REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 14 OF 2010

ABDALLA RHOVA HIRIBAE & 3 OTHERS .....PETITIONERS

VERSUS

THE HON ATTORNEY GENERAL & 6 OTHERS .....RESPONDENTS

AND

KITUO CHA SHERIA.....INTERESTED PARTY

JUDGMENT

Introduction

1. This petition challenges the approval by the respondents, who the petitioners allege have the statutory responsibility in land allocation, environmental planning and management and also in project approvals, of several projects ranging from shrimp and prawn farming to sugarcane growing and titanium extraction within the Tana Delta. They allege that such approvals have been done without the requisite land use plan and environmental impact assessment having been done, and that the implementation of such projects without a multiple and comprehensive land use Master Plan will violate the constitutional rights of the petitioners and the communities living within the Tana Delta Wetlands.

2. The Petition is brought against the Attorney General as the 1st respondent, the National Environmental Management Authority (NEMA) as the 2nd respondent, the Tana and Athi Rivers Development Authority (TARDA) as the 3rd respondent, the Tana River County Council as the 4th respondent, the Commissioner of Lands as the 5th respondent, the Water Resources Management Authority as the 6th respondent and the Mumias Sugar Company Ltd as the 7th respondent. Kituo Cha Sheria, a non-governmental organization involved in the provision of legal aid to the indigent, applied and was permitted to participate in the proceedings as an Interested Party.

The Pleadings

3. The petitioners commenced this matter by a Petition dated 23rd July 2010, which was amended on 13th September 2010 pursuant to an order made on 19th August 2010. The Petition was further amended with the leave of the Court on 4th April 2011. Before me now is a Further Amended Petition dated 10th May 2011 in which the petitioners seek the following orders;

> **(i) A declaration that the Respondents, by failing to develop a multiple and comprehensive land Use Master Plan for the Tana Delta has infringed the rights of the petitioners and the people of the Tana Delta as envisaged by Article 28 and 42 of the Constitution, as well as infringing Article 60 of the constitution.**
>
> **(ii) An order of mandamus be directed at the respondents to develop, in consultation with all the stakeholders and inhabitants of the Tana Delta, a multiple and comprehensive land use master plan for guiding land use, development, livelihood and biodiversity/ecological protection.**
>
> **(iii) An order of prohibition directed at the respondents prohibiting them and their agent, servants or employees from undertaking any decision or action in respect of the land and natural resources pending the hearing and determination of this cause or until such time as a land Use master Plan for the Tana Delta is developed in accordance with the orders of this Honourable Court.**
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> **(iv) That there be no costs to this application in view of its public interest nature.**

4. The petition is supported by two affidavits sworn by the 1st petitioner, the first sworn on 23rd July 2010 in support of the Petition and a supplementary affidavit sworn on 14th December 2010.

5. The Petition is opposed. The 1st and 5th respondents jointly and the 2nd respondents filed grounds of opposition dated 8th October 2010 and 7th

March 2011 respectively. The 3rd respondent filed an affidavit sworn by its Company Secretary, Andrew Nyachio, on 17th November 2010. The 6th respondent filed an affidavit sworn by its Chief Executive Officer, Engineer Philip Olum, on 10th January 2012 while the 7th respondent filed an affidavit sworn by Emily Otieno, its Company Secretary, on 11th May 2011. The petitioners and the 2nd, 3rd, 6th and 7th respondents as well as the interested party filed written submissions. The 4th respondent did not participate in these proceedings or file any response to the Petition despite having been duly served.

Background

6. The background to this petition is given in some detail in the pleadings by the petitioners, who state that they have filed this suit as the representatives of the communities that reside in and derive a livelihood from the Tana Delta Wetlands within Tana River District. These communities include the Orma, Wardei and Somali communities who are pastoralists, the Pokomo and Mijikenda who engage in farming, and fishing communities comprising the Malakote, Bajuni and Luos. Also included are the hunters and gatherers comprising the Wasanya and Boni. The petitioners allege that these communities have lived and exercised their livelihood within the Tana River Delta since time immemorial, and have thus acquired land rights and rights of use over resources available in the Tana Delta Wetlands.

7. The petitioners describe the Tana Delta Wetlands as comprising an approximate area of 200,000 Hectares with very rich and diverse biological resources; that 76% of its bio diversity is wetlands and comprises permanent water bodies, swamp or marsh vegetation, seasonally flooded grasslands, mangrove forests, riverine/floodplain forests, marine sea grass beds, coral gardens and coastal dune habitants; that the remaining 24% comprises wooded grassland and bush land associations. They have also described in some detail the wildlife and vegetation extant in the Delta, including two species of monkeys that are considered endemic to Kenya- the Tana River crested Mangabey and the Tana River Red Colubus, as well as several globally threatened bird species, including Basra Reed Warbler and

Malindi Pipit. It is also a refuge for wildlife of all variety ranging from primates, hippos, crocodiles, elephants, buffalo, fish and huge congregations of birds as a result of which the Delta qualifies as an important bird area (IBA) and Key Bio Diversity (KBA) on a global scale.

8. The petitioners allege that the respondents have approved several projects in the Delta including shrimp and prawn farming, oil seed farming, large scale sugar farms and eco-friendly bio fuels, rice and maize farming, Jatropha growing and titanium mining. The petitioners state that the projects have not been successful or beneficial to the local communities as they have been speculative and have been done without consulting the local communities. This is what precipitated the filing of this Petition.

