**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Petition 466 of 2006**

1. **CHARLES LEKUYEN NABORI**
2. **JOEL OLE SAAYA**
3. **CLEMENT NASHURU**
4. **WESLEY KAKIMON**
5. **EDWARD TAMAR**
6. **NGAMIA RANGAL LEMEIGURAN**
7. **SHAOLIN LERICHE MEIGURAN**
8. **SAMSON LEREYA KAKIMON**
9. **SAMANTITA SAMARIA LENGIYAA**
10. **STANLEY LETEREWUA……PETITIONERS**

**AND**

**THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT**

**THE MINISTER FOR ENVIRONMENT AND NATURAL RESOURCES.....2ND RESPONDENT**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....3RD RESPONDENT**

**THE COUNTY COUNCIL OF BARINGO….....4TH RESPONDENT**

**J U D G M E N T**

During 1983/84, Food & Agricultural Organization (FAO) in conjunction with other partners introduced two species of acacia-like plants (prosopis juliflora and prosopis Braziliansis) at Lake Baringo basin, herein referred to as “the weed”).

Available correspondence on the matter indicate that these plants were introduced in the area to provide fuel wood and also for the purpose of afforestation, among other uses.

Over the years the plants grew and spread thereby turning out to be major weeds which colonized an expansive piece of land in what is now known as Ngambo Location of Baringo District.

According to available information on this file the plants have caused extensive damage to the lake basin ecosystem compelling the present petitioners to lodge in to this Court this petition in form of a constitutional reference.

The petition was lodged into this Court on 23rd August 2006 by ten petitioners. They are Charles Lekuyen Nabori, Joel Ole Saaya, Clement Nashuru, Wesley Kakimoni, Edward Tamar, Ngamia Rangal, Lemeigurau, Shaolin Leriche Meigurau, Samson Lereya Kakimon, Samantita Samaria Lengiyaa and Stanley Leterewua.

They say they are all residents of Ngambo Location Marigat Division Baringo District within Rift Valley Province of the Republic of Kenya.

Their complaints in respect to this dispute is directed at the Honourable Attorney-General of the Republic of Kenya as the 1st Respondent, the Minister forEnvironment and Natural Resources of the Republic of Kenya as the 2nd Respondent; National Environment Management Authority, as the 3rd Respondent and the County council of Baringo as the 4th Respondent.

The petition avers that the petitioners are ordinary residents and communal land owners of all that piece of land forming the Geographical area known as Marigat Division of Baringo District in Rift Valley Province of the Republic of Kenya.

That they and their ancestors had been enjoying an uninterrupted occupation of the said land for years.

That the petitioners, like other residents of the area, are pastoralists who also engage in small scale farming for subsistence and livelihood.

They state that they have also over time caused such necessary social amenities such as schools, churches, shopping centres to be created for the purpose of sustaining human life in the said locality.

That on or about the year 1982, the Government of Kenya through the Ministry of Agriculture sanctioned and authorized the introduction of the weed prosopis juliflora in Ngambo Location of Marigat Division Baringo District by the Food and Agricultural Organization (F.A.O.) in conjunction with the 2nd respondent and/or its predecessor ostensibly to curb desertification.

That the introduction of the weed was through a joint project between the Government of Kenya and the Food and Agricultural Organization (F.A.O.) under a partnership agreement. That the local people and/or its leader were neither consulted nor involved save as labourers to plant the new trees under

Government supervision.

They state further that the weed was introduced and planted in three large parks set aside for the purpose but that its invasiveness in nature easily caused it to get out of control and spread at an alarming rate and that twenty (20) years after its introduction it had completely overgrown in the entire landscape of Marigat and Mugutani Divisions of Baringo District and that it continues to spread at such an alarming rate.

That the introduction of the weed has had adverse effects on the environment and the socio-economic well being of the petitioners and other occupants of the affected areas throughout the Republic of Kenya.

Particulars of injurious harm of the plant on the environment and the associated losses are specified in the petition thus:-

That

(a) Due to its first spreading nature the shrub forms extensive impenetrable thickets that gradually choke up all other indigenous plants and grasses leaving much of the soil bare and prone to erosion.

(b) Loss of treasured pasture land, the weed does not allow other grasses to grow.

(c) Loss of livestock; this is due to the poisonous thorn of the shrub,

(d) Its thorns pose a big problem to human movement livestock and machinery. They cause paralysis of limbs leading to amputation of affected limbs massive punctures to machinery and blockage of roads and footpaths,

(e) Blockage of rivers causing flooding,

(f) Displacement of people from their homes (the weed has taken over entire homes and schools).

(g) Loss of playing fields.

(h) Perpetual anxiety and apprehension due to the continuing adverse effect of the weed;

(i) Destroyed the economic base of the pastoralists' community and particularly the petitioners bringing about massive poverty.

According to the petitioners the Government of Kenya (read the 1st and 2nd Respondents) is liable for the damage and loss brought about by the weed.

Then the petitioners give the particulars of such damage and loss as follows; namely:

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

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

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

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

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

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

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

(h) Not taking into account the devastating effect of the plant as proven in countries of origin before sanctioning its introduction in the petitioner's land.

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

That because of the failure or negligence of the Government the petitioner's hold it liable for the loss, suffering and massive damage to the environment and their livelihood.

That continued decimation of natural biodiversity in the affected areas continue unabated contrary to Kenya's obligation as a party to the international convention particularly to the convention on Biological Diversity 1992 to which Kenya is a party.

That the petitioners hold the 3rd responsible (liable) for failing in its statutory duties as enunciated under its establishing Act: The Environmental Management and Coordination Act, 1999 (EMCA).

That it:

(a) Failed to carry an environmental impact assessment and audit of the effects of the weed prosopis juliflora, on the petitioner's land.

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

(c) Failed to advise the government of Kenya on the weed to act swiftly to prevent further environmental degradation as a result of the weed.

(d) Has not taken any action or at all to deal with the problem of the weed in Kenya.

(e) Failed to research monitor and/or highlight the problem of the weed on the petitioner's land and other affected areas.

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

That the petitioners through the Community Museum of Kenya, a non-Governmental Organization,

lodged a complaint with the 3rd respondent's Public Complaints Committee registered as *PCC Complaint Number 67 of 2005* against KEFRI and F.A.O. on the destructive nature of the weed wherein *t*he said committee carried out investigations into the effects of the weed and that in its findings affirmed the petitioner's claim and recommended inter alia that the week be eradicated. That the said recommendations have, however, not been implimented.

That the Petitioners state that the land is the core of their culture and provide for their material needs and economic base and that since the devastating invasion of the weed they have been reduced to paupers and that they and their generations to come are threatened with eviction from their ancestral land by the weed taking over their entire landscape.

The petitioners further state that the respondents have breached and continue to breach all the international convention on environment and development and will continue to do so unless this Honourable Court intervenes.

That the Golden rule on environment is prevention and unless the respondents swiftly act on the problems associated with the invasion of the weed the petitioners see a bleak future in the affected areas of the Republic.

That despite numerous admissions by the respondents and its agents on the adverse effects of the weed on the ecology, people's livelihood and massive losses of livestock the respondents have persistently refused to act to address the problem. That instead, some of the recommendations at managing the noxious plant are not only feeble and inadequate in the circumstances, but would also increase environmental pollution; i.e. charcoal burning.

That the petitioners state that unless the Honourable Court comes to their aid the uncontrollable spread and destruction occasioned by the introduction and perpetuation of the weed will go on unabated to the detriment of the petitioners putting their very livelihood and survival at stake.

Further that the respondents are likely to continue with their studious silence on the effects of the weed to the detriment of the petitioners.

According to the petitioners, the adverse effects disastrous consequences serious injury and irreparable damage occasioned by the weed to the petitioners and to the generation yet unborn are evident and incontrovertible.

That the petitioners have a clear and constitutional right to a balanced and healthful ecology and are entitled to protection by the state in its capacity as the parens Patriae.

