adjudication and Settlement Officer (DLASO), to shed light on the alleged adjudication process.</p> <p>7. The allegation that community rights had been violated was not proved. The Petitioners had not laid a basis for the allegation and they did not demonstrate how their rights under articles 27, 40 and 43 of the Constitution of Kenya 2010 had been violated. They did not meet the legal threshold set for purposes of pleading and demonstrating how constitutional rights had allegedly been infringed.</p> <p><i>Petition dismissed.</i></p> |
| Court Division: | Land and Environment |
| History Magistrates: | - |
| County: | Meru |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Petition dismissed |
| History County: | - |
| Representation By Advocates: | Both Parties Represented |
| Advocates For: | - |
| Advocates Against: | - |

Sum Awarded:

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REPUBLIC OF KENYA

IN ENVIROMENT AND LAND COURT AT MERU

PETITION NO. 33 OF 2014

SAMUEL M'AMAROO M' KAURA.....1ST PETITIONER
THANGICIA M' MUNYA M' ERIMA.....2ND PETITIONER
JENIFFER KATHURE.....3RD PETITIONER
JULIUS M' ARITHI M' ITABARI TUMBO.....4TH PETITIONER
JACOB M' ANTILI KING'ANG'A.....5TH PETITIONER
ADRIANOMUNENENE NKUNJA.....6TH PETITIONER
LUKE NG'OLUA MUNGANIA.....7TH PETITIONER
SAMUEL MITHIKA.....8TH PETITIONER
CHARLES KOBIA.....9TH PETITIONER
PETER MWENDA THANARA.....0TH PETITIONER

-VS-

MERU COUNTY GOVERNMENT.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT
CABINET SECRETARY FOR INTERIOR AND COORDINATION
OF NATIONAL GOVERNMENT.....3RD RESPONDENT
KENYA WILDLIFE SERVICE.....4TH RESPONDENT

JUDGMENT

1. Before me is a Constitutional Petition dated 2nd September 2014, in which the Petitioners seek the following reliefs;

(a) A declaration that given the public announcement by the then President of the Republic of Kenya and the attendant lapse of time with non activity by the Respondents and the declaration of the suit land as an adjudication area, the Legal Notice No. 86 of 2000 signed by H.H Madoka Minister of State has been overtaken by events and is no longer in the public interest to keep it alive and it is accordingly null and void. A declaration that the creation of Nyambene National Reserve through the said Legal Notice No. 86 of 2000 was not preceded by any lawful consultation of the Nyambene County Council as was provided for in the Wildlife (Conversation and Management Act), now repealed and is accordingly null and void.

(b) A declaration that the continued existence of Legal Notice 86 of 2000 offends, violates and is in breach of Articles 60 (1) of the Constitution of Kenya to the extent that it limits the local community access to land and threatens the security of their

land rights and hampers sustainable and productive management of land resources of the Meru County and is a threat to county security.

(c) A declaration that the continued existence of Legal Notice No. 86 of 2000 is the basis upon which the County Government of Meru and the Kenya Wildlife Service have unilaterally moved to exclude the community from access and management of the affected land and this amounts to a violation, contravention and breach of the provisions of Article 63 (4) of the Constitution of Kenya which guarantees that community land shall not be disposed off or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

(d) A declaration that the actions of Meru County Government in collusion with the Kenya Wildlife Service in recruiting, training and setting up of an armed unit of County Game wardens within the area covered by Legal Notice No.86 of 2000 poses grave danger to peace, security and good order in the four constituencies of Igembe North, Igembe Central, Tigania East and Tigania West given that the process of land adjudication is ongoing in the same area.

2. Consequential to the above declarations, the Petitioners have sought the following order:

(i) The Respondents by themselves, employees or otherwise howsoever be prohibited from occupying and/or interfering with community land comprised in all that area of land measuring approximately 640.6 square kilometres situated within Meru County in what was formerly known as Nyambene County Council, Nyambene District, Eastern Province, the boundaries of which are more particularly delineated and edged in purple on Boundary Plan No. 216/61, which is signed, sealed and deposited at the Survey Records , Survey of Kenya Nairobi and a copy of which may be inspected at the Office of the Director General , Kenya Wildlife Service, Nairobi.

(ii) Costs of the Petition.

3. This Petition has been opposed by the 1st Respondent which is the county government of Meru and the 4th Respondent which is the Kenya Wildlife service. I have not seen any response to the petition emanating from the 2nd and 3rd Respondent who are the Attorney General and the Cabinet secretary for interior respectively.