The Petitioners' Case

9. The petitioners are aggrieved by the respondents' failure to develop what they refer to as a multiple and comprehensive Master Plan to guide proposed developments within the Tana Delta in a way that helps to safeguard the environment and the rights of the local people. Additionally, they claim there is no clear control over land allocation in the Delta, nor has a cost-benefit analysis of the current economic and ecological value of the Delta *via a vis* the proposed projects been undertaken. The petitioners are thus concerned that since there is a scramble for the Tana Delta, the local people are likely to lose their right to the land on which they have lived and resources on which they have relied upon since time immemorial, particularly because there is no control over the land allocation and no central decision making and management for the development of the Delta. Moreover, they allege that very little information on the intended projects is available to enable the residents of the Delta participate meaningfully and have their interests taken into account.

10. The petitioners, through their Counsel, Mr. Chigiti and Mr. Thiga, raise several reasons for their opposition to the proposed projects: that the projects are not beneficial to the local communities as they are speculative and are done without consulting the local communities; that the Tana Delta

lacks a conservation and development master plan and this has caused failure of the developments; that there would be large scale displacement of people leading to a change of livelihood systems; that the available water resources of the Tana River and the Delta have not been considered adequately; that the respondents have not conducted a cost-benefit analysis of the current economic and ecological values of the Tana Delta against the proposed projects;

11. They contend, further, that the economic loss to Kenya of the loss of the Delta's ecological system in terms of water storage, shoreline protection, carbon storage, climate moderation and biodiversity has not been quantified; that the development of the Delta is likely to increase and intensify the land use conflicts between farmers and livestock herders due to a decrease in the available land; that the proposed schemes and wetland reclamation will cause severe physical destruction of the Delta flood plain habitats and associated biodiversity which would be a loss to the nation as a whole; and finally, that pollution from agricultural inputs and factory effluents will adversely affect the coastal and marine biodiversity.

12. The petitioner contend that Article 2(5) and (6) of the Constitution imports international laws and international instruments into Kenyan law, and the proposed projects in the Tana Delta negate Kenya's adherence to the obligations stipulated in international agreements to which Kenya is a party such as the **Convention on Biological Diversity (CBD)** whose core objectives are biodiversity conservation, sustainable use and equitable access and benefit sharing. They also contend that the proposed projects violate the **United Nations Declaration on the Rights of Indigenous People** that provide for the right of prior informed consent before the territories of the indigenous people are taken; the **Convention on Migratory Species (CMS)** that requires parties to protect migratory species throughout their cross border territories; and the **Convention on Wetlands of International Importance (RAMSAR)** which promotes wise use of wetlands.

13. The petitioners claim that their right to life and the environment have been violated; that the right to life and environmental rights existed under the repealed constitution; and that under section 6 of the **Transitional and Consequential Provisions** in the Sixth Schedule of the Constitution of Kenya 2010, all rights and obligations arising and subsisting before the effective date continued as rights and obligations of the government under the New Constitution. They relied on Article 19(2) with regard to the purpose for recognition and protection of human rights and Article 28 on the inherent dignity of all and the right to have that dignity respected and protected; They therefore ask the court to issue the orders sought prohibiting any further action on the Delta until a comprehensive Master Plan has been done.

Submissions by the Interested Party

14. While associating itself with the submissions of the petitioners in support of the Petition, the Interested Party through its Counsel, Ms. Mburugu, submitted that the Constitution at Article 56 provides for the rights and freedoms of individuals and includes the rights of communities, indigenous, marginalized and minority groups. It argued that it is the responsibility of the state to take affirmative action to enable Indigenous People participate in all spheres of life, have opportunities in the economic field, develop their cultural values and have reasonable access to water and health services.

15. The Interested Party relied on the UN Convention on the Rights of Indigenous People which provides that indigenous people have the right to full enjoyment, as a collective or individual, of all human rights and freedoms as recognized in the Universal Declaration of Human Rights. In addition, Ms Mburugu referred to the International Covenant on Civil and Political Rights and submitted that it recognizes the rights of indigenous communities and minorities, and Article 27 thereof provides that persons belonging to such minorities shall not be denied their right in community with other members of their group, to enjoy their own culture, and to profess and practice their own religion or use their own language.

16. The Interested party referred the court to the case of **Center for Minority Rights Development and Minority Rights Group International -v- Kenya, Africa Commission on Human and People's Rights, Communication No. 276 of 2003 (The Endorois case)** in which the African Commission held that the Kenyan government was guilty of violating the rights of the country's indigenous Endorois community by evicting them from their lands to make way for a wildlife reserve. The petitioners in that case had sought restitution of their ancestral land, compensation for wrongful displacement from Lake Baringo Game Reserve, and a finding that their right to property, culture, religion, natural resources, development and religion have been contravened.

17. Ms. Mburugu submitted that the indigenous communities around the Tana Delta remain predominantly reliant on a subsistence livelihood and are non-urbanized. She argued that they therefore face serious threats to their basic existence due to systematic government policies, and they face eminent eviction and infringement of their fundamental rights if the respondents carry out the impugned projects since they rely fully on the Tana Delta for their livelihood. Ms Mburigu contended that since investors, including the respondents, have taken an interest in the Delta and have failed to protect the area's ecosystem, it is in the interest of the public that this court intervenes to protect the Tana Delta from selfish exploitation and further threat to the existence of the wetland and by extension, the potential threat to the livelihood of the pastoral, fishing, farming, and hunter gatherer communities in the Delta.