They state further that at the hearing of the petition the petitioners will seek leave of the Court to lead evidence to demonstrate the loss to the environment and to their socio-economic livelihood resulting in massive poverty directly as a result of the weed and will accordingly seek for damages and compensation against the respondents.

As a result of all the averments made as herein before stated, the petitioners then prayed for judgment against the respondents as follows:

(a) A declaration that the fundamental right to life as protected and envisaged by Section 70 and 71 of the constitution of Kenya, consists, comprises and translates to the right and entitlement to a clean and healthy environment free from pollution of any kind that is detrimental to human health, wealth

and/or socio-economic wellbeing and ultimately human life.

(b) A declaration that a right to a clean and healthy environment is a fundamental attribute of people and the aggression to the environment occasioned by the weed amounts to a breach of this right which this honourable Court is empowered to address and remedy accordingly.

(c) A declaration that the introduction of the weed to Ngambo Location of Marigat Division of Baringo District of Kenya in or about 1982 and the continued unabated spread of the weed was and is a clear contravention of the threefold statutory and internationally acknowledged principle on protection and conservation of the environment namely:

(i) The sustainable development Principle in that although the weed was introduced to oustensibly curb desertification, its negative effect cannot sustain the initial intention but indeed compromise the ability of future generations resident in the said area to meet their own needs,, through desertification and loss of livestock amongst other adverse effects.

(ii) The polluter pays principle in that even in the face of glaring evidence of destructive effect of the weed, the respondents have taken no steps/adequate steps to remedy the situation yet the responsibility to do so squarely lies with them. The respondents have instead ignored even the recommendations of the public complaints committee on the weed in PCCC No. 67 of 2005 between Community Museums of Kenya and Kenya Forestry Research Institute and Food & Agricultural Organization.

(iii) The precautionary principle in that the respondents were not keen to establish the characteristics and nature of the weed prior to introducing it to the said areas nor did they take any precautionary step to curb or arrest the spread of the weed once it exhibited its destructive and invasive nature.

The petitioners then seek the awards as advanced in the Stockholm Declaration on human environment 1972 and the Rio Declaration 1992; namely:-

(d) A declaration that the introduction of the weed to Ngambo Location of Marigat Division in Baringo District amounted to and still amounts to a breach of the petitioner's right to sustainable development as envisaged and set out in the Environmental Management and Coordination Act 1999.

(e) A declaration that the petitioner's right to life as set out in Section 71 of the constitution has been compromised by the introduction of the weed to warrant this Honourable court intervention.

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

(g) A declaration that the weed prosopis juliflora has occasioned direct loss in human life, livestock, pasture land, poor health all culminating in poverty/depreciation of the socio-economic wellbeing of the petitioners and other residents of Marigat Division of Baringo District.

(h) A declaration that in light of the polluter pays principle, the 1st and 2nd respondents are directly liable for the loss occasioned to the petitioners and other residents of Marigat division of Baringo District by the introduction of the weed.

(i) That the weed be declared a noxious weed in the same category with other weeds set out in the suppression of Noxious Weeds Act cap 325 Laws of Kenya.

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

(k) An order compelling the implementation of the Public Complaints recommendation with respect to the complaint on the weed in PCCC No. 67 of 2005 between Community Museums of Kenya and Kenya Forestry Research Institute and Food & Agricultural Organization.

(l) A direction that F.A.O. do jointly with the Government undertake the implementation of any orders that the Court may issue.

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

I. total eradication of the weed,

II. Plantation of indigenous and environmental friendly trees and grasses.

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

I. Assess and quantify the loss visited upon the environment and to the residents of Baringo District by the weed;

II. Assess and quantify the loss resulting from death of livestock loss of pasturelands, farmlands, playing fields, riparian lands and loss of homes and other social amenities.

III. Assess injury to persons and commensurate awards, and make a finding and report to Court is assessments and finding;

IV. Assess and ascertain the injuries occasioned to individuals resident in the areas affected by weed and recommend commensurate monetary compensation thereto.

V. Complete its task within sixty days of appointment.

(a) An order of compensation for damage based on the findings of the Commission.

(b) Exemplary damages.

(c) Costs of this petition.

(d) Any other/further relief that this Honourable Court may deem fit and just to grant.

This petition was supported by affidavits of six persons – four (4) residents of Ngambo Location, one (1) resident of Marigat Division and One (1) doctor who examined three (3) patients said to have been pricked by a thorn from the weed/plant.

One of the residents of Ngambo Location was ***Charles Lukuyen Nabori*** who was appointed as Ngambo Location Chief in 1968; promoted to the rank of Senior Chief in 1980 and as Paramount Chief in 1998. We do not know what he means by saying he retired as Paramount Chief in 1993.

That it was in 1982, while he was in the position of Senior Chief when a representative of Food Agricultural Organization, one ***Ndegwa*** and one ***Kariuki*** from the Forest Department approached him with information that a certain plant was to be introduced in his area. As such administrator he obliged and gave all due support to this project in terms of logistics, coordination and implementation. That the officers who approached him with the information of the introduction of the plant in Ngambo Location gave the reason for the introduction as curbing desertification, prevention of wind and windmills – wind breaker; assistance in soil erosion and blockade of gullies and that it was a government policy.

According to his affidavit he was instructed to set up three plots to act as nurseries, to mobilize labourers to dig and prepare the place for plantation and others to protect the trees against being destroyed by both human beings and livestock; which he did.

That he was not consulted before the introduction of the plant but that after such introduction, the weed has had devastating effects on both human, livestock, ecological system and all that appertains to the environment as more particularly specified in paragraph 16 of this deponent's affidavit.

The deponent complains in paragraph 17 of the said affidavit that he has himself suffered from the effects of the plaint as it has invaded his homestead forcing him to vacate it. That because of this the deponent has complained to the Government of Kenya several times.

That it was this deponent who complained about the menace posed by the weed in his area to one ***Eustace Gitonga***, a Director of Community Museums of Kenya in the year 2000 and that upon this complaint ***Mr. Gitonga*** took up the matter with Food and Agricultural Organization through various correspondences which are annexed to the affidavit.

That annexed to the same affidavit are responses to the complaint whose detail, we shall go into later in this judgment.

That in spite of the complaints lodged to the Government no steps had been taken by either it or Food and Agricultural Organization on the matter.

That because of this inaction on the part of the Government, the deponent had mobilized members of Ilchamus Community, and in consultation with Community Museums of Kenya *PCC No. 67 of 2005 was filed with the Public Complaints Committee under Community Museums of Kenya v. Kenya Forestry Research Institute and Food and Agricultural Organization.*

According to the deponent, despite the recommendations of the public complaints committee, some of which were for the Minister for Agriculture to declare the weed Noxious and its eradication nothing of substance had been done or implemented on the ground since the Public Complaints Committee is a toothless body which has no mechanism for effectively and ably supervising or implementing its recommendations.

That since the weed/plant is noxious and dangerous the deponents' right to a clean and healthy environment is being breached by its unabated spread and that as a citizen of this country he has a right to seek redress in this Honourable Court.

That the Kenya Government has failed to enforce international resolution to which it is a signatory as specified in paragraph 31 of the affidavit and to which the deponent is entitled.

According to him, the duty imposed by the Environmental Management and Coordination Act to

safeguard and enhance the environment has been breached and that the deponent has an automatic avenue to move to the High Court of Kenya to register his complaint over the contravention of his fundamental rights and freedoms, which has jurisdiction to entertain environmental matters like any other alleged human rights complaint.

That as a result of breach of these fundamental rights this Honourable court has special jurisdiction to order for damages to be paid.

The deponent complains in the affidavit that as he litigates he has been rendered a refugee in his village by virtue of the invasiveness of the weed/plant which has totally colonized his house and evicted him there from.

That he was a fabulous and wealthy person owning many cows and sheep before the introduction of the weed but he had been rendered a destitute and economically vagrant with no hope of jump-starting his economic power.

