REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION NO. 7 OF 2020

JOHN NGIMOR & 554 OTHERS.....APPLICANTS

VERSUS

NORTHERN RANGELANDS TRUST & 3 OTHERS.....RESPONDENTS

RULING

1. This is a ruling in respect of the petitioners' application dated **16/12/2021**. I will set out verbatim the prayers it seeks as hereunder:

(1) That this matter be certified urgent and prayer 2, 3, 4, 5 and 6 be granted ex parte in the first instance.

(2) That pending the hearing and determination of this application, the Honourable Court be and is hereby pleased to issue an ex parte interim injunction order stopping, prohibiting and forbidding the respondents jointly and severally, restraining them whether by themselves, their agents, servants, representatives, assignees and/or whosoever acting under their instructions/directions from entering, mapping, surveying and delineating community land, carrying out conservancy operations, importation of wildlife, evicting community members or any other activity under the Memorandum of Understanding for Collaboration in Conservation, Management, Sustainable Use of Natural Resources and to Promote Community Development Initiatives in West Pokot County as signed in December, 2019 between the 4th respondent and 1st - 3rd respondents in the areas of Endugh, Kasei, Sekerr, Masol, Lomut and Weiwei Wards within West Pokot County.

(3)That pending the hearing and determination of this Petition, the Honourable Court be and is hereby pleased to issue an ex parte interim injunction order stopping, prohibiting and forbidding the respondents jointly and severally, restraining them whether by themselves, their agents, servants, representatives, assignees and/or whosoever acting under their instructions/directions from entering, mapping, surveying and delineating community land, carrying out conservancy operations, importation of wildlife, evicting community members or any other activity under the Memorandum of Understanding for Collaboration in Conservation, Management, Sustainable Use of Natural Resources and to Promote Community Development Initiatives in West Pokot County as signed in December, 2019 between the 4th respondent and 1st - 3rd respondents in the areas of Endugh, Kasei, Sekerr, Masol, Lomut and Weiwei Wards within West Pokot County.

(4) That pending the hearing and final determination of this application and petition, the Honourable Court be and is hereby pleased to set aside/stay the Memorandum of Understanding for Collaboration in Conservation, Management, Sustainable Use of Natural Resources and to Promote Community Development Initiatives in West Pokot County as signed in December, 2019 between the 4th respondent and 1st - 3rd respondents signed on December, 2019, all maps and consequential agreements arising therefrom.

(5) The pending the hearing and determination of this application, the County Commissioner of West Pokot County and West Pokot County Commandant do oversee the implementation of the orders sought herein and to ensure that peace and order prevails.

(6) That the Honourable Court be pleased to certify the matter to be placed before the Honourable Chief Justice or such other person duly authorized to act in such capacity for the appointment of three judge bench as it raises substantial questions of law.

(7) That costs of this application be provided for.

2. The application is supported by the sworn affidavit of the 1st petitioner who exhibits a written authority to plead on behalf of the other petitioners.

3. As evident from the prayers above the applicants are opposed to the implementation within certain areas of West Pokot County of a memorandum of understanding signed between the 4th respondent and the 1st – 3rd respondents. With the exception of a part of **prayer no 4** the rest of the reliefs sought are interim reliefs. Part of **Prayer no 4** seems to suggest that the petitioners would wish to have the memorandum of understanding subject matter of this petition summarily set aside at an interlocutory stage which this court is not inclined to do before hearing of the petition for obvious reasons.

4. The issues that arise for determination from the instant application are as follows:

a. Whether this court has jurisdiction to hear and determine this petition.

b. Whether the conservatory orders should issue.

c. Whether the matter should be certified under article 165(4) of the Constitution.

d. Who should bear the costs of the application"

The issues are discussed as hereunder.

a. Whether this court has jurisdiction to hear and determine this petition.

5. This court granted interim orders on **1/2/2021** preserving the *status quo* in respect of the suit land. The respondents subsequently filed responses questioning jurisdiction of the court. This court must therefore set out to examine the record in order to establish if it has jurisdiction.