18. The Interested Party asked the court to apply the national values and principles as stipulated in Article 10 of the Constitution in resolving this case, and in the event, that it finds the projects viable, to order that their implementation proceeds in phases and progressively in order to ascertain and monitor the effects they have on the petitioners and the Tana Delta ecosystem.

The 1st and 5th Respondent's Case

19. The position taken by the Attorney General and the Commissioner of Lands, as presented by Learned State Counsel, Mr. Mutinda, is that the Petition does not disclose any cause of action against them as the petitioners have admitted that the 3rd respondent has statutory power to advise on the institution and coordination of development projects within Tana River and Athi River Basin. They contend that the orders sought against the respondents generally are invalid as they ought to be specific with regard to which party they are directed at. Mr. Mutinda submitted that the 5th respondent has no responsibility for land allocation in the Delta as the land in question is trust land which falls within the jurisdiction of the Tana River County Council, and that in any event, the projects in question have not commenced and there was therefore no violation or threatened violation of the petitioners' rights. He therefore urged the court to dismiss the Petition as against the 1st and 5th respondent.

The 2nd Respondent's Case

20. The thrust of the 2nd respondent's case as set out in its grounds of opposition dated 7th March 2011 and in its submissions is that this court has no jurisdiction to entertain this Petition; that the Petition is fatally defective for misjoinder of parties as the 2nd respondent is wrongly enjoined as a party, that the petitioners' application is incompetent and devoid of merit and that the petitioners ought to bear the costs of this Petition. It contends further that the joinder of all the respondents other than the state is wrongful as only the state can guarantee fundamental rights. Learned Counsel, Ms. Onsare, who presented the case on behalf of the 2nd respondent, submitted that there is only vertical application of human rights, not horizontal, and referred the court to the decision of the court in **Charles Lukeyen Nabari and 9 others -v- Attorney General & Anor. Petition No. 613 of 2006, Rodgers Mwema Nzioka -v- Attorney General and Others, Petition No. 613 of 2006 and Portia Mutema Robinson -v- Senior Resident Magistrate Children's Court, Misc Applic 1222 of 2007.** The 2nd respondent therefore urged the court to dismiss the Petition with costs.

The 3rd Respondent's Case

21. The 3rd respondent, **TARDA,** is a state corporation incorporated under the **Tana and Athi River Development Authority Act** Chapter 443 of the Laws of Kenya. Its functions are provided under section 8 of the Act. Its case, as presented by its Counsel, Mr. Moya, is that it has power to, among other things, draw up and keep up to date a long range development plan for the Tana Delta area, which it has done. It therefore perceives the demand by the petitioners for creation of another master plan as mischievous and an attempt to usurp its powers and functions, thereby rendering it obsolete.

22. The 3rd respondent's case is in four main limbs. It argues that this is not a constitutional matter that falls under the jurisdiction of this Honourable Court as the petitioners are seeking orders of judicial review which should not be sought by way of a petition but by way of a judicial review application. It contends also that the petitioners are seeking to suspend the operation of a statute, yet the provisions of a statute, in this case the TARDA Act, are constitutional unless held otherwise, and the provisions of the Act have not yet been held unconstitutional, nor have the petitioners shown that any of the provisions of the Act are unconstitutional.

23. It is also the 3rd respondent's contention that it complied with all its statutory obligations and mandate in the process of establishing the disputed projects, and it consulted all stakeholders and communities affected by the project. It argues that the petitioners did not raise any objections to the implementation of the disputed projects during the consultation process. The 3rd respondent therefore takes the position that it is in the national and public interest, which interest outweighs the purported interests of the petitioners, that the projects, which would also be of great benefit to the communities in the Tana Delta, be allowed to proceed as they will lead to improvement of food security, employment creation, poverty reduction and address the country's need for self-sufficiency in food production.

24. The 3rd respondent has set out various facts pertaining to the project. In the affidavit sworn by its Company Secretary, Andrew Nyachio, the 3rd respondent depones that in order for it to discharge its statutory mandate effectively, it cooperates and coordinates with the government and other bodies such as the National Environmental Management Authority (NEMA), The County Council of Tana River and the Water Resources Management Authority in setting up, overseeing and monitoring projects in the area. It also sets out in detail the projects to which the petitioners are opposed, and the process leading to the approval of the projects which it, however, maintains have not yet been implemented. The projects include the Tana Delta Integrated Sugar Project, a Private Public partnership (PPP) between itself and the 7th respondent, Mumias Sugar Company Limited, in which the 3rd respondent hopes to engage in irrigated sugar production in a 20,000 ha piece of land in Lower Tana floodplains. It states that this project will be largely situated in Garsen and Tarasa Division of the newly created Tana Delta District, 200 km North of Mombasa.

25. Mr. Moya submitted on behalf of the 3rd respondent that extensive consultations and public discussions were carried out on the said project, and over 2,600 stakeholders were individually consulted; that views were sought from a wide range of lead agencies, Members of Parliament, councilors, local leaders, NGO's and conservation groups; that five public meetings were held, four in the project area and one in Nairobi, to allow opportunity for contribution by stakeholders. The 3rd respondent produced in evidence a list of stakeholders consulted, and a copy of the public notice issued.