The deponent beseeches the Court to invoke its inherent powers and make declaration as more particularly specified in paragraph 37 of the affidavit.

Various photographs, correspondences, minutes of community Committee Meetings relating to the weed, recommendations of the Public Complaint Committee in PCCC No. 67 of 2005 are annexed to this affidavit.

The second affidavit is that of Clemea Nashuru resident of Ngambo Location and assistant lecturer in the Department of Natural Resources Management at Egerton University. He is also a member of a task force on National Land Policy Formulation and a member of Pastoralist Department Network of Kenya and a doctorate student of Egerton University doing research on the extent of damage caused and/or posed by the weed/plant.

According to this deponent, who describes himself as an elitist with special interest in prosopis juliflora, personally affected by it as his research concerned, categorically states that the weed is extremely noxious and dangerous and that the situation on the ground is environmentally volatile. That unless urgent measures are undertaken the situation will get out of control. This deponent beseeches this honourable Court to give it special attention.

That this deponent has attended many workshops and that coupled with personal research and consultation with various experts, there was a clear breach of his environmental rights as a citizen of Kenya which right is inalienable and absolute and that this honourable Court had jurisdiction to redeem his said right and address the question of quantum.

In paragraph 5 of his affidavit this deponent describes the plants invasive nature, its formation of devise and impenetrable thickets, its power to choke up any vegetation, its strong competition with any plant for soil moisture; formation of impenetrable canopy, its evergreen nature, its very rough, sharp and strong thorns, drought resistant, its very strong deep roots; its colonization domination and highly poisonous to other plants or vegetation, its tall growth, very aggressive and vigorous very hard to cut and wear out cutting roots and its excellent ability to re-grow after the stem is cut. That the weed had covered a total of 300 square kilometers which is almost the entire land occupied by the Ilchamus Community.

That regardless of the season and/or climatical patterns it grows both in size and quality and at a very

fast and alarming rate.

That due to biological characteristics the plant had displaced both human beings and livestock.

The problems caused to livestock by the plant are spelt out in paragraph 7(a) of the affidavit as:

- due to its invasiveness, the grass had disappeared; livestock lack adequate grass;

- The pods are strong and resistant and have adverse effects on the teeth in terms of weakening the gums hence causing teeth to come off.

- Chemical patents in the seedpods are palatable to livestock and cause teeth problems.

- A diet high in pod causes mortality in sheep and goats due to digestive problems like impaction.

To human beings, the problems caused are spelt out in sub-paragraph (b) of paragraph 7 of this deponent's affidavit as follows:-

- The pollen of prosopis juliflora causes human allergies, asthma and lung inflammations.

- The strong thorns can cause injury to feet and/or any part of the body it pricks due to their poisonous nature.

- The smoke causes children to cough and choke persistently,

- Causes punctures to tyres of vehicles and bicycles.

- Increase in malaria as a result of weed thickets close to homes.

According to the deponent the weed had caused untold suffering to him and in every area which has been colonized and in the deponent's confirmed research he had concluded that the value of the wood had been out-rated by the losses it poses.

The deponent refers to the complaint lodged by the Ilchamus Community against the Government and the Food and Agricultural organization to the Public Complaints Committee and the recommendations the Committee made including the total eradication of the weed and its classification as a noxious weed.

The deponent also refers to HCC No. 115 of 2006 in which he participated and also the Ministerial Statement made by the Minister of Environment and Natural Resources in Parliament over the weed to show the seriousness and magnitude of its effects.

According to this deponent, the sum total of his extensive research which is still on is that the shrub has decimated the environment and that there was a real threat to anyone who resides in the areas affected by it.

That the problem of the weed is worsened by the fact that the maturity rate is very fast in that once the pods drop to the grounds they take a few months to grow and develop into a fullgrown shrub and even the pods which -are swept down the river or stream end up growing in the water bodies.

The deponent then annexes to his affidavit a bundle of his research papers, newspaper cuttings, symposium reports and various photographs depicting geographical appearance of the area before the introduction of the plant and suggests steps to be taken to wit:

- The declaration of the weed as noxious.

- Total eradication,

- Formulation of clear policy by the government on the weed.

- And taking of full responsibility by the Government and not to dodge the bullet by insisting on the merits of the plant,

The deponent asks this Court to follow the decision in the case of Ms Shefila Zia & Others v. WAPDA – and to constitute or make an inquiry to establish the extent of the environmental degradation and/or harm which will not be pre-judicial to any party since everyone is entitled to a clean and healthy environment.

That the deponent's right to a clean and healthy environment has been violated and that he makes this affidavit in support of the petition filed herein.

On this affidavit is annexed a ruling on a preliminary objection in HCCC No. 115 of 2006, the Hansard Report of the Ministerial Statement in Parliament in relation to the weed on July 20th 2006, proceedings of the workshop on integrated management of prosopis species in Kenya of 1st and 2nd October 2003, a letter dated 8th October 2004 from the Director of Kenya Forestry Research Institute to the Permanent Secretary, Ministry of Environment and Natural Resources; regarding the weed, a news article in the East African on how a foreign tree is colonizing the Njemps who live in Baringo; Newspaper cuttings on the plant, a paper on the invasion of prosopis juliflora and local livelihood by *Esther Mwangi* and *Brent Swallow*, A report by *Ratemo Michieka* from a Standard Newspaper (then director-General, NEMA); a research brief on the plant; and two (2) photographs showing an abandoned home and completely blocked road by the weed.

A third supporting affidavit is that of *Joel Ole Saaya* a resident of Marigat Division of Baringo District; a Councilor, opinion leader and respected elder among the Ilchamus Community.

That as a community leader, amongst the complaints received from the residents are those caused by this weed.

That since this weed was introduced in the area without consultation or consent of the community; this deponent has seen many people who have been affected by it.

That he himself has lost close to five hundred (500) head of cattle, three hundred (300) sheep and goats through loss of grazing field and other related deceases brought about by the plant.

That he has assisted many displaced people either through personal contributions or mobilizing fund raising to raise money to assist these displaced and/or assist them to relocate.

The he has assisted those who were pricked financially to access medical treatment.

That he himself has been displaced by the weed hence destabilizing his social economic and political

well-being.

That the problems are continuous and were becoming unbearable.

That he had raised these problems with Baringo County Council in their capacity as trustees to the land which is under invasion by the weed/plant, the Ministry of Environment and Natural Resources Baringo District and National Environment and Management Authority who are in charge of safeguarding the environment but that nothing had happened.

That evens the action taken by Museums of Kenya to lodge a complaint on behalf of Ichamus Community to the Public Complaints Committee which made encouraging recommendations, nothing substantial was happening on the ground.

The deponent also refers to HCCC No. 115 of 2006 which was struck out as against the 1st and 2nd respondent on ground that no proper notice had been served upon them.

On this affidavit are annexed notice of withdrawal of HCCC No. 115 of 2006 Notice to the Attorney-General pursuant to the provisions of Section *13A(2)* of the Government Proceedings Act dated 14th July 2006 and copy of a letter from the Attorney-General to the Permanent Secretary Ministry of Environment and Natural Resources;

A fourth supporting affidavit is that of *Dr. Wellington K. Kiamba*, a graduate of Bachelor of Medicine and Bachelor of surgery, University of Nairobi and Medical Practitioner based at Nakuru.

This doctor attended to three (3) patients, namely *Samantita Samaria Lengiyaa* on 3rd July 2006, *Stanley Leterewua* on the same day and *Kabon Ngochilla* on 5th July 2006.

That all the three patients had been pricked by thorns of the plant/ weed and that each of them gave this deponent medical problems which were associated with the injury caused by the prick.

The deponent compiled and made medical reports in respect to all the three patients, all of which were annexed to the affidavit

*Wesley Kakimon* also swore a supporting affidavit on 23rd August 2006.