6. All the respondents approach the issue of jurisdiction from the perspective of the doctrine of exhaustion of remedies. According to them the dispute before court is an internal dispute over land use arising from a schism in the community in that some members of the civic territories named support while others oppose the land use model integrating wildlife conservation and other uses. It is stated that the petitioners lead the group wishing to preserve the land for indigenous uses. It is therefore urged that the dispute falls under the provisions of **Sections 39(2)** and **42** of the **Community Land Act (CLA)** and **Section 117** of the **Wildlife Conservation and Management Act** (**WM&CA.)**

7. It is further urged by the respondents that the petitioners are bound to apply the existing mechanisms before coming to court as that would have been, in their opinion, in accordance with the policy engendered in **Article 60(1) (g)** and **Article 159 (c**) of the Constitution and that owing to failure to do so the instant petition and motion are premature. The respondents cite the cases of **S.K. Macharia & Another Vs Kenya Commercial Bank Ltd & 2 Others 2012 eKLR And Geoffrey Muthinja & Another Vs Samuel Muguna Henry & 6 Others 2015 eKLR; The County Government Of Turkana Vs National Land Commission & Others , and Mutanga Tea & Coffee Company Ltd Vs Shikara Ltd & Another 2015 eKLR** on matters jurisdiction and the exhaustion doctrine. Also, citing **Nightrose Cosmetics 1972 LTD Vs Nairobi City County Government and Others 2018 eKLR,** the respondents have further submitted that where prior remedies have not been exhausted the court may decline to apply the exhaustion doctrine and assume jurisdiction only in exceptional circumstances, but the petitioners have failed to plead those exceptional circumstances in the instant case. The respondents aver that the inescapable conclusion to be drawn from **Articles 60** and **159** of the **Constitution** is that both Parliament and the Constitution did not intend the courts to be the forum for settlement of disputes relating to community land, whether registered or unregistered and that the national land policy underscores amicable resolution of land use conflicts, without distinguishing between registered or unregistered community land. While quoting the equity maxim that *"equity considers done that which ought to have been done,"* the respondents rely on **Regulation 12** of the **Community**

Land Regulations for their proposition that at the end of **18** months from the date of the commencement of the regulations all community land ought to have been registered, and that there is therefore no basis for distinguishing between registered and unregistered land for the purposes of this petition. The respondents further cite the cases of **Ibrahim Mohamud Ibrahim & Another Vs Kenya Wildlife Service & 4 Others 2020 eKLR, Narok County Council Vs Trans Mara County Council 2000 1 EA 161,** and **Wildlife Direct Vs Kenya Wildlife Services & 4 Others 2020 eKLR** and submit that the alternative statutory mechanisms are more appropriate than the court in that the court is *"culturally and geographically removed from the suit land."*

8. It has also been submitted that the petition can not be maintained against the 2nd and 3rd respondents as community based organizations, unincorporated entities devoid of legal personality, and they fall outside the definition of *"respondent"* as defined in **Rule 2** of the **Constitution Of Kenya (Protection Of Rights and Fundamental Freedoms) Practice And Procedure Rules 2013** yet the claim is pleaded jointly and severally against all the respondents. The case of **Kituo Cha Sheria Vs John Ndirangu Kariuki** and **Kipsiwo Community Self Help Group Vs the Attorney General & 6 others** are cited in support of this proposition, and it is urged that the court should not issue any orders against them as they would be in vain.

9. In response to the respondents regarding the issue of jurisdiction the petitioners cited **Articles 23(1)** and **165** of the Constitution and **Section 13** of the **Environment And Land Court Act** as granting this court unlimited original and appellate jurisdiction to hear disputes under **Article 162(2**) of the Constitution and to hear and determine applications for redress of denial violation or infringement of or threat to a right or fundamental freedom in the bill of rights.

10. The petitioners contend that the **Community Land Act** contemplates disputes in respect of registered community land between the members of one registered community and another registered community and the section covered by the MOU is still unregistered and the alternative dispute resolution methods in the Act can not apply. They urge that a provision purporting to limit this court's jurisdiction should be in express and certain terms. The petitioners state that the word "*alternative*" connotes an option to choose how best other than in a court the dispute should be resolved, and it can only be mandatory if parties have agreed so. It is urged that the petitioners exhausted the efforts to resolve the dispute through letters which they claim the respondents ignored and that at one point they petitioned the County Assembly of West Pokot regarding the dispute. Citing the case of **Suzanne Achieng Butler & 4 Others Vs Redhill Heights Investments Ltd & Another 2016 eKLR** and **Cooperative Bank of Kenya Ltd Vs Patrick Kangethe Njuguna & 5 Others 2017 eKLR** the petitioners aver that the court should apply the *"predominant purpose test"* or the *"dominant issue test"*. The last point they raise is that the preliminary objection raised by the respondents does not amount to a preliminary objection properly defined in **Mukisa Biscuit Manufacturers Vs West End Distributors Ltd 1969 EA 96.**

11. In respect of **Section 117** of the **Wildlife Conservation And Management Act** the petitioners aver that it does not apply since the petition does not include the KWS and also that the dispute is not about an ongoing protection, conservation or sustainable use and management of wildlife and that in any event the respondents have failed to demonstrate that the KWS has granted them a licence. They appear to argue that at the most, the court should stay the proceedings rather than strike them out, pending such an ADR process.