26. The 3rd respondent further claims that in accordance with the provisions of the Environmental Management and Coordination Act (EMCA), it commissioned experts, approved by the 2nd respondent, to undertake and carry out an environmental impact assessment (EIA). The EIA was necessary as the law makes it mandatory that a projects of the magnitude contemplated in the Tana Integrated sugar Project be subjected to the provisions of section 58(2) of the said Act. The experts fully complied with

all the provision of the law and submitted the said report to the 2nd respondent on 26th November, 2007 which in turn carried out its own assessment. The 3rd respondent submitted that the 2nd respondent approved the EIA report subject to mandatory conditions which were stipulated in the letter of approval, and thereafter issued an Environmental Impact Assessment License Registration Number 0001891 dated 19th June 2008.

27. The 3rd respondent thus argues that aside from the fact that it has complied with the law in every respect, the proposed sugar project is likely to have far more positive effects than negative impacts. The project will not only cover the sugar deficit in the country but also create the much needed employment for the local residents.

28. The 3rd respondent also went into some detail with regard to the Tana Delta Irrigation Project (Rice and Maize) which we need not go into here. Suffice to say that according to the 3rd respondent, this project dates back to the 1970s and 1980s when the country experienced recurrent drought. The project has however, not been implemented as intended due to financial constraints and the damage to the project by *El Nino* rains in the late 1990s. The 3rd respondent avers that the main objective of the Tana Delta Irrigation Project is to increase rice production and contribute towards making Kenya self-sufficient in food supply. It is also aimed at generation of employment opportunities, increasing income levels and improving the living standards of local communities.

29. The benefits to be derived nationally and by the communities in the Tana Delta from the impugned projects, according to the 3rd respondent, far outweigh any alleged damage to the petitioners' individual interests. It argues that, should the rice and maize projects be stopped, there would be very serious regional and national ramifications: *n*ational food security would be threatened, the livelihood of many members of the communities residing in the Tana Delta would be adversely affected, and there would be a reduction in the economic independence and viability of the Tana Delta,

which would result in a violation of Article 60 of the Constitution with regard to the area.

The 6th Respondent's Case

30. The 6th respondent was established under the provisions of section 7 of the Water Act, 2002. Its mandate under section 8 of the Act is to advise the Minister concerning any matter in connection with water resources, develop principles, guidelines and procedures for the allocation of water resources, monitor and from time to time re-asses the national water resource management strategy, to receive and determine application for permits for water use, monitor and enforce conditions attached to permits for water use, regulate and protect water resources quality from adverse impacts, manage and protect water catchments, and determine charges to be imposed for the use of water from any water resource amongst others.

31. Ms Olewe, Learned Counsel for the 6th respondent, submitted that the petitioners have failed to demonstrate how the 6th respondent has violated its statutory obligations and thereby breached their constitutional rights; that the 6th respondent does not have the mandate to draw up a master plan to guide proposed developments within the Tana Delta or any other part of the country. It maintains that it has an obligation to prepare a water catchment management strategy, and in doing so, it is required, under section 15 of the Water Act, to carry out public consultations. In compliance with these provision, it duly published in the Standard Newspaper of 15th April, 2008 its intentions to carry out public consultations to formulate a catchment area management strategy within the Tana catchment area, and through the Gazette Notice published on 11th April 2008, it invited members of the public to present their contributions and comments for consideration in the development of the Catchment Management Strategy.

32. Upon conclusion of the aforesaid consultations, the 6th respondent states that it adopted the views presented to it, developed and published the Tana Water Catchment Area Management Strategy which provided plans for the management, use, development, conservation, protection and control of

water resources within the Tana catchment area. It also submits that subsequently, in June 2008, it had, pursuant to Rule 10(n) of the Water Resources Management Rules, 2007 facilitated the formation of 42 Water Resources Users Association (WRUA) within the Tana catchment area through sensitization, induction and training of the WRUA in order to sustain the resources management demands within the area and to work with the authority in water resources management activities.

33. The 6th respondent contends therefore that it has not breached any of the petitioners' constitutional rights but has indeed consulted the public in the review of options for managing water resources within the Tana Delta, addressed the competing demands for water use in the area through the creation of water resource classification system, and even developed the Tana Catchment Area Management Strategy as envisaged under section 15 of the Water Act. Further, it contended that it has not at any time failed to discharge its statutory duties, and that its proposal for water allocation in its Management Strategy recognizes the need for development of a water allocation plan for each sub-catchment within the Tana Delta. It therefore contends that the Petition is premature, ill-advised and misconceived as the 6th respondent has not received any application for water from any of the projects listed in the petitioner.

The 7th Respondent's Case

34. The 7th respondent's case as presented by its Counsel, Mr. Wetangula, is set out in the replying affidavit sworn by its Company Secretary, Emily Otieno, on 11th May 2011. It echoes to some extent the submissions of the 3rd respondent with regard to the Tana Integrated Sugar project: that the 3rd and 7th respondent entered into an agreement to set up the Tana Integrated Sugar Project in Garsen Division of Tana River District and partly covering Lamu District, an area of about 33,000 Hectares of land. The main features of the proposed project are sugarcane production, outgrower systems, water supply to the project, a sugar factory, a co-generation facility of up to 34 megawatts power capacity, an ethanol plant and livestock supporting activities including fisheries. The 7th respondent contends that the project is

among the priority areas of development focus of vision 2030 and will help bridge the national sugar production deficit currently standing at 200,000 tonnes per year.