Petitioners' case

4. The case for the Petitioners is to be found in the body of the Petition as well as in the affidavits of one Samuel M'Maroo, the 1st petitioner, who has sworn the affidavits on his own behalf and on behalf of the other petitioners.

5. Petitioners' case is that this Petition relates to all that land measuring approximately 640.6 Square Kilometers situated within what was Igembe Central, Igembe North and Tigania East constituencies now covering the said Igembe Central, Igembe North and Igembe South and also Tigania East and West constituencies, delineated and edged in purple on Boundary Plan No. 216/61 which was signed, sealed and deposited at the Survey Records Office, Survey of Kenya Nairobi and is in possession of the Director General of the Kenya Wildlife Service, the 4th Respondent.

6. Petitioners claim that prior to the promulgation of the new Constitution of Kenya 2010, the suit land the subject of these proceedings was under the jurisdiction of the Nyambene County Council as a trustee of the local community and that vide Legal Notice No. 86 of 2000, dated 6th June 2000, the 3rd Respondent's predecessor, Hon. M.H Madoka Minister of State, purporting to exercise powers under Section 18 (1) of the Wildlife (Conversation and Management) Act (now repealed), and claiming to have consulted Nyambene County Council, declared the area more particularly described in paragraph 16 of the Petition as Nyambene National Reserve.

7. It was further contended that the Petitioners together with thousands of residents and inhabitants of the area affected, led then by their then and current leaders of Igembe North, Igembe Central, Igembe South, Tigania East and Tigania West protested and held demonstrations, on the grounds inter alia that the gazettement of the Nyambene National Reserve was done without consulting the people at the grassroots who depended on the said land for their livelihood for centuries, and that neither the County Government of Meru nor the Kenya Wildlife Service had taken into account that with the increasing population in the area, there was limited farming and grazing land. Petitioners claim that the development of the contemplated Nyambene National Reserve will only heighten community tensions among the clans and families who stand to be displaced and/or forcibly dislocated.

8. Petitioners claim that the creation of Nyambene National Reserve by the Minister and the intention and actions of the County Government as set out thereunder contravened and breached the principles of land policy outlined under Article 60 (1) of the Constitution in that it limits the communities access to land and threatens the security of their rights and hampers the sustainable and productive management of land resources of the County of Meru particularly that area set apart as Nyambene National Reserve. That, following community and public outcry occasioned by the declaration of the Nyambene National Reserve, the then President of the Kenya visited Nyambene and at a public rally in the year 2002 announced that the government had withdrawn the Legal Notice although this was not followed by any legal notice to that effect although no activities took place in the suit land until 2007 and 2008.

9. Petitioners aver that the decision of the Meru County in collusion with the Kenya Wildlife Service to revive the legal notice clandestinely and without any consultation with the affected communities and without any resolution or decision of the County Assembly has the effect of reversing and or interfering with the adjudication process and this process posed grave danger to security, law and order in the five constituencies of Igembe North, Igembe Central, Igembe South, Tigania East and Tigania West. That, indeed on 14th July 2014, the Kenya Wildlife Service conducted a passing out parade of 30 game wardens specially trained on behalf of the Meru County Government to serve in the Nyambene National Reserve as a Para-military unit under the Commander of the Governor of Meru County and that the posting of armed game wardens in an area of active land adjudication had heightened tension in the area covered by the Nyambene National Reserve and this posed a grave security risk in the area.

Case for 1st Respondent

10. The case for the 1st Respondent has been advance by one Ntoitha Mithiaru the 1st Respondent's County Executive Committee Member in charge of Cooperatives, Enterprise Development and Tourism as well as by some residents who have filed Replying affidavits in response to the petition.

11. 1st Respondent avers that the subject matter of this suit was Nyambene National Reserve, measuring approximately 640.6 square kilometers located to the North East of the County of Meru, which land was legally gazetted as a National Reserve vide Legal Notice No. 86 of 2000 dated 6th June 2006. It is further averred that a Legal Notice is defined in law as a legal action or intent announced by advertising in newspapers or some public posting and that in Kenya, the legal forum provided for advertising such legal action is the Kenya Gazette and that in view of the foregoing, it is not true that the Legal Notice No.86 of 2000 was published in a clandestine manner as the same was published in the Kenya Gazette as is prescribed by law, hence petitioners could not legally argue that a roadside declaration devoid of any legal process even by the then President had the effect of revoking a Legal Notice.