12. In the case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1,** the Court Of Appeal stated as follows regarding jurisdiction:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised <u>at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.</u> Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." (Emphasis mine)

13. Jurisdiction having been raised as a preliminary issue, it must therefore be dealt with as such. In the case of **Mukisa Biscuit Manufacturing Co. Ltd. v. East End Distributors Ltd [1969] E.A. 696** the court observed as follows:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

14. Jurisdiction is therefore an important issue, the first port of call in any litigation. The jurisdiction of the Environment and Land

Court springs from **Article 162(2)(b)** of the **Constitution** which provides as follows:

"System of courts.

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2)Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a)employment and labour relations; and

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

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article."

15. The jurisdiction of this court also springs from **Section 13** of the **Environment And Land Court Act** which states as follows:

Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b)relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d)relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5)Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the

Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

16. In the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1,** the Court Of Appeal observed as follows regarding the issue of jurisdiction:

"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics."

17. In the light of the foregoing it is important to examine the record to establish whether this court has jurisdiction over the matter before it. However, the issue of whether the objection is a true preliminary objection within the rule in the **Mukisa case** (supra) must be handled first.

18. The basis of the respondents' preliminary objection is twofold as follows:

i. That the petition breached the doctrine of exhaustion of remedies provided by statutes, namely the Community Land Act and the Wildlife Conservation and Management Act.

ii. That the orders sought have been sought jointly and severally against all the respondents yet the 2nd and 3rd respondents are CBOs, unincorporated non-juridical persons against whom they can not apply and therefore they can not issue at all.

19. With respect to the first limb, an examination of the cited statutes should reveal whether there are dispute resolution mechanisms laid out thereunder. The petitioners in their response opine that they have exhausted the efforts at ADR and point at what they believe is credible evidence of the fact while the respondents differ and try to poke holes in the purported evidence of ADR presented by the petitioners. Therefore, based on the parties' altercations with regard to facts, the prevailing situation herein is contrary to the dicta in the **Mukisa case** (supra) in that what is raised by the respondents herein can not amount to a pure point of law which can argued *"on the assumption that all the facts pleaded by the other side are correct"* as there are numerous disputed allegations from both sides of the divide to be verified; for the reason that what one party states has been controverted by the other and a lengthy examination of documentations and arguments has to be engaged in to establish the truth thereof, it is the opinion of this court that the objection to the petition on the basis of the first limb above does not meet the definition of a proper preliminary objection.

20. Regarding the second limb, this court agrees with the respondents that orders of court should not be made in vain and should be directed at verifiable persons or entities. However, the argument that the entire petition and the motion are non-starters for having

been brought jointly and severally against all the respondents yet some are non-juridical persons is too wishful, unrealistically simplistic and untenable on two grounds. First, among multiple parties a court of law is able discern who should be the target and issue orders alike to guided missiles in their manner of operation, which will hit only the required target and avoid those who have no capacity to comply with those orders. Secondly, as long as the parties capable of receiving and implementing the orders of the court are still in the proceedings, the claim against them can not be defeated simply on account of misjoinder, yet the oxygen principle discourages summary dismissal or striking out where it is possible to resuscitate a suit even by way of amendments. Besides, the **Kipsiwo case (supra)** cited by the respondents may be distinguished in that where a non-juridical person has brought proceedings in its name, then the court's hands are tied in that there is no legally identifiable person in favour of whom orders may finally issue. The reversed argument that the respondents raise after citing **Kipsiwo (supra)** that *"any proceedings initiated against a respondent without legal capacity are a nullity from the start"* is only correct in so far as the objection on the basis of "capacity to sue" is raised against a petitioner or claimant; it is in my view quite erroneous to raise it against respondents in order to dispose of an entire petition and yet some of them have capacity to be sued.