This deponent states that he was born and brought up in Ngambo Location Marigat division where he resides to date and is fully aware of the weed/plant, which was introduced in Ngambo Location in or about 1982 through joint effort by the Government of Kenya and Food and Agricultural Organization (FAO) and the adverse effect the weed has brought upon the said location and Marigat Division.

That the deponent affirms the claim made in the Petition and in particular as concerns the invasive and destructive nature of the weed.

He states further that it is true that the weed had occasioned adversity of unknown magnitude since its introduction to Ngambo Location through:

I. Loss of livestock

II. Diversion of river causes causing flooding;

III. Loss of grazing land;

IV. Financial loss and disability through injuries from the weed thorns

V. Poverty

VI. Loss of playing fields

That in the circumstances it was fair and just that this Honourable Court grants the prayers sought to arrest the loss brought by the weed.

Edward Tamar a resident of Ngambo Location and Primary School teacher swore the 6th supporting affidavit. In it he stated that when the plant was introduced in the early 1980s in Ngambo Location, he was a teacher.

That at the time the land was very open, gentle and plain and that he learned through one *Kariuki* and one *Ndegwa* about the Government intention to introduce the weed/plant but that the reason for its introduction was not explained to him.

That according to him there was no reason or need for the plant to be introduced in the area.

That the deponent saw three (3) plots set aside for nurseries and instructions from Government officials from Kenya Forest Research Institute that once the trees were matured, they would be transplanted to peoples farms and compounds.

The deponent states that in his own experience, the plant is very invasive, spreads fast and that it has dominated and colonized everywhere as a result of its ability to withstand drought and harsh conditions.

That even if livestock feeds on the pods and later after digestion these animals excrete the seedlings still germinate.

That the entire Ilchamus Community live on group ranches whereby most lands are not demarcated and therefore cows, goats and sheep excrete and discharge the seeds hence speeding the spread.

That since this was a government policy, the deponent did not know what to do and that even pangas and axes cannot cut the trees down and/or that even if it does the trunk still germinates and grows into a big tree.

According to this deponent, many pupils had suffered as a result of being pricked by the plants toxic and sharp thorns and that it has brought a number of serious problems; namely:

(a) The pricked leg or feet if not treated on time causes serious problems including amputation;

(b) School playing fields have been covered by the plant, thus undermining social activities;

(c) Many roads and paths to schools have been blocked

(d) Farming and rearing of livestock has diminished and by virtue of invasiveness of the weed, poverty has crept in which has direct impact on the Standard of Education,

(e) 14 homes have been vacated,

(f) Nursery school at Maasai Village has been closed; and that

(g) Livestock do not return home on time due to blocked paths.

*Prof. Kivutha Kibwana*, then Minister for Environment and Natural Resources, Advocate of the High Court of Kenya and a Law Professor swore a replying affidavit on behalf of the 1st and 2nd respondents on 31st May 2007 and had it filed in Court on 7th June 2007.

In it he swears that he had read the Petition dated 23rd August 2006 and the affidavits of *Charles Lukuyen Nabori, Edward Tamar, Joel Ole Saaya, clement Nashuru, Wesley Kakimon* and *Wellington Kiamba* and the documents annexed thereto and in support thereof.

He states that he had no knowledge and could not answer to the allegations made in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 10 of *Charles Lukuyen Nabori's* affidavit or paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of Edward Tamar's affidavit; but that he was familiar with the officers who are dealing with the pilot project on the control management and exploitation of prosopis in Baringo including *Mr. Simon Choge*, who had to his knowledge done a lot of research on prosopis and related issues.

He was also aware that going by the geographical and historical records of the area which he had access to by virtue to his tenure in office, the description of the area painted by the applicant in paragraph 11 of his affidavit was a totally different picture from what is in the records.

He states in the affidavit that he is aware during 1970s save at the shores which were generally wetter, Baringo district was generally dry, characterized by bare soil and dust storms just like many other arid and semi-arid regions of East Africa, that it was mainly unproductive and its adverse unpredictable climate and increased human and animal activities were responsible for acceleration of wind erosion processes especially in the drier seasons leading to the resultant reduced biological productivity.

That in the deponents experience as Minister in charge of environmental matters he had come to realize that owing to the need for animal fodder, vegetation was the single most important resource for pastoralists in the arid areas of Kenya, but that its constant availability was negatively affected by vagaries of climate variation and resource degradation that have continued to dog the arid and semi-arid areas to date, thereby presenting the Government of Kenya with the constant task of according the residents of these areas special treatment for the specific purpose of alleviating the resultant poverty as seen from the copy of the National Poverty Eradication Plan – which he annexes to the affidavit together with the copy of a publication "*East African Ecosystems and their conservation – marked as KK3 and KK2.*

That the arid and semi-arid conditions in many areas in Kenya had in the past also attracted sympathy and attention of individuals and organizations who had attempted to ameliorate the lives of the residents in many ways including afforestation using diverse tree species as evidenced by the annexed affidavit of *Mr. Choge* a Senior Research Officer specializing in Natural Resource Management and Social Economic and Policy Issues in Kenya Forestry Research Institute.

That this is the official who had been involved in the prosopis control projects in Baringo District.

According to the deponent the official record indicates that long before prosopis species was ever known in Baringo district it existed in other parts of Kenya where it was being propagated by individuals

and institutions when global circulation of information was still low as compared to the current worldwide web (internet) age.

That the deponent is aware that owing to the need for saving the top soil from serious wind and water erosion the Government of Kenya also persistently and for a long time has encouraged afforestation programmes in many areas of Kenya especially the arid and semi-arid areas.

That in the late 1970's and early 80's the afforestation campaign by the Government for the purpose of curbing degradation, drought and erosion as well as providing shade, windbreak and fuel wood throughout the country coincided with the ready presence of prosopis in the areas needing to be afforested including Baringo.

That by virtue of the activities of individuals and institutions, by the year 1983 the prosopis tree was already popular in the arid and semi-arid areas including Baringo; owing to scarcity of sufficient information of the species at that time, the local residents, who having been used to the hardy nature of prosopis, had not by then discovered any adverse aspects of prosopis propagated it widely during these campaigns.

That according to available records to the deponent the Government did not introduce or sanction the introduction of prosopis juliflora in Ngambo Location, that records indicate that prosopis juliflora was available in some parts of Kenya by the 1930's and that by 1970's it was commonly found in many places in Kenya. That it was subsequently dispersed by human and animal activity as well as by natural phenomena; its movement within the country was unrestricted and considered normal as seen in the affidavit of *Simon Choge*.

That the deponent had established through research that owing to the scarcity of plant resources throughout the world there was a growing awareness of utilizing newer plant resources that were not being relied on before, but that in many areas of the world such as India, Chile Brazil and Mexico, prosopis had been extensively studied in programmes which embrace research plants over the last few years and that its exploitation for local gain had been intensified especially in the arid areas.

That in accordance with information the deponent had received from field officers who implemented the prosopis control pilot project in Baringo, the Plant is greatly valued and relied on as a source of food, fodder, shade, wood fuel and building poles.

That it also serves as a wind breaker and that its blossom helps greatly in the production of quality honey. That the deponent is personally aware of the numerous honey sale points along the Marigat-Nakuru road which is indicative of the productivity of the plant.

That the deponent is aware that trading in prosopis products such as wood, food, honey and fodder is already providing the only source of income for some families in Baringo district and that this had generally been shown in one of the annexures to the affidavit of *Clement Nashuru* which is in the Court record.

That prosopis juliflora is almost unsurpassable as a fuel in the dry rural areas of this country and that many residents depend on it for fuel to cook all their meals.

That this deponent also relied on copy of the affidavit of *Mr. Simon Choge* which he had attached to his affidavit and marked as *KK4.*

In the deponents honest belief this suit (Petition) is premature in that the land is still communally owned and that the petitioners may not at present prove with ease the extent to which they own the land.