35. Like the 3rd respondent, the 7th respondent contends that in accordance with the provisions of the Environmental Management Coordination Act (EMCA) and Legal Notice No. 101 of 2003, it commissioned experts to undertake and carry out an Environmental Impact Assessment (EIA) as an EIA is mandatory for projects of the magnitude of the Integrated Sugar Project in order to assess any effect that the project may have on the environment; that the 2nd respondent having received and reviewed the EIA report approved the project and issued Impact Assessment License No. 0001891 dated 9th June, 2008; that the said license was issued subject to some mandatory conditions which the 7th respondent must adhere to at all times.

36. The 7th respondent further submitted that at any rate, this matter is res judicata as the same issues that it raises were the subject of **Malindi High Court Judicial Review Case No. 20 of 2008**, which case had been dismissed. It therefore urged the court to dismiss the petition with costs.

Determination

37. I have set out in some detail the respective submissions of the parties. This is because the Petition before me seeks orders that require that the court balances two very important but competing interests: the interests of the petitioners to a clean environment and in safeguarding their livelihoods, and the larger public interest in having the considerable resources of the Tana Delta utilized so as to foster not only the development of the area but also to meet certain national needs such as the need for adequate supply of sugar and food security.

38. The area the subject matter of this Petition-the Tana Delta- is also considerably important, as the petitioners point out in their submissions. It is one of the six RAMSAR sites in Kenya set out in the list to the RAMSAR

Convention, and it is thus not only important to the petitioners and the communities in the Delta, but is also recognized under international law as an area that needs protection and conservation.

Issues for Determination

39. The parties to this matter had proposed certain issues for determination which were contained in a list of issues signed only by the petitioners' Counsel. Having considered the pleadings and submissions in this matter, I take the view that the multiple issues identified by the parties can be properly captured in the following four issues:

    i) Whether this Court has jurisdiction to hear and determine this Petition;
    ii) Whether there is a misjoinder of parties;
    iii) Whether the respondents have violated constitutional or statutory provisions and thereby violated or threatened to violate the petitioners' constitutional rights;
    iv) Whether this court can grant the reliefs sought.

Jurisdiction

40. It has been argued on behalf of the respondents that the Court has no jurisdiction to hear this Petition as there are no constitutional issues raised and that the petitioners, who seek orders of prohibition and mandamus, should have sought relief by way of orders of judicial review. The petitioners argue that the provisions of the Constitution, specifically Articles 22, 23 and 165 of the Constitution give this Court jurisdiction to hear and determine this matter. I agree with the submissions by the petitioners. Article 23 of the Constitution allows the court, in an application brought under Article 22 of the Constitution, to grant ***'appropriate relief'***, including, at Article 23(f), orders of judicial review. The powers of the court are not limited and this court can issue orders of judicial review should the merits of the case so demand.

41. It was also contended by the respondents that this court has no jurisdiction as the matter is ***res judicata*** on the basis that the petitioners had filed a similar matter which was dismissed by the High Court sitting in Malindi. The petitioners, however, argue that the doctrine of ***res judicata*** does not apply in this case as **Malindi High Court JR Misc. Civil Appl. No. 20 of 2008** was not heard and determined on its merits as the suit was struck out on a technicality. Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya requires that, in order for a matter to be considered ***res judicata,*** it should have been substantially at issue between the same parties, and should have been heard on its merits.

42. I have read the ruling of the Court in Malindi High Court JR Misc. Civil Appl. No. 20 of 2008 which was annexed to the supplementary affidavit of the 1st petitioner. I note that the names of the parties are not included in the ruling availed to the court. At any rate, as the petitioners correctly submit, the High Court in Malindi did not hear the suit and dismiss it on its merits. It was struck out on the basis that the facts on which it was based were set out in the statement, rather than in an affidavit, as required under the provisions of Order 53 of the Civil Procedure Code. I believe that there is no dispute about the application of the doctrine of ***res judicata***:- it applies where a matter has been substantially at issue between the same parties, and has been heard on its merits. None of the respondents in this matter disputes that the issues now before the court have never been heard and determined on their merits. I therefore find and hold that the court has jurisdiction to hear and determine this matter.

Application of the New Constitution

43. The respondents have also challenged this Petition on the basis that it relies on the provisions of the new Constitution while the impugned projects were conceived and implementation commenced before the promulgation of the new Constitution. They contend that the Constitution has no retrospective application and the Petition should therefore be dismissed. The petitioners' response to this argument is that the rights that are threatened with violation were protected under the former constitution,

just as they are protected now under the 2010 Constitution.

44. I agree with the petitioners in this regard. The right to life and all that goes with it, including the right to a livelihood and a clean environment, were protected under the former constitution, albeit, the right to a clean environment and livelihood, indirectly as elements of the right to life. More importantly, the petitioners are entitled to continued protection of these rights, so that if there is a threat of continued violation, it cannot be properly argued that because the events in question occurred prior to the new Constitution, the petitioners have no right of recourse before the Court.