12. The 1st respondent states that at the time when Nyambene National Reserve was gazetted as a National Reserve in the year 2000, the law that applied to the setting aside of Trust Land vested in a County Council was **Section 117 (1) of the then Constitution and Section 13 of the Trust Land Act (CAP 288 of the Laws of Kenya)**, which law provided the detailed procedure to be followed and which procedure was duly followed by the then County Council of Nyambene. That, in due regard to the foregoing, the land the subject of this matter in this suit was duly set aside as a National Reserve under the old Constitution of 1963 and further in accordance with the Trust Land Act (CAP 288 of the Laws of Kenya) and as such, Legal Notice No. 86 of 2000 could not be held to have contravened any Article of the Constitution of Kenya and more so Article 63 (4) of the Constitution of Kenya 2010.

13. 1st respondent contends that the Wildlife (Conservation and Management) Act (CAP 376 Laws of Kenya) mandated the 4th Respondent (KWS) to establish linkages and gain support for wildlife conservation with stakeholders and communities co-existing with wildlife. In view of the foregoing, on or about June 2013, the County Government of Meru as part of the County Integrated Development Plan, decided to operationalize Nyambene National Reserve as a flagship project for the county and to this effect held several meetings with all affected communities in the nine sub counties and a consensus was duly built, authorizing the operationalization of the project for economic gain to the county. He further deposed that Nyambene National Reserve bordered Isiolo County to the North and was further located in an area that was notorious for cattle rustling, insecurity and lawlessness and as such there was no structured economic activity in the area, including farming or grazing either in the National Reserve or its surroundings and that further the suit land was mainly located in a rocky ground which could not be used for farming.

14. It was further averred that the training of community rangers by the 4th Respondent under its community enterprise development programme was geared towards reaching out to communities that interact with wildlife for purposes of providing graduates with basic paramilitary procedures, ecology and ecosystem management, community enterprise models, wildlife

management, human wildlife conflict management, first aid and personal discipline, management information systems and enterprise development among others.

15. The 1st Respondent stated that it had a mandate to manage Nyambene National Reserve with the help of the 4th Respondent (KWS) which obligation the County Government was constitutionally obligated to undertake.

16. The persons who have filed Replying Affidavits in support of the county government of Meru are **Elijah Muchai M' Mutiga, David Mwenda M' Itirithia, Julius Kang'ote and Francis Gichamui**. These people are the chairperson of Nyambene SubCounties herdsman, a trained police reservist and vice chairperson of pasture and water for Igembe North, a retired chief of Muthara location and the Current chief of Ngaremara location respectively. They have deponed inter alia that the operationalization of Nyambene National Reserve would bring peace to the region and peaceful co-existence of communities in the area. They are therefore opposed to granting of the orders sought for in the petition.

Case for the 4th respondent

17. The case for the 4th Respondent has been advanced by one Robert Njue, an assistant Director of National Parks and Game Reserves through his Replying affidavit sworn on 10/12/2014. He avers that Nyambene National Reserve indeed existed and that the same was established following Legal Notice No. 86 of 6th June 2000 as per provisions of Section 18 of Wildlife (Conservation and Management) Act CAP 376 (Repealed) and was duly listed as number 24 under the National Reserves Section of the Eleventh Schedule under Section 119 (a) of the Wildlife Conservation and Management Act 2013. 4th defendant claims that the gazettment of the Reserve was properly and lawfully done in that it was done with the agreement of a competent authority as per Section 18 (1) of CAP 376 (Repealed) following consultation between the erstwhile Minister for State in the Office of the President, the 4th Respondent and the County Council of Nyambene and that the County Council of Nyambene was the competent authority authorized in law to deal with the land.

18. The 4th Respondent further contended that it was not aware of any other public pronouncement nullifying the gazettment of the Reserve and that further if such pronouncement was made as alleged, the same was of no legal effect in that matters relating to degazettment of a National Reserve are provided in Section 37 of the Act and that further Section 37 thereof provided that for an area of land designated as a wildlife protected area to cease to exist as such, the Cabinet Secretary in charge of wildlife shall upon consultation with the competent authority in this case the 1st Respondent publish a notice in the gazette for the intention to degazette and that this would only happen after prior consultation between the Cabinet Secretary, National Land Commission, the 4th Respondent and subsequent approval of a resolution of Parliament. The 4th Respondent further denied that the said Reserve was within any Land Adjudication Section as alluded to by the Petitioners.