21. Perchance this court has erred in the above analysis and conclusions, I will proceed further and examine if the arguments based on statute could have any merit.

22. Section 39 of the **CLA** states as follows:

Dispute resolution mechanisms.

(1) A registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.

(2) Any dispute arising between members of a registered community, a registered community and another registered community shall, at first instance, be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws.

(3) Where a dispute or conflict relating to community land arises, the registered community shall give priority to alternative methods of dispute resolution.

(4) Subject to the provisions of the Constitution and of this Act, a court or any other dispute resolution body shall apply the customary law prevailing in the area of jurisdiction of the parties to a dispute or binding on the parties to a dispute in settlement of community land disputes so far as it is not repugnant to justice and morality and inconsistent with the Constitution."

23. Evidently, **Section 39** of the **CLA** deals with land already registered under the **CLA**. Consequently, it is quite clear that **Regulation 25(1), Regulation 25(4)** and **Regulation 42** being subsidiary in nature can not override the express statutory provisions; though they do not address the land subject of the ADR as registered land, this court must presume that the land to be dealt with under those regulations must be registered while the suit land is not. the respondents can not therefore benefit from these provisions to support their preliminary objection.

24. **Section 117** of the **Wildlife Conservation And Management Act** states as follows:

Disputes

(1) Any dispute that may arise in respect of wildlife management, protection or conservation shall in the first instance be referred to the lowest possible structure under the devolved system of government as set out in the Devolution of Government Act including traditional resolution mechanisms.

(2) Any matter that may remain un-resolved in the manner prescribed above, shall in all appropriate cases be referred to the National Environment Tribunal for determination, pursuant to which an appeal subsequent thereto shall, where applicable, lie to the Environment and Land Court as established under the Environment and Land Court Act, 2011.

25. The argument raised by the petitioners to counter the respondent's reliance on **Section 117** of the **Wildlife Conservation and Management Act** (**WM&CA)** is that the Kenya Wildlife Service **(KWS)** has not been enjoined in these proceedings and no licence has been demonstrated to have been issued to the respondents by the KWS to render the dispute one regarding ongoing protection, conservation, management, etc. of wildlife and that those facts remove this dispute from the purview of the ADR envisaged by the **WM&CA**.

26. With respect it is difficult to see any connection between the struggle by the petitioners to protect community land and the requirements of the **WM&CA** while their land has not been declared to fall under any of the categories mentioned in **Section 31 (1) (a)-(c)** of the **WM&CA** or in respect of which no publication has been made in accordance with **Section 31 (1) (d)-(e)** of the same Act. In quoting **Section 117** of the **WM&CA,** the respondents rely on decisions in which it is evident that **KWS** was a party and that the cases involved areas formally under protection under the Act. In this court's view, it is only disputes within such areas that come under the authority of the Act as per **Section 31** that can be covered by the ADR mechanisms in **WM&CA.** Consequently, the submission that the respondents have not satisfied the ADR mechanisms under the **WM&CA** holds no substance. The upshot of the foregoing is that this court's jurisdiction with regard to this specific case is not circumscribed by any provisions of the **WM&CA,** and it may hear and determine the dispute at hand.

b. Whether the conservatory orders should issue.

27. In determining that issue this court is aware of the decisions in **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others 2014 eKLR** and **Michael Osundwa Sakwa vs Chief Justice and President Of The Supreme Court Of Kenya & 5 Others 2016 eKLR** regarding conservatory orders.

28. In the **Gatirau case** (**supra**) the Supreme Court Of Kenya observed as follows:

"Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

29. To determine if the conservatory orders are deserved, the information provided in the petition and the responses is relevant.

30. In their application, the applicants pray that an interim order of injunction be issued prohibiting the respondents jointly and severally from conducting certain activities in the stated areas pending the determination of the instant petition and also to set aside or stay the said memorandum. The opposed activities include entering, mapping, surveying or delineating community land, carrying out conservancy operations, and importation of wildlife, evicting community members or any other activity under the memorandum of understanding.

31. The memorandum of understanding that has been cited, a **14** page document, is attached to the application. It is entitled **"Memorandum of Understanding between the County Government of West Pokot, Northern Rangeland Trust & Community Wildlife Conservancies – For Collaboration In Conservation Management Sustainable Use Of Natural Resources & To Promote Community Development Initiatives In West Pokot County."**

32. In that MOU the 1st respondent describes its chief mission as follows:

"…to develop resilient indigenous community-led conservancies that transform indigenous people's lives, secure and peaceful coexistence and sustainable conservation and use of natural resources. Pursuant to its mission NRT raises funds for member conservancies and provides advice and guidance relating to its leadership and management of conservancies."