Whether There Is a Misjoinder of Parties

45. The 2nd respondent has argued that this Petition is defective for misjoinder of parties, contending that only the Attorney General should have been made a party as it is the state which protects and guarantees the fundamental rights and freedoms of the people under the Constitution. The 2nd respondent has relied on, among others, the decision in **Charles Lekuyen Nabari and 9 Others –v- Attorney General and Anor (Supra)** where the High Court stated that:

> ***'these rights are vertical not horizontal and the correct party to join even in the case of the government is the Attorney General. No other individuals should be made a party thereon. In that case joining the 3rd-4th respondents (NEMA and County Council of Baringo) to this petition was a misjoinder of parties and is an abuse of the court process.'***

46. The 2nd respondent is correct that, at the time the decisions it has relied on were made, the constitution then in force limited the application of constitutional rights to the state, and an action for violation of a constitutional right could not be maintained against private individuals or entities; that there was only vertical, and not horizontal, application of the Bill of Rights. However, the Constitution of Kenya 2010 has changed the

situation, and the Bill of Rights is binding on both state and non-state actors. Article 2 of the Constitution provides that

> ***'This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.'*** (Emphasis added)

At Article 20, the Constitution provides that

> ***'The Bill of Rights applies to all law and binds all State organs and all persons.'*** (Emphasis added)

47. To my mind, the express constitutional provision that the Constitution in general and the Bill of Rights in particular applies to and binds all persons represents a radical departure from the position under the former constitution where only the state could be held liable for violation or infringement of constitutional rights. In my view, where the facts so demonstrate, an individual or corporate person such as the 2nd, 3rd, 4th, 6th and 7th respondents can be held to have violated another person's constitutional rights, and appropriate orders or declarations issued. Indeed, this court has so found in **Law Society of Kenya –v- Betty Sungura Nyabuto & Another Petition No. 21 of 2010** and **B.A.O & Another –v-The Standard Group Limited & 2 Others Petition No. 48 of 2011**. I therefore find and hold that there is no misjoinder of parties in this matter.

Applicable Constitutional Provisions

48. Having disposed of the technical objections to this Petition and found that the court has jurisdiction to hear it and that the Petition is properly before me, it is important to consider the constitutional provisions applicable to the matter before applying these provisions to the substantive issues raised in the Petition.

49. The Constitution at Article 42 guarantees to everyone the right to a clean environment. It provides as follows:

> ***'Every person has the right to a clean and healthy environment, which includes the right—***

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
(b) to have obligations relating to the environment fulfilled under Article 70.

50. Article 60 contains provisions with regard to land policy and provides that

60. (1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—
(a) equitable access to land;
(b) security of land rights;
(c) sustainable and productive management of land resources;
(d) transparent and cost effective administration of land;
(e) sound conservation and protection of ecologically sensitive areas;
(f)...

51. Article 69 imposes a duty on the state to ensure environmental conservation and sustainable use of resources by providing that:

69. (1) The State shall—
(*a*) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
(*b*)....
(*c*).....
(*d*) encourage public participation in the management, protection and conservation of the environment;
(*e*) protect genetic resources and biological diversity;
(*f*) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
(*g*) eliminate processes and activities that are likely to endanger the environment; and

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

52. Article 70 allows a party to bring a matter such as the one now before me for redress when it provides as follows:

> ***70. (1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.***

53. In determining a matter such as this, the court must also bear in mind the provisions of Article 19 of the Constitution:

> ***19. (1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.***
> ***(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.***

54. Finally, the national values and principles of governance set out in Article 10 of the Constitution are also worth bearing in mind:

> **10.** ***(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***
> ***(a) applies or interprets this Constitution;***
> ***(b) enacts, applies or interprets any law; or***
> ***(c) makes or implements public policy decisions.***
> ***(2) The national values and principles of governance include—***
> ***(a)....the rule of law, democracy and participation of the***

people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

Whether there has been a Statutory or Constitutional Violation by the Respondents

55. It is now well established that a party alleging violation of a constitutional right must demonstrate, with a reasonable degree of precision, what provisions of the Constitution have been violated, as well as the manner in which they have been violated. See **Anarita Karimi Njeru –v-Republic (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance-v-Attorney General & Others High Court Petition No. 229 of 2012.** This is important not just to allow the respondents to know the case that they have to answer, but to enable the court make a clear determination on the alleged violations.

56. The petitioners' chief complaint in this petition is that there is no single master plan to guide proposed developments in the Tana Delta in a way that helps to safeguard the environment and the rights of the local people. They contend that the local people are therefore likely to lose their rights to the land that they have occupied and on whose resources they have depended since time immemorial. They also argue that there is no clear control over land allocation in the Delta and neither has a cost-benefit analysis of the current economic and ecological value of the Delta against the proposed projects been undertaken.

57. The petitioners allege that their rights under Article 42 of the Constitution, which guarantees to every person the right to a clean and healthy environment, have therefore been violated by the respondents. They argue that Article 69 which obliges the state to ensure the sustainable

exploitation, utilization, management and conservation of the environment and natural resources, as well as ensuring equitable sharing of the accruing benefits, has not been complied with.

58. The respondents have taken the position that the projects which are impugned in this Petition have not yet commenced, and therefore there has been no violation of the petitioners' rights. They submit, further, that in any event, there was extensive consultation with, among others, the communities whom the petitioners state they represent, and they have submitted in evidence minutes of meetings in which the 1st and 4th petitioners were present, and at which the respondents contend, and this has not been disputed, that the petitioners raised no objection to the projects. I have not heard the respondents to deny the petitioners' entitlement to the rights that they assert. They allege only that these rights have not been violated, and that the Petition is premature as the projects in question have not yet commenced.

59. The petitioners have alleged that the projects have been undertaken without a comprehensive master plan to guide developments in the Tana Delta. They do not, however, indicate the statutory basis for this argument. I have looked at the provisions of the TARDA Act and noted that the 3rd respondent is required, under the provisions of section 8 of the Act, to draw up and keep up to date, a long-range development plan for the Tana Delta area. Indeed, the development of the Tana and Athi River area are the raison d'etre of the 3rd respondent. It would follow, therefore that if the 3rd respondent has complied with the requirements of the TARDA Act with regard to development of the long range plan for the area, the petitioners would have no basis for complaint. I shall revert to this shortly.