Submissions

19. Submissions were filed by the petitioners and the 1st respondent only.

20. It was submitted for the Petitioners that since the Gazettment of the impugned Legal Notice No. 86 of 2000, there was stiff opposition from members of the community leading to the then President of the Republic of Kenya, Daniel Toroitich Arap Moi visiting the area in the year 2002 and he assured the residents in a public rally, that the suit land would not be declared a National Reserve and that since 2002 the Respondents had not taken any further action and that the Respondents had now unlawfully and illegally purported to have the suit property declared a National Reserve and purported to enter it as well and install security personnel.

21. It was submitted that the mere assertion by Mr. Ntoitha Mithiaru that Nyambene County Council had aspired to create a National Reserve did not show any proof of consultation between the 4th Respondent and the community around the suit property.

22. As to whether Legal Notice No. 86 published in the Kenya Gazette on 6th June 2000 was constitutional, it was submitted that there was no constitutional basis for publishing the same under the former constitution and neither was it sanctioned under the provisions of the Wildlife (Conservation and Management Act) (repealed).

23. With regard to the issue as to whether the continued exclusion of the community from accessing and managing the affairs of the suit land was in breach of the constitution, it was submitted that public participation as laid down under the Constitution was one of

the key values of National Values and Principles of Governance and that the continued exclusion of the community in the management of the suit property was in massive breach of the constitution and to this end the Respondent ought to be compelled to involve them in the said management.

24. It was also submitted that the recruitment, training and setting up of an armed unit of County Game Wardens within the suit property was not within the law as the function of securing the Country from any internal threats was a preserve of the 3rd Respondent.

25. It was further submitted that the suit property was well within the ambit of Article 63 (2) (d) and it was not in dispute but it was being held by the 1st Respondent as trust land but not public land and that the purported conversion and adjudication was not in line with Article 63 of the Constitution and that unless the actions of the Respondents were checked by this court, they would amount to an arbitrary deprivation of the community of the property which they rightly hold.

26. Finally, it was submitted that the National Values and Principles of Governance which bind all state organs such as the Respondent enlist participation of the people as one of the values of governance as well as human dignity, equality, social justice, inclusiveness, equality, human rights, non discrimination and protection of the marginalized and failure to abide by them posed a grave danger to peace, security and good order in the 4 constituencies of Igembe North, Igembe Central, Tigania East and Tigania West given that the process of land adjudication was going on in the same region.

27. On the other hand, it was submitted for the 1st Respondents with regard to the Petitioners allegations that there was no constitutional basis for the publishing of Legal Notice No. 86 of 2000, that the National Reserve was properly created in accordance with the law, no controvertible evidence had been provided by the Petitioners against the same. It was submitted thus that the burden of proof in such an instance lay with the Petitioners an obligation they had failed to discharge.

28. With regard to the issue as to whether the Legal Notice No. 86 of 2000 creating Nyambene National Reserve had been withdrawn by roadside declaration given by the then President of the Republic of Kenya, the 1st Respondent submitted that in the year 2002 when the Legal Notice No. 86 of 2000 was allegedly revoked via roadside declaration, the procedure for revocation of a National Reserve was clearly elucidated under Section 7 of the Wildlife (Conservation and Management) Act 376 (repealed) and that it was clear that none of the above process had been followed for purposes of degazetting Nyambene National Reserve.

29. As to whether the recruitment, training and setting up of county game wardens within the suit property was unlawful, it was submitted for the 1st respondent that the suit property herein was in deeded Nyambene National Reserve within the 4th Respondents mandate which was the sole state organ tasked with the protection, conservation, sustainable use and management of wildlife pursuant to Section 6 (1) of the Wildlife (Conservation and Management) Act 2013 and that the 4th Respondent continued to carry its mandate in accordance with the law and that the Petitioners had not tendered any evidence to reveal how peace and security was being threatened.

30. Finally it was submitted for the 1st Respondent that despite the suit having been brought as a Petition alleging that the Petitioners rights elucidated under the constitution of Kenya have been infringed, the specific provisions of the law apparently infringed were never pleaded with particularity. Consequently, and in absence of cogent evidence before the court and in regard to the foregoing, the Petition should be dismissed with costs.