33. In achieving the objective the 1st respondent states that it collaborates with landowners and indigenous local communities to sustainably conserve and manage wildlife and wildlife habitats outside and adjacent to some state-controlled protected areas. The 2nd and 3rd respondents are the first two conservancies it has already supported in West Pokot County. The manner of support the 1st respondent accords them is detailed in the MOU whose implementation is by a joint committee constituted of representatives

appointed in writing from the 4 respondents, a representative of the Kenya Wildlife Service and any other key stakeholders. However, it is noteworthy that KFS and those other stakeholders are not signatories to the MOU.

34. In their application the petitioners aver that pursuant to that memorandum of understanding the 1st respondent is undertaking mapping activities to delineate community land for private wildlife conservation for a term of over 10 years, and is also in the process of importing wildlife to graze on the community land, without seeking the free prior informed consent of community members through adequate public participation; this is said to have caused tension due to the impending eviction of community members an allegation the respondents dispute. It is alleged that some incidents of insecurity have occurred due to massive eviction of people, who have been pushed to the Turkana-Pokot border by the 1st respondent's mapping and delineation of land. The petitioners fear that their right to privacy is affected as the areas mapped out by the 1st respondent impact on their cultural and religious sites. The petitioners are also apprehensive of increased human–wildlife conflict and consequent loss of their grazing lands after the project implementation.

35. The petitioners also allege that the 1st respondent is intent on imposing bylaws on settlement and grazing activities and thus disinheriting the community of its communal land and disrupt their life as pastoralists who graze in open fields, and thus undermine their cultural and traditional activities.

36. It has been reported that upon petition to the County Assembly by members of the Masol and Weiwei Communities being the two targeted for implementation of the MOU, the *ad hoc* committee of the West Pokot County Assembly established to probe the activities of the 1st Respondent in West Pokot recommended, *inter alia* the halting of all the activities of the 1st respondent until the registration of all community land and the revocation of all maps prepared by the 1st respondent, which recommendations the respondents have allegedly disregarded. It is averred that since the respondents have allegedly failed to engage the petitioners as members of an indigenous community in public participation, or in the drafting of the MOU, they have no express or implied authority of the local community to enter into the MOU. It is alleged that the MOU has never been explained to the community in a language they would understand. It is also further alleged that the board members of the 2nd and 3rd respondents do not represent the community interests as they were handpicked by the 1st respondent without the community's knowledge, and that the community's democratically elected leaders, religious leaders, community elders, women and youth were not represented, thus leading to the violation of the community's fundamental rights.

37. It is further alleged that there was a precursor to the 2nd respondent which was ignored by the 1st respondent in its activities suspected to be aimed at delineating the community land for private use, and that some of the 1st respondent's professed plans are the same as the Constitutional functions of the County Government of West Pokot. The West Pokot County Government is alleged to have violated the national values and principles of governance under the Constitution.

38. Finally the petitioners aver that the 1st respondent lacks an approved land use plan and an environmental and social impact assessment, that the suit land is mostly unadjudicated, lacking in a register of members which is still being compiled by the community. It is this land that the 1st - 4th respondents are allegedly intent on acquiring without public participation, and that they are employing coercion and undue influence on the community to do so.

39. In their grounds filed on **1/2/2021** the 1st -3rd respondents raise the following main grounds against the petition and the motion:

a. This court lacks jurisdiction to entertain the petition and notice of motion by virtue of the provisions of section 117 of the Wildlife Conservation and Management Act 2013, section 21(1) (f) of the Access to Information Act 2016 and section 42 of the Community land Act 2016.

b. That the application and the petition are premature as the petitioners have not exhausted alternative dispute mechanisms.

c. That the court is being invited to make orders that would interfere with another arm of government's exercise of its Constitutional and statutory functions;

d. That the motion is premised on mere speculation and unfounded allegations;

e. That the applicants have approached this court with unclean hands.