That further, the deponent is aware that the subsistence pastoralist culture of the communities living in the Baringo area was progressively giving way to a mixed economy where some people had taken to some measure of agriculture to supplement their livelihood as evidenced in *KK2.*

The deponent states in his replying affidavit that prosopis trees have many competitive ecological advantage over other vegetation, but prosopis only spreads quickly in disturbed, eroded, over grazed or drought affected land, associated with unsustainable agronomic practices and consequently it is common to find prosopis where the land is bare and none or little other activity is taking place.

According to this deponent prunning appears to be the single most important technique in improving prosopis tree yields. That the plants become valuable productive trees by prunning and in addition, regularly pruned trees are found to have smaller root systems, use soil water more effectively and compete less with neighbouring crops and grasses, furthermore prunning leads to the establishment of a canopy cover thus reducing the chances of re-invasion.

That this averment is in opposition to paragraph 15 of Edward Tamar's supporting affidavit to the petition.

The deponent avers that he is aware that there were many areas in Kenya where prosopis has grown and that one common denominator of these areas was that they had generally been areas of low population density and had at one time or other experienced the environmental disturbances typically caused by humans, such as over-grazing, erosion and bush fires. That this is confirmed by the list on page 5 of the Public Complaints Committee Report annexed to the affidavit of the 1st Petitioner.

The deponent refutes contents of paragraph 18 of *Charles Lukuyen Nabori's* and paragraphs 5 and 6 of *Joel Ole Saaya's* supporting affidavits as the Ministry of Environment and Natural Resources has no record of these complaints.

According to the deponent, since it was Food and Agricultural Organization which introduced the plant in Baringo District the 1st Petitioner properly sought relief from it.

That the deponent was not aware of the letter dated 22nd February 2003 save through Court proceedings but that in any event the letter was not from the Government and that it contradicts other averments in the supporting affidavit.

This replying affidavit suggests that the petitioners have shifted their attention from Food and Agricultural Organization and are fishing out for a culprit or victim for their litigious purpose.

That there are no letters from the Government containing any admissions as the one referred to and annexed to the supporting affidavits were not written on the Government

That in response to paragraph 22 of *Lukuyen Nabori's* supporting affidavit the deponent to the replying affidavit states that its context demonstrates adequately that the deponent addressed his representations to Food and Agricultural Organization whom the deponent to the supporting affidavit thought liable.

That in response to paragraph 23 of *Nabori's* affidavit and paragraphs 6 and 7 of *Ole Saaya's*

affidavit the deponent to the replying affidavit says the Ministry which he heads is discharging its ordinary duties to the residents in the affected areas not due to any admissions of liability but upon a genuine need to do so to manage and exploit prosopis for the good of those residents.

That in this regard the Government had, just as in the case of other plant resources, done the following to maximize the benefits of prosopis to citizens:

*(a) Established farmers field schools in the areas affected by prosopis*

*(b) Encouraged research regarding prosopis*

*(c) Hosted workshops to create public awareness of the true nature of prosopis;*

*(d) Granted financial assistance to the local people towards management and exploitation of prosopis*

*(e) Cooperated with international bodies such as FAO to maximize on the positive results of the above initiative*.

The deponent to the replying affidavit has no knowledge of the contents of paragraphs 2, 3 and 4 of the affidavit of ***Joel Ole*** *Saaya* and paragraphs 2, 3 and 4 of the affidavit of *Wesley Kakimon* and cannot therefore comment on them but reiterates that the Government did not introduce the plant prosopis in the area as alleged.

That the Government was weighing the merits or demerits of biological means of control as well as mechanical removal of the plant. The deponent here refers to ***Mr. Choge's*** affidavit on which is exhibited a copy of a South African study trip report, an application for importation of a beetle and an import permit for the beetle from South Africa which demonstrates measure of Governments Control.

That any complaints made to the Public Complaints Committee by the Petitioners was so done after the Government had commenced initiatives to manage and exploit prosopis for public benefit.

That the petitioners are not truthful when they remain silent or openly mislead the Court saying that the Government is doing nothing about the plant when initiatives are being taken in line with recommendations of the Public Complaints Committee in parts of Baringo District with a measure of success save in Ngambo Location where field officials from the Ministry and ***KEFRI*** have reported opposition by residents; some of whom individually for the satisfaction of their own needs quietly and extensively rely on prosopis.

That given the geography of the land now under prosopis, its eradication would revert Baringo to the drier semi-desert landscape situation it previously was, exposing it to harsh weather elements that might result in drought and massive soil erosion.

The deponent states that the weed/plant has not been declared noxious weed in Kenya and that contents of the affidavit of *Nashuru* are weak, unsubstantiated allegations.

That there are no environmental breaches committed as alleged in paragraph 4 of *Clement Nashuru's* affidavit.

That it is not true that the trees of the plant cannot be cut down with axes or pangas because the

deponent is aware that these are the implements mostly used by the residents who have agreed to participate in the Government's prosopis control pilot project. This is shown in the farmers' field proposals exhibited in *Mr. Choge's* affidavit as read with their budget documents.

According to the deponent, the hardiness of prosopis is the greatest characteristic that enables its survival in arid areas where nothing else or litte would grow.

That the problems associated with prosopis became known to the Government with time but that the complaints against the plant are not entirely due to its genuine disadvantages but due to lack of knowledge on the part of some of the local people on the commercial usefulness and economic potential of the under utilized and under exploited prosopis plant and partly as a result of a deliberate attempt on the part of some residents to scuttle the Government efforts in the prosopis control projects in the areas with prosopis in the false belief that litigation would yield them colossal financial gain from well endowed international organization. That as an example of these attempts was where the residents of the other locations of Baringo district except Ngambo had accepted and were participating in the Government initiated projects.

*Prof. Kibwana* states that his answer in Parliament over a question relating to this plant as per the Hansard report was given in accordance with the information which was availed to him then, but that since then it had been corrected by officers from *KEFRI* and the Forest Department and had been informed by those officers including *Mr. Choge*, that the government did not introduce or sanction the introduction of Prosopis Juliflora in Ngambo Location as alleged by the petitioners, and that records show hat it was introduced to Baringo before 1983 by institutions and individuals in an attempt to afforest the arid area.

That in response to paragraph 13 of *Clement Nashuru's* affidavit and paragraph 11 of *Edward Tamar's* affidavit, the Professor depones that he had been advised by officers in the Ministry pursuant to their findings collected from the affected ground and agrees that the mode of dispersal remains natural through water, wind, animals and birds and that there is no planned propagation of prosopis on the ground by humans.

According to the Professor's replying affidavit the Ministry of Environment and Natural Resources is taking the greatest caution so that some of the methods of control such as the beetle are not implemented rashly at the risk of potential future problems, hence the beetles are under test oriented quarantine and they are currently undergoing evaluation at Government research institutions to-date.

That further the Government had facilitated the passing of new statutes including the Environmental Management and Coordination Act 1999 and the Forest Act 2005 to ensure that the environment is protected. That these Acts are still in their early years of implementation and that given more time the effect of the institutions created thereby will be felt nationally.

That besides testing and evaluation methods of eradication several other considerations had come up that further point out that eradication of prosopis might be less beneficial to the country.

That Kenya has citizens outside the prosopis – prove regions who had realized that the tree is useful and had began to enter the areas with prosopis in order to exploit it for fuel, wood and fodder for commercial purposes.

That in the face of an ever growing demand for forest products the fuel wood and fodder needs that will be met by this enterprise will ease the traditional wood exploitation that has exerted much pressure

on the conventional gazetted forest resources.

That an extract from the economic survey 1980 showing the results of Household Energy Consumption Study and Development Plan 1984-1988 showing the policy objectives and constrains in the Natural Resources Sector (see ***KK5*** and ***KK6***) demonstrate that as early as 1983 there was an apprehension well founded on statistics that the demand for forest products would soon outstrip their supply.