Determination

31. I have carefully considered this Petition, the rival submissions by the parties and the authorities relied upon by the parties. I frame the issues for determination as follows:

- (i) Whether the legal Notice No. 86 of 2000 was published in blatant regard to the applicable law.
- (ii) Whether the legal notice no.86 of 2000 was degazetted.
- (iii) Whether adjudication is in progress.
- (iv) Whether the rights of the community as enshrined in the constitution have been violated.

Whether the legal Notice No. 86 of 2000 was published in blatant regard to the applicable law.

32. It is not in dispute that when the Legal Notice No. 86 of 2000 was published on 6th June 2000 creating Nyambene National Reserve the applicable law then was Section 117 (1) of the Constitutional Kenya (repealed) and Section 18 of the Wildlife (Conservation and Management Act CAP 376 (repealed). Section 117 of the former constitution provided as follows:

“Subject to this Section, an Act of Parliament may empower a county council to set apart an area of Trust Land vested in that county council for use and occupation-

a). by a public body or authority for public purposes; or

b). for the purpose of the prospecting for or the extraction of minerals or mineral oils; or

c). by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof”.

33. Section 18 (1) of the Wildlife (Conservation and Management Act) CAP 376 (repealed) provided as follows;

“With the agreement of the competent authority, the minister may, by notice in the Gazette, declare any area of land to be a National Reserve.”

34. It was contended for the Respondents that at the time when Nyambene National Reserve was gazetted as a National Reserve in the year 2000, the detailed procedure as provided for in Section 117 (1) of the then Constitution was duly followed by the then Nyambene County Council. I have indeed perused the impugned Legal Notice No.86 2000 dated 6th June 2000. The same inter alia provides as follows:

“In exercise of the powers conferred by Section 18 (1) of the Wildlife (Conservation and Management) Act , the Minister of State in the Office of the President, after consultations with the competent authority Nyambene County Council, declares the following Order:-

THE WILDLIFE (CONSERVATION AND MANAGEMENT)

(NYAMBENE NATIONAL RESERVE ORDER 2000)

35. It is a principle tenet of law that he who alleges must prove. Save for the Petitioners contending that there were no consultations between the then Minister for State and Nyambene County council, no evidence was tendered to prove these allegations. The impugned notice is very clear that there were consultations between the then Minister and Nyambene County Council and in absence of any evidence to the contrary I hold and find that indeed there were consultations between the Minister and Nyambene County Council.

Whether the legal notice no.86 of 2000 was degazetted.

36. The other issue raised by the Petitioners was that Legal Notice No. 86 of 2000 creating Nyambene National Reserve was withdrawn by roadside declaration given by the then President of the Republic of Kenya H.E Daniel Toroitich Arap Moi in the year 2002 at a public rally. The date of the said declaration was not stated. Section 7 of the Wildlife (Conservation and Management Act) (repealed) provided for the procedure for cessation of an area as National Park, National Reserve or local sanctuary. The same provided as follows:

“Cessation of area as a National Park, National Reserve or local sanctuary;

(1) subject to subsection (2) of this section, the Minister after consultation with the competent authority, may by order declare any National Park, National Reserve or Local Sanctuary specified thereof, shall cease to be a National Park, National Reserve

or Local Sanctuary.”

37. The provisions of Section 7 of the Wildlife (Conservation and Management Act) (repealed) are quite clear as to how an area shall cease to be a National Reserve. There was no evidence that that Legal Notice No. 86 of 2000 had been withdrawn by the then President and even if it were indeed true that the said notice was withdrawn/revoked by the President via a road side declaration, the said declaration would be null and void and of no effect since due process in allegedly withdrawing/revoking the said notice was not followed.

38. In the case of Attorney *General & 6 others v Mohamed Balala & 11 others [2014] eKLR (which authority has been relied on by the Respondents)*. The Court of Appeal rendered itself thus;

“The appellants submitted that the President enjoys some degree of discretionary power by virtue of his executive authority. There is however nothing in the Article 131 of the Constitution of Kenya 2010 that would warrant the issuance of such directive. If anything by courtesy of sub-article (e), the President is obligated to ensure the protection of human rights and fundamental freedom and the rule of law. How can we say that there is rule of law when we clothe the President with powers not anchored in law and which is exercised in an opaque manner. How then will the President be held to account if he was to exercise such power oppressively in a cavalier manner or even capriciously or whimsically? Executive authority should be exercised on the basis of law and not fiat. The appellants talk of the President exercising some powers through executive orders. However, no evidence of such executive order signed under the hand of the President and his seal was tendered in this case. We are a country who proclaim to all and sundry that we run our affairs within the tenets of rule of law. Whatever is done or decreed in the name of the country must have a legal basis. It should be supported by statute or the Constitution. The requirement in this instance is opaque and cannot be traced to any legal grounding for evaluation nor rationale. It is worth repeating that it was not sufficiently demonstrated that the requirement was a presidential decree issued in furtherance of his executive powers, especially since there appears to have been a break in its implementation between the first and second Presidents.”