40. The first two grounds constituted the preliminary objection that has been determined as above.

41. In addition the deponents in the replying affidavit of the 1st respondent, the deponent, one **Tom Lalampaa** who describes himself as its Chief Executive Officer, avers as follows: that the 1st respondent is a charitable trust and an umbrella body with members of the local communities across Kenya directing it through a council of elders; that the petition and motion have not attained the standard of proof; that the court is being misused by the petitioners to frustrate or sabotage a positive community project that has been in the process of being developed since **2014**; that it is involved in securing peace and transforming lives.

42. The 1st respondent further states in the replying affidavit that it emphasizes on: formal and traditional rights and customary decision making over communal land being upheld in a conservancy; maintenance of transparency equity and accountability of the conservancy to the wider community; skills for effective conservancy management; accrual of conservancy benefits to the community and facilitation and mentorship to ensure that communities benefit from their natural resources in a sustainable, structured and planned manner. It claims to be carrying out its activities without undermining the community ownership, autonomy and decisional independence of the community. It states that its policy includes respect for traditional livelihoods, traditional governance systems and the co-existence of the people, livestock and wildlife and favours traditional institutions with modern practices technologies and governance systems and helps them contribute to both the local and national development.

43. In response to the claim of lack of free prior informed consent the 1st respondent states that it is members who apply for admission to the NRT, and the people of West Pokot applied to it for assistance in setting up conservancies. It denies that its activities have fostered insecurity and maintains that on the contrary, they are based on peace and security in the areas of operation.

44. In respect of the MOU the 1st respondent avers that the MOU does not amount to a legally binding document, that it does not involve the grant of concessions over land and that it has led to enlightenment of community members on community land issues while the provisions of the **Community Land Act** have not been implemented; that it does not envisage the transfer of all the 4th respondent's functions to the 1st respondent; and that it is does not amount to a public private partnership. The 1st respondent maintains that it has dealt with the 4th respondent in the latter's capacity as a trustee for the land of the people of West Pokot, including land under the 2nd and 3rd respondents, pending the registration of the affected community land.

45. In respect of its plans regarding the 2nd and 3rd respondents, the 1st respondent states that they were launched in the presence of the local administration amongst others and that they involved improvement of access to water health and education, building peace and security and conserving natural resources. It states that the management plans address all aspect of community land uses including worship sites, human settlement, and wildlife conservation. However, while admitting that there are plans for the 2nd and 3rd respondents to provide for proposed wildlife sanctuaries in the future, 1st respondent states that those plans are only futuristic and innocuous to the petitioners for now and it denies that it has been involved in any wildlife translocation and that none of the respondents have requested for such translocation. This statement will have to be weighed against the contents of paragraph 31 of the petitioners' further affidavit dated **10/2/2021** which quotes the "*2nd respondent's manager*" as celebrating the introduction of some form of wildlife in the 2nd respondents area of jurisdiction and attaches some extracts of electronic communications with photographs.

46. The 1st respondent states that it took the community representatives on study tours to other community conservancies and they, having witnessed the benefits thereof, envisioned the establishment of similar conservancies in West Pokot.

47. Concerning the report of the *ad hoc* committee of the West Pokot county assembly, the 1st respondent states that the same has not been placed before the full County Assembly for adoption and so it does not amount to a decision of the County Assembly; it also adds that the County Assembly had approved the MOU in the year **2019** and that *elected leaders* from the county were involved in the process that led to the 1st respondent's establishment of its presence in the county since **2014** and the lengthy delay on the part of the petitioners in seeking any redress, if any wrong had been committed, is therefore questionable.

48. The 1st respondent claims to have also ran a radio campaign involving guests who understood and could speak the local dialect and thus addressed the issues the petition raises. It also claims to have held sensitization meetings while observing covid-19 health precautions in the year **2020**. At **paragraph 70** of the 1st respondent's replying affidavit, it is deponed that Members of parliament and other leaders were aware of and involved in the process that led to the establishment of the 1st respondent in West Pokot.