60. The petitioners also complain that there is no clear control over land allocation in the area. Regrettably, however, they have not placed before me any material that would help in determination of whether or not such alleged lack of land allocation control has resulted in loss or threatened loss

of land by the indigenous communities in the Tana Delta. It should be borne in mind that with the coming into force of the Constitution, Chapter 5 thereof, and Article 69 specifically, contains very clear provisions with regard to the use and safeguarding of land and the environment, and for protecting the rights of indigenous communities as well as individuals and the public to land and a clean environment. Article 69(1) in particular bears emphasising:

> ***(1) The State shall—***
> ***(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;***

61. Article 69 thus imposes on the state a specific obligation to ensure sustainable use, management and conservation of the environment and natural resources. This provision, in my view, contemplates legislation that provides for comprehensive protection of the environment, land and natural resources, in effect, requiring the kind of multiple comprehensive plan that encompasses all elements that go into protection of the environment-use of forests, water, land and other resources- that the petitioners appear to have in mind. The idea behind the provisions of Article 69 were, in my view, to have an all-encompassing legislative and policy framework to ensure full enjoyment of all the rights appurtenant to land and the environment Since such rights arise from different factors and are controlled by different state entities, the way to ensure their enjoyment is to have an agency that co-ordinates the various entities involved in their exploitation and management. Should the state fail to have such an agency, policy and legislation in place, then it can be said to be in breach of its constitutional obligations to the petitioners.

62. I have considered the provisions of the TARDA Act and the functions and mandate vested in the 3rd respondent. Although the Act was enacted prior to the promulgation of the new Constitution, its framers appear to have contemplated the need for an agency that co-ordinates the functioning of

all bodies that deal with any aspect of the Tana Delta wetland. Thus, section 8 of the Act imposes on TARDA the mandate, among other things:

> *a) To advice the government generally and the Ministries set out in the schedule in particular on all matters affecting the development of the Area including the apportionment of water resources;*
>
> *(b) To draw up and keep up to date, a long range development plan for the area;*
>
> *(c) To initiate such studies and to carry out such surveys, of the area as it may consider necessary, and to assess alternative demands within the area on the resources thereof, including electric power generation, irrigation, wildlife, land and other resources, and to recommend economic priorities;*
>
> *(d) to co-ordinate the various studies of, and schemes within, the area so that human, water, animal, land and other resources are utilized to the best advantage, and to monitor the design and execution of planned projects within the area;*
>
> *(e) to effect a programme of monitoring of the performance of projects within the area so as to improve that performance and establish responsibility therefor, and to improve future planning;*
>
> *(f) to ensure close cooperation between all agencies concerned with the abstraction and use of water within the area in the setting up of effective monitoring of that abstraction and use;*
>
> *(g) to collect, assemble and correlate all such data related to the use of water and other resource within the area as may be necessary for the efficient forward planning of the area;*
>
> *(h) to maintain a liaison between the government, the private sector and foreign agencies in the matter of the development of the Area with a view to limiting the duplication of effort and to assuring the best use of technical resources;*
>
> *(I) to render assistance to operating agencies in their applications for loan funds if required; and*
>
> *(j) to cause the construction of any works necessary for the*

protection and utilization of the water and soils of the area.
(Emphasis added)

63. The 3rd respondent contends that in the process of conceptualizing and implementing the impugned projects, it prepared and has in place a long range plan for the Tana Delta. I have not heard the petitioners to say that this long range plan is inadequate, or that it does not address the issues they wish considered. What they demand is that another comprehensive master plan be done. I have, however, not heard the 3rd respondent assert that it availed its long range plan to the petitioners or other stakeholders after the process of consultation and formulation of the plans.

64. At any rate, however, as the law currently stands, I cannot find a basis for alleging violation of a statutory duty by the respondents. The evidence before me shows that the 3rd respondent, on whom lies the statutory mandate with regard to planning for the Tana Delta, has complied with the requirements of its establishing Act. The 3rd and 6th respondents have also, in my view, met the requirements of the Environmental Management and Co-ordination Act (EMCA). They have included in the documents filed in court the EIA reports and licences that were required with regard to the projects. With regard to the 6th respondent, it has complied with the provisions of section 8 of the establishing Act by preparing, through a consultative process, the Water Catchment Strategy for the Tana Delta.

65. The Constitution, has, however, set a bar that is much higher than the obligation imposed by statute on the respondents. It mandates, at Articles 60 and 69, that a comprehensive legislative and policy framework with regard to land and the environment be put in place. Where either policy or legislation with regard to a certain matter or sector already exists, section 7 of the Sixth Schedule to the Constitution requires that such policy or legislation be applied with the amendments and alterations that will bring it into conformity with the Constitution. In this case, even though the respondents have not violated their establishing Acts, these Acts must be read and applied so as to confirm to the dictates of the Constitution.