That through such official information, the deponent had obtained from his position as Minister for Environment in this country and through keeping in step with current affairs in the media, he had become aware that it was generally opined by expert scientists and environmentalists globally that the global warming was as a result of accumulation of green house gas emissions, mainly carbon dioxide, in the atmosphere, that the reduction of these gases would alleviate the threats posed by climate change and that increased vegetation cover could reduce these gases from the atmosphere.

According to the deponent, Kenya was a signatory to the United Nations Framework convention on climate change and the Kyoto Protocol to the same convention. That Kenya hosted the 12th session of the conference of parties being the 2nd session of the meeting of parties to the Kyoto Protocal (*UNFCC COP 12* and *COP (MOP/2*) in the year 2006 and he was aware that at the United Nations Conference on climate change in Nairobi held on 6th to 17th November 2006 Governments through their representatives continued discussions on future action on climate change including discussions on commitments for industrialized countries under the Kyoto Protocol beyond 2012.

That the deponent was aware that the Clean Development Mechanism was a new mechanism under the Kyoto Protocol intended to bring about cooperation in emissions reduction between industrialized countries for which emissions reductions is mandatory under the protocol and developing countries which for the time being do not suffer from any emissions restrictions.

That the purpose of the Clean Development Mechanism is to assist non-Annex/parties in achieving sustainable development and in contributing to the ultimate objectives of the convention and to assist non-Annex 1 parties in achieving their quantified emissions limitation and reduction obligations (*QUE LROS*) under article 3, that under Clean Development Mechanism non-Annex 1 parties will benefit from project activities resulting in emissions reduction and Annex 1 parties may use certified emissions reductions accruing from such project activities to contribute to compliance with part of their quantified emissions limitation and reduction obligations under article 3 as determined by the conference of parties serving as the meeting of parties to the Kyoto protocol.

According to *Prof. Kibwana*, in line with what he has averred to in paragraphs 51 and 52 of the affidavit herein, a process had developed whereby the developed countries who are the main emitters of green house gases, enter into arrangements with developing countries to establish Clean Development Mechanism projects and that the World Bank Carbon Unit has established to fund such projects.

That there are many possibilities for land use and land use change **(***LULUCF*) type Clean Development Mechanism projects in developing countries but therein a preference by Annex 1 countries for forestry because of its potential for earning large emissions credits and the ease with which they can be established in developing countries they qualify on the ground of improving the environment and contributing to sustainable development.

That following that conference the deponent had realized that the establishment of *CDM* had raised the possibility that in the near future the arid and semi-arid areas of Kenya would be utilized better to

attract capital from the developed countries through planting, managing and exploitation of prosopis.

That utilizing arid areas would achieve two objectives – wetter arable parts of the countries may be utilized for food production to the exclusion of afforestation, to feed the ever increasing population and the less utilized arid and semi-arid areas to be made more useful in the end through afforestation with the drought resistant species.

The deponent states that he is aware that the Clean Development Mechanism already has over 1200 projects in the pipeline in the world and that Kenya's neighbour Uganda is one of the developing countries which has embraced ***CDM*** project. He attaches a bundle of documents marked as *KK9* to support this.

That he is also aware that the development of free cover in the ASALS will not help in the reduction of global warming generally but will also help the development of more moderate and friendly micro climate locally for the country's greater agricultural benefit. That there is scientific evidence that the climate and ecology in East Africa is susceptible to rapid change in response to global climatic change. That this is evident in the copy of an extract from the publication "East African Ecosystems and their conservation marked "*KK2*").

That in order to make a contribution to this noble goal of controlling climate change, consideration had been made by the Government that Kenya might eventually utilize vegetation cover in the arid and semi arid areas, but that even as this is being considered the strategy of management control and exploitation of prosopis as well as education of the public on the species as explained herein before have not been halted.

The deponent is also aware according to his affidavit that Kenya was in the process of realizing the national ideal of unity, that our constitution envisages national unity that can defy monolithic tribal occupation by any one ethnic community in any given area in that it empowers the citizens liberty within the confines of the law to own land move around the country and settle anywhere.

That indeed many people of varying ethnic backgrounds and cultures are to be found settled in places far away from what may be considered their ancestor's places of origin; hence the great diversity of the interests of local communities may not be represented by just a few people like the petitioners yet the petitioners are urging eradication of prosopis.

That further the deponent knows by virtue of his official position that pursuant to the matters contained herein above which describe the Government's approach to prosopis the Ministry of Environment and Natural Resources is in the process of finalizing a cabinet paper and that soon the observations from the said initiative and other sources are being coalesced into a government policy on prosopis management and exploitation.

That the deponent honestly believes *Section 3* of *EMCA* does not create any rights for the petitioners under the constitution. That in any event the deponent honestly believes that in law remedies under the constitution should be resorted to when all other specifically designed and more efficacious remedies including statutory remedies are either not available or have been exhausted.

That he believes with greatest respect for the petitioners the alternative is to clog the Kenyan justice system with petty disputes labelled "*Constitutional Matters*".

That the deponent had indeed noted that the provisions of the constitution which the petitioner's cited

did not avail them of any remedy, and that further the proper rights alleged to be violated under the said provisions were not specifically mentioned and that he believes that many of the orders the petitioners seek do no accord with the legal procedure that their grievance had adopted and that they should therefore be rejected preliminarily.

That to his knowledge every legal dispute of the constitution has a measure of constitutional angle to it. That in his honest belief the Court would be unnecessarily burdened with trite matters not discerning "*Constitutional*" status if it were to entertain every petty legal disputes as a matter needing constitutional interpretation. That in this regard the deponent was of the considered view that that the Court ought to take the minimalist approach in determining whether this matter raises any serious constitutional issues or it can be dealt with under common law or the statute law.

That the responsibility of creation of a policy tool to deal with prosopis or any given problem in the national sphere lies with the executive in the normal execution of duties and that the deponent had demonstrated the Government's efforts to handle the issue of prosopis according to its policy making mandate and that he believes this Court's observance of separation of powers between the legislature, the executive and judiciary would prevail in the prevailing circumstances so that the executives which is best placed to do so may exercise its policy making mandate freely without public perception or encroachment of mandate.

*Dr. Avignon Muusya Mwinzi*, the Director-General of the 3rd defendant (Authority) also swore a replying affidavit.

In it, he deponent said that since the year 2000, the third defendant had exercised its mandate where required and discharged its statutory duties in accordance with the express provision of the law.

That having been established in the year 2000 and since the Act does not operate retrospectively, any claims against the 3rd respondent for acts and/or omission dating back to the year 1983 were misconceived, mischievous and an abuse of the Court process.

That extensive research by leading government agencies and experiences in other countries where the subject plant prosopis juliflora thrives show that complete eradication of the same in virtually impossible and as such strategic management and control measures are instead advocated for.

That the 3rd respondent had thus in collaboration with the indigenous people in the affected areas and relevant government agencies initiated measures and been actively involved in addressing the problem of prosopis juliflora towards along term goal of achieving a balance and healthy ecology where the weed/plant can co-exist harmoniously with other living inhabitants.

That the 3rd Respondent had been involved in extensive comparative research on the weed/plant reaching out to other countries experiences on the plant and seeking information on the plants' management in those countries with a view to identifying an appropriate management and central method.

That this is evidence of the 3rd respondent unwavering commitment towards addressing the problem of the weed/plant in accordance with its mandate under the Environmental Management and Coordination Act, 1999.

According to this deponent, indeed the petitioners themselves do concede in their petition that the 3rd respondent Public Complaints Committee when presented with the complaint on the weed/plant carried

out investigations and recommended the eradication of the same. That all the time the 3rd respondent to all complaints with unequalled magnitude.

That pursuance to the Environmental Management and Coordination Act 1999, and the rules made there under, the 3rd respondent is under no obligation to conduct Environmental impact Assessment or audit as the case may be. Instead proponents of particular projects are required to submit their project Environmental Impact assessment reports to the third respondent before financing, commencing, proceeding with or conducting any undertaking specified in the 2nd Schedule to the Act and also to carry out and submit to the 3rd respondent annually Environmental Audit reports on projects which an environmental study report has been made detailing their conformity or otherwise to the assessment report.