39. In the case of *Lucy Migigo & 550 others v. Minister for Lands and 4 Others ,COA Nyeri Civil Appeal No.227 of 2011*, the court had this to say regarding promises made by the President **“with regard to the issue of the promise for land made by the former President (Jomo Kenyatta), to the alleged squatters, the order of mandamus could not issue to enforce a promise to do anything in the future, and neither could mandamus issue to enforce a promise not underpinned by a statutory provision and moreover, a promise could not create nor convey an interests in land”**.

40. In the case of *Ledida Ole Tauta & Others v. Attorney General & 2 Others Petition No. 47 of 2010*, the court was dealing with a case where petitioners together with the Masai Community were seeking a declaration that they were entitled to the suit land known as Ngong hills measuring approximately 577 hectares... It was held that **“Ngong hills Forest had not been degazetted as such and its boundaries had not been varied to make it available for alienation to the petitioners”**. Likewise in the present case, I find that Nyambene National Reserve has not been degazetted and the land is hence not available for alienation.

Whether adjudication is in progress.

41. Petitioners have advanced a claim that adjudication is in progress with a view to giving community members title deeds in respect of the area in question. These averments are captured in paragraph 21, 22 and 23 of the petition, whereby notices declaring the areas as adjudication sections were issued from year 2007. Adjudication process is mainly anchored under two statutes; The Land Consolidation Act and the Land Adjudication Act. The process is a function of the National Government, whereby the office of the District Land Adjudication and settlement Officer (DLASO), is the one mandated to spearhead the process. If the scenario was one where adjudication is on –going within the national reserve, then the petitioners ought to have brought on board the DLASO to shed light on this issue. Further, the Petitioners could also have requested for a court scene visit to enable the court asses the real situation on the ground. My conclusion on this point is that I am not persuaded by the petitioners that any adjudication process is taking place within Nyambene National Reserve.

Whether the rights of the community as enshrined in the constitution have been violated.

42. As to whether the rights of the communities as enshrined in the constitution have been violated by the aforementioned legal notice, I find that this allegation has not been proved. Save for the Petitioners contending that there was no Constitutional basis for publishing the said Notice, the Petitioners did not lay any basis for this contention, neither did they demonstrate how their rights under Articles 27, 40 and 43 had been violated and in what manner. In the case of *Mumo Matemu v Trusted Society of Human*

Rights Alliance & 5 others [2013] Eklr. The Court of Appeal expressed the following view;

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements.

43. I find and hold that the Petitioners have not met the threshold set out in the **Anarita and Mumo Matemo cases** (*supra*) and they have not demonstrated how their Constitutional rights have allegedly been infringed.

44. It is indeed not in dispute that when Legal Notice No.86 of 2000 was published in the year 2000, declaring Nyambene National Reserve, the applicable law was the old Constitution but Nyambene National Reserve came in to effect after promulgation of the new constitution (2010).

45. *In Samuel Kamau Macharia and Another vs Kenya Commercial Bank Ltd & 2 Others, [2012] eKLR* the Supreme Court of Kenya stated as follows;

“At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectively, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectively would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution”.

46. *In absence of indication to the contrary, that the new Constitution was indeed to act retrospectively the Petitioners cannot purport to rely on the provisions of the new Constitution (2010) and the Wildlife Conservation and Management Act 2013, to claim that their rights have been infringed.*

CONCLUSION

47. *Taking into totality all the circumstances in this Petition, I find the same to be devoid of merits and the same is hereby dismissed in its entirety with no orders as to costs.*

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 3RD OCTOBER, 2018 IN THE PRESENCE OF:-

C/A Galgalo/Faith

Mbijiwe A for 4th respondent

Ashaba holding brief for Okango for 1st respondent

HON. LUCY. N. MBUGUA

ELC JUDGE



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