66. The petitioners and the Interested Party have asked the court to be guided by Article 10 of the constitution, particularly with regard to public participation and consultation of the affected communities when determining this matter. They have also asked the court to be guided by the decision of the African Commission in the **Endorois case** (supra). From the pleadings and submissions before me, it is clear that some consultation and participation that involved the petitioners and he communities at the Tana Delta did take place. The documents attached to the respondents' pleadings indicate that public meetings were held and the proposed projects were publicized in the media. This is unlike the situation in the Endorois case, where no consultation of the community whatsoever appears to have occurred. Consequently, while the concerns of the petitioners are legitimate, their allegations that there have been constitutional and statutory breaches are, in my view, unfounded and, to some degree, premature. The petitioners' case is based on apprehensions, rather than on actual violations, as is evident from the submissions by the respondents, which were not challenged by the petitioners, that the impugned projects have not yet commenced; and that of those that have commenced, some, like the rice irrigation project that began in the 1980s, have stalled due to financial and other constraints.

67. However, the fact that the projects are not ongoing and no constitutional violations have occurred makes it essential that the prescriptions of the Constitution with regard to the protection and conservation of the environment, and with regard to proper land use, be complied with and the necessary plans incorporating all aspects of the Tana Delta's land and resource use and development as contemplated under Article 60 and 69 be incorporated. Such plans will also accord with the provisions of the RAMSAR Convention to which Kenya is a party, which establishes the ***'wise use'*** principle that requires ***"the sustainable utilization of wetlands for (the) benefit of humankind in a way compatible with the maintenance of the natural properties of the eco-system."***

68. The 3rd respondent, as the lead agency in the development and use of the Tana Delta, has a responsibility to co-ordinate all the state organs involved so as to ensure that the resources of the Delta are properly utilized. This requires not only that the initial plans for any project take into account the needs and views of the communities, that the plans prepared after the process of consultation are availed to parties in the position of the petitioners and the communities they represent, but also that the projects are monitored from time to time to ensure that their implementation does not injure the interests of the communities or the environment. This, I believe, is contemplated even in existing legislation. As the 7th respondent submitted, it was given an EIA licence with conditions that require periodic monitoring and assessment to measure the impact of the implementation of the projects on both the environment and the communities in the Delta. Section 8(d) of the TARDA Act has similar provisions. I am therefore in agreement with the petitioners that there is a need for a comprehensive plan to ensure proper use of the Delta and protection of its resources and bio- diversity not only in the interests of the petitioners but in the interests of the entire nation and future generations. There is also a need for the projects to be monitored from time to time to ensure that there is no threat of violation of the petitioners' and the communities' interests.

Whether This Court Can Grant the Reliefs Sought

69. The Petitioners have prayed that the court grants orders prohibiting the projects and directing the respondents to carry out a comprehensive and multiple Master Plan for the Delta. I am not inclined to prohibit the continuation of the projects before a comprehensive Master Plan has been done in light of my findings that there are in existence plans prepared in accordance with existing statutes, the inadequacy of which has not been demonstrated, and that there is no body currently charged with preparation of such a plan. I am convinced, however, that it is in the interests of the communities that a re-valuation of the long range plan prepared by the 3rd respondent, and of any short-term or long term plans for the Tana Delta, be carried out prior to the commencement or resumption of the projects that gave rise to this dispute.

70. Article 23 of the Constitution empowers the court to frame appropriate relief in order to vindicate fundamental rights and freedoms of citizens. This jurisdiction is wide but must be exercised judiciously taking into account the circumstances of each case. In the circumstances of this case, the orders that commend themselves to the court, and which I hereby make, are as follows:

i) **That the 3rd and 6th respondents do furnish the petitioners and other stakeholders within 45 days of today the existing plans that they are required by statute to prepare or obtain in respect of the utilisation of the land and resources of the Tana Delta.**

ii) **That the 3rd respondent be and is hereby directed to re-evaluate its short-term, medium term and long range plans for the Tana Delta in consultation and with the participation of the petitioners, the communities in the area and all state and private entities involved in the projects in the Tana Delta to ensure that they comply with the requirements of Articles 60 and 69 of the Constitution**

iii) **That the 3rd, 6th and 7th respondents facilitate periodic monitoring of the projects that have already commenced to assess their impact on the Tana Delta wetlands and the interests of the communities which derive a living from the Tana Delta.**

71. With regard to the 4th respondent which has not bothered to participate in these proceedings, there is nothing before the court that can assist in determining whether or not it has complied with its statutory obligations under the Physical Planning Act which vests it with the power of planning, management and control of trust land. Section 29 of the Physical Planning Act sets out the powers of local authorities as including power to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area. However, in view of the changes Brought by the Constitution with regard to the holding and

management of public and community land under Articles 62, 63 and 64, particularly the creation of the National Land Commission, and the provisions with regard to devolved government, I believe the issues relating to the 4th respondent are moot.

72. Given the public interest nature of this petition and the importance of the subject matter, I take the view that it is in order that each party should bear its own costs. It is so ordered.

73. I am greatly indebted to the parties for their diligence in prosecuting their respective cases.

Dated Delivered and Signed at Nairobi this 4th day of February, 2013

MUMBI NGUGI

JUDGE

Mr. Chigiti instructed by the firm of Waruhiu Kowade & Ng'ang'a Advocates for the Petitioners
Ms. Mburugu instructed by the firm of Getrude N. Angote Advocates for the Interested Party
Mr. Mutinda instructed by the State Law Office for the 1st and 5th respondents
Ms. Makasila instructed by the firm of Miller & Co. Advocates for the 2nd respondent
Mr. Moya instructed by the firm of Waweru Gatonye & Co. Advocates for the 3rd respondent
Ms. Olewe instructed by the firm of Albert Mumma & Co. Advocates for the 6th Respondent
Mr Wetangula instructed by the firm of Mohammed Muigai Advocates for the 7th respondent