That it is therefore clear that the 3rd respondent has at no one time neglected, refused and/or failed to discharge its statutory duties in as far as the weed/plant is concerned and there is therefore no nexus or connection between the 3rd respondent's mandate as provided for under ***Section 9(1) 2(a) to (g)*** and *3* of the Environmental Management and Coordination Act, 1999 and that the alleged violation of the Petitioner's right to a clean and healthy environment does not lie.

That indeed the allegations that the 3rd respondent has not taken any action on the weed/plant and/or that it has ignored and continues to ignore its devastating consequences were not only frivolous but also vexatious.

The deponent then outlined the statement issued in Parliament on 20th July 2006 by the Minister for Environment and Natural Resources over the Government's interest in the management and control of prosopis juliflora, hence it was not true that the 3rd respondent has persistently refused to address the problem because the petitioners are well aware of the respondents initiative and uncompromised desire towards the control and sustainable management of the weed/plant.

That the deponent has been advised by his advocates which advice he accepts to be true that the petition has no respective status and that any prayer seeking relief on behalf of other persons not being petitioners in the petition is misconceived and cannot be legally issued.

That the petitioners had previously instituted a suit in this Court's Civil Division, *HCCC No. 115 of 2006* despite being aware of the efforts being made to manage prosopis juliflora.

That after that suit against the 1st and 2nd respondents was struck out the petitioners unilaterally withdrew the suit against the 3rd respondent without making any provision for the costs due to the 3rd respondent who had entered appearance and filed a defence and made Court appearances in the suit.

That that suit was withdrawn by notice dated and filed in Court on 21st August 2006 as the petitioner realized that the same did not disclose any cause of action against the 3rd respondent.

That it was worth noting that the present petition is grounded on the same facts.

According to the deponent the petitioner's action in lodging this petition without setting out the forgoing facts clearly shows that the current petition has been filed in bad faith and that it is an abuse of the Court process.

That the petitioner's claims against the 3rd respondent are clearly misconceived and an abuse of the Court process and that the petition ought to be struck out as against the 3rd respondent.

On this affidavit are annexed research materials, on the impossibility of complete eradication of the weed/plant, proceedings of a workshop on integrated management of prosopis species in Kenya held on 1st and 2nd October 2003 where the 3rd respondents Chairman was Chief Guest, and an article by the 3rd respondent's Director-General on the subject plant published in one of the 3rd respondents magazine publication-*Mazingira Yetu*, *Vol. 2 of July 2004* at page 33 and 34 and reported in the East African Standard on Saturday 10th July 2004; copies of research work published in 3rd respondent's publications of June 2006 and September 2005, copy of the recommendation of the Public Complaints Committee and a copy of a letter dated 13th June 2006 from the Permanent Secretary Ministry of Environment and Natural Resources inviting the 3rd Respondent to a consultative meeting on the Control and Management of the weed/plant.

The 4th defendant filed no replying affidavit or any documents in this application and was not represented throughout the proceedings.

On the first day of the hearing of the application, to wit 20th June 2007, there was an application by the applicants for Viva Voce evidence to be called but this application was overruled by this Court on the grounds that there were provisions for this under the law in applications for constitutional references.

*Mr. Letangule*, who led the applicants made his opening remarks and referred to the application and the supporting affidavit. The application was by way of petition which composed of a description of the applicants. *Mr. Letangule* referred to them as pastoralists and communal land owners. According to him in a move to curb desertification in Baringo District Food and Agricultural Organization in conjunction with the Kenya Government introduce the subject plants in Baringo District without consulting the residents except to use them as labourers to plant them.

That these plants were introduced in Ngambo Location from South America without proper research being carried out, but that when they created problems which were brought to the respondents' attention, these were not addressed.

That they had spread in the area rapidly and taken over the entire landscape by storm causing a lot of destruction to the economic base of the people in the area.

According to counsel, the petitioners had complained to the District Officer, the District Commissioner and even to various Ministries without any tangible results.

Counsel submitted that though land is the petitioner's core livelihood, since the introduction of the plant the petitioners had been reduced to paupers and were threatened with eviction from their ancestral land and that the Court should intervene to save them from a bleak future.

According to the counsel, the harmful effects of the plants far out-weigh the intended benefits and that the plants should be declared noxious and an affirmative action taken towards their eradication.

That by virtue of ***Section 75*** of the constitution, the petitioners had been deprived of their land (property) without compensation.

Counsel then took the Court through six (6) affidavits sworn by the petitioners to show the effects of the subject plants including abandonment of homes, killing of other plants and even grasses, and also livestock.

That the community even lodged a complaint with the Public Complaints Committee (*No. 67 of 2005*)

which went round and made certain recommendations out of which prayers *K* and *I* of the Petition have arisen.

That although this issue was raised in Parliament and the Minister for Environment promised that he would assess the extent of the menace caused by the weed/plant and/or to declare it a national disaster no action had been taken.

That a doctor, *Willingtone K. Kiamba* had examined some patients who had been pricked by the strong thorns of the plant and sworn an affidavit to this effect. That it was the court's duty to find that the petitioners had suffered loss, been evicted from their own homes, rendered poor and as refugees in their own area and to be awarded the remedies sought in the petition.

That before introducing the plants in Baringo District those responsible should have known their effects and that therefore their introduction was deliberate.

Counsel submitted that this court has the power to act over this dispute and that it should give Kenya Constitution a living instrument to the environmental issues.

That while the public complaints committee established under the Environmental Management and Coordination Act can make mere recommendations there is no modality under it to enforce them and that it is only this Court which can effect them.

According to counsel *Section 3(5)* of the Environmental Management and Coordination Act is worded in similar manner as *Section 84(1)* of the Constitution and that where any person alleges that his environmental rights have been or are being infringed he has a right to come straight to the High Court for a remedy – one of which is to issue writs for the enforcement of the recommendations of the Public complaints committee, issue of orders on damages and so on.

Counsel submitted that the Environmental Management and Coordination Act recognizes customs, land use scope of living, continuity of human life and future generations.

Counsel complained that there was no budgetary allocation for fighting the weed/plant which he called a natural disaster and that it was only an order of the Court which would wake up the Government.

Counsel blamed the Minister for Environment & Natural Resources for referring to this issue as petty when people of Marigat and animals were dying and others being disfigured as a result of this plant.

That there was no government policy on the management of the weed and the respondents had ignored and continue to ignore the problems associated with it but that the problem should be arrested now.

That the thorn of the plant is too strong and that as soon as it pricks one the part of the body pricked has to be amputated and that everyone was limping as a result of being pricked by the thorn.

*Mr. Njoroge Mwangi* for the 1st and 2nd Respondent submitted in opposition to this petition. He stated that for one to resort to a constitutional court his/her rights under the constitution must have been infringed by a body in authority but if not, then there was an alternative legal framework for redress.

According to him, the petitioners in court in this petition were there in their personal capacity and

not on behalf of any other person.

He submitted that there had been concealment of materials facts, one of which was to mislead the Court that it was the Government which introduced the plant in Ngambo Location of Baringo District when in fact this was not true.

Counsel referred to a number of correspondences in bundle A to show that it was not the Government which introduced the weed/plant in Ngambo Division of Baringo District and also to show that the Government was on the ground doing a lot to contain, manage and control the harmful plant.

That various bodies are on the ground to assist in the management and control of the plant and that the residents have been recruited to participate in this management and control of the harmful plant.

That in fact 2 scientists had been sent to South Africa to study the problems of the weed/plant and how that country is managing and controlling the plant and that a beetle had been imported from there into Kenya to assist in the eradication of prosopis juliflora but when residents were consulted about it they refused to accept it.

That it was not correct to say this plant was useless because since its introduction, Baringo had changed for the better, and that the plant is extensively relied on for fodder.