49. I find that there is at least one vital question to be determined in this petition as to whether the impugned MOU was subjected to public participation before its implementation, and, if not, whether any of the petitioners' rights and fundamental freedoms under

the constitution have been threatened or violated and whether the MOU should be declared unconstitutional and revoked. As stated earlier this court can not make any definitive findings at this interlocutory juncture to avoid prejudice to the trial of the main petition. Nevertheless, the respondents' activities under the MOU are intended to be carried out, or to continue being carried out, on land which the petitioners claim to be unregistered community land governed by the CLA and therefore, however well-intentioned the respondents are, the activities and their mode of execution must be tested for conformity to the Constitution and the statutes at the hearing of the main petition. For example, while admitting that the suit land is unregistered community land, the 1st respondent has also expressly admitted that there are plans for the 2nd and 3rd respondents to provide for proposed wildlife sanctuaries in the future; however, it would appear that some of the professed actual and planned activities of the 1st and 4th respondent bear some aspect of benevolence to the community that can not be overlooked for instance, the improvement of access to *water*, *health* and *education*, *promoting peace and security*, *combating illegal wildlife trade*, *measures for mitigating human wildlife conflict*, and some aspects of *conserving natural resources*. These would be supplemental to the duties of the national and devolved governments; these are in the opinion of this court severable from the MOU; obviously, some can be undertaken by the 4th respondent under its constitutional obligations even in the absence of any MOU whether with or without the external support from any other body. While considering the foregoing facts, what this court must therefore do at this interlocutory stage is to strike a balance and assert proportionality in determining what activities to permit or injunct.

50. The three critical components of the petitioners' complaint against the respondents in their attempts to establish community conservancies are the mapping and surveying of the community land, the alleged illegal importation of wildlife and eviction of community members from sections of the community land; however the respondents have denied the actual or intended translocation of wildlife or eviction. While dealing with allegations and counter allegations at an interlocutory stage, all the court can do is to apply the precautionary principle espoused by **Section 3** of the **Environmental Management and Co-Ordination Act 1999 (EMCA).** In this courts' view a concomitant of establishment of wildlife conservancies is some restrictive application of other ordinary land uses and this may therefore affect landowners' rights.

51. **Section 58** of **EMCA** as read with the **2nd Schedule** in the same Act envisages Environmental Impact Assessment (EIA) study reports for major changes in land use, introduction of new crops and animals and large scale resettlement programmes. The potential impact on the petitioners of any importation of wildlife and eviction of community members from the suit lands, if those events take place before the finalization of this petition, cannot be foretold at the moment. However the express citation in the MOU of the respondents' intended collaboration with **NEMA, WARMA,** and **KFS**, which are the principal bodies concerned with natural resources, environmental matters and wildlife conservation is an indicator that the respondents are aware that their activities are subject to scrutiny from independent bodies; the present drawback is that those entities having not been enjoined as parties to this suit, their input in the respondents' current activities, if any, can not be gauged at this interlocutory stage.

52. In the light of the foregoing this court is therefore persuaded that there is need to issue conservatory orders in this matter pending the hearing and determination of the instant petition, and that only in so far as they will protect the community land in the areas mentioned in this petition from any further mapping, delineation or surveying, eviction of residents and importation of any animals into the land which may threaten the rights of the petitioners over the land.

c. Whether the matter should be certified under article 165(4) of the Constitution.

53. It is also sought that the instant petition be certified under **Article 165(4)** of the **Constitution** as raising a substantial question of law under **Article 165 (3)(b) and (d)** to be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

54. Owing to what this court has stated while determining the immediately preceding issue and which need not be reiterated here, I certify that this matter raises substantial questions of law under **Article 165 (3) (b)** and **(d).**

d. What orders should issue.

55. The upshot of the foregoing is that the motion dated **16/12/2020** partly has merit and it is hereby partially granted to the extent that:

i. Pending the hearing and determination of the instant petition a conservatory order is hereby issued restraining the respondents while acting under or pursuant to the document entitled "Memorandum of Understanding for Collaboration in Conservation, Management, Sustainable Use of Natural Resources and to Promote Community Development Initiatives in West Pokot County" signed in December, 2019 between the 4th respondent and 1st - 3rd respondents from any further

mapping surveying or delineation of community land and any importation of wildlife to or eviction of community members from the community land comprised in Endugh, Kasei, Sekerr, Masol, Lomut and Weiwei Wards within West Pokot County.

ii. This petition raises substantial questions of law under Article 165 (3) (b) and (d) of the Constitution of Kenya 2010.

iii. The file record regarding this petition shall be transmitted with utmost dispatch by the Deputy Registrar of this court to the Hon the Chief Justice for the empanelment in her discretion of a bench to hear and determine the main petition in accordance with Article 165(4) of the Constitution.

iv. The costs of the application shall be in the cause.

It is so ordered.
DATED, SIGNED AND DELIVERED AT NAIROBI VIA ELECTRONIC MAIL ON THIS 25TH DAY OF MARCH, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.