Counsel conceded that the plant posed a danger due to its expansive occupation of space but added that if it could be confined and controlled, its advantages outweigh the dangers.

That an order to eradicate the plant would be injurious to 63% of the people who affirmed its introduction.

That the plant had been instrumental in afforesting Baringo District and to prevent soil erosion.

Counsel submitted that no sufficient material had been laid before the Court to support the order sought.

It was, not shown that the petitioner live in Ngambo Location and that any of them was directed to plant the weed and by whom?

That there was no evidence that the Government introduced the plant in Ngambo Location and that though there were 10 petitioners before the Court only four (4) of them swore affidavits which means even if the court were to issue any orders, the other 6 would not qualify.

That since the plant has not been declared as a noxious weed, it remains in place and that the Government would need to look at the broad aspect of wider interest and have a systematic study of the plant before taking any action.

According to the counsel the Government had not runaway from the problem of the weed/plant but that eradication of it was not possible, only its exploitation and management. That there is greater benefit in the management and control approach than eradication.

*Mr. Muiruri* who was teaming up with *Mr. Njoroge* for the 1st and 2nd respondent submitted that this case in Court was not of public interest in nature.

According to him there had been no allegation of infringement of any right as per the relevant constitutional provisions by any of the petitioners.

According to this counsel the constitutional rights to be agitated must be confined to *Sections 70* to *83* of the constitution.

That there was no clear case of infringement of fundamental rights of the petitioners in this case and that they rely on the Environmental Management and Co-ordination Act, which deals with a clean and healthy environment.

That the Petitioners should have handled this matter within the ambit of the above Act because there is the legal frame work established by *Section 3(3)* thereof.

According to this counsel the constitution does not need any Act of Parliament to interpret it and that where there is statute which has set out particular procedure then it is incumbent upon the litigants to exhaust that procedure.

Counsel submitted that the jurisdiction of this court had been wrongly invoked.

Counsel referred to sections 60, 61, 65, 71, and 75 of the constitution and submitted that the Petitioners had not shown which specific provisions of those sections had been infringed and that the remedies sought by the petitioners were statutory and not constitutional.

According to him the Petitioners were supposed to exhaust statutory reliefs before seeking constitutional reliefs in this Court.

He submitted that some reliefs sought were of a particular nature while others were directed against institutions not party to the constitutional reference.

Counsel submitted that it was an abuse of this court process for the petitioners to make this constitutional reference when they are aware that the remedies they are seeking are available under the Environmental Management and Coordination Act – *No. 8 of 1999.*

Counsel conceded that if one were to be fair to the Petitioners then prayers (a) (e) and (j) of the Petition could be considered but that these remedies could easily be dealt with under the Environmental Management and Coordination Act aforesaid.

That, on the other hand, the petitioners had failed to show any infringement of their rights under the provisions of the constitution quoted in which case the entire petition must fail.

That the prayer for damages cannot be granted where there was no conclusive material evidence to enable Court to make a determination on damages since affidavits sworn in the petition do not offer conclusive material evidence on these hence that the procedure adopted to come to court was improper and that due to this procedural impropriety the petition should fail.

According to counsel, no claim for infringement of fundamental rights can be granted under the constitutional provision without satisfying the required ingredients thereof, say overt acts.

That growth of trees in an area cannot portray deprivation of right to life.

Counsel referred to the correspondence annexed to the Petition which were exchanged between a representative of Food and Agricultural Organization and Community Museums of Kenya and wondered what these articles were all about.

According to him constitutional provisions have no ambiguity and should be interpreted in the ordinary sense.

That the petitioners herein had not demonstrated that their rights to life had been violated.

That growth of trees (plants) cannot be held to be a danger to life within the meaning of *Section 71* of the Constitution.

According to *Muiruri,* it has been shown that measures were being taken to manage and control the weed/plant.

That the petitioners have watched the plants grow for 20 years and cannot say the respondents are responsible for this.

Counsel wondered who should claim constitutional remedies as has been done here by the petitioners in respect to commercial land?

That though Marigat Division was given as the area covered submission made had shown that only parts of the area had been affected. But that before a claim of this nature is granted one needs to lay a claim to his property and to establish the nature of his property right and the entitlement to enjoy it as a matter of right.

According to counsel, the spread of the plant in Ngambo Location does not amount to compulsory acquisition of land under section 75 of the constitution and that in view of the submissions that this is communal land; this Provision of the constitution cannot apply.

That there has been no allegation of compulsory acquisition of the land by the Government or that it is the said Government which introduced the various seeds of the weed/plant in Baringo District with the intention of dispossessing the owner thereof.

Counsel submitted that in view of the above, the petitioners had not discharged the onus to prove compulsory acquisition of the property.

He stated that if the Government took action and completely eradicated the plants complained of, people in the affected area would go back to the days of dusty winds and the respondents will be back in court against the respondents.

That the Petitioners had not shown any proprietary right over the affected land or that the Government had compulsory acquired it to call into play section 75 of the constitution, hence prayers sought under that section must fail.

Counsel started that the process of policy formulation is adequately catered for under the Environmental Management and Co-ordination Act and that the Court cannot be handed the recommendation of the Public complaints Committee, established under that Act, for implementation.

He submitted that on the submissions made the petitioners had not demonstrated what violation

had been meted upon them or how the violation occurred and how it relates to them.

That the respondents were not involved in the introduction of the plant in the area but that they had assumed responsibility to respond to the wishes of the people and put in motion mechanism for the control and management of the weed and urged that the application be dismissed with costs.

*Mr. Ngugi* who represented the 3rd respondent also submitted in the petition.

According to him rights under Section 71 to 83 of the constitution had not been sworn by the petitioners to have been infringed and that it had not been stated how the 3rd respondent had violated these rights.

Counsel submitted that the petition was incompetent, so general and that it should be dismissed. He even wondered whether the procedure adopted by the petitioners to come to court under a constitutional reference was proper.

According to him, since the Environmental Management and Coordination Act provide for remedies on infringement of environmental rights, then constitutional provisions should not be invoked.

That fundamental rights can only be invoked against the state hence joinder of the 3rd and 4th respondents to this petition amounts to a misjoinder, hence the only correct party to be joined to such constitutional reference is the Attorney-General who secures guarantees and enforce fundamental rights. That fundamental right are personal and cannot be claimed on behalf of others.

That the petitioners cannot sue on behalf of residents of Marigat Division for the eradication of the weed/plant since the rights sought are personal to them in court.

According to counsel the Environmental Management and Coordination Act was enacted in the year 1999 and came into force in the year 2000.

That in view of this, any claim against the 3rd defendant –respondent dating back to 1983 is mischievous and that in fact the previous, case filed by ordinary plaint against the 3rd defendant, amongst others, was withdrawn.

That the 3rd defendant has no duty to carry out the environmental impact assessment as this duty is on the proponent of the project.

That it was not true that the 3rd respondent had not advised about or reported the plight of Marigat residents to the Government because, according to counsel, it had carried out research and has been on the ground and produced many papers and magazines, had called meetings and talked there at on the topic relating to these plants and that at one such workshop the Chief Guest was the Chairman, a *Mr. Khamala*.

Counsel submitted that no case can be sustained against the 3rd respondent in this petition.

According to the counsel, the petitioners had benefited a lot from this plant since 1983 and that a report published in the year 2003 shows the merits and demerits of the plant.

Counsel submitted that there was no evidence before this court to enable it set up a commission to assess damages. That to set up such commission would amount to allowing assessment of damages

without giving the respondents a chance to challenge this assessment.

He stated that whether or not the plant – prosopis juliflora, is a noxious weed is not within this court's jurisdiction.

That this Court should determine if this case falls within the ambit of the constitutional provisions cited; and whether the fundamental rights of the petitioners have been violated.

*Mr. Letangula* in reply reiterated his earlier submissions and added that the case raises weighty constitutional issues that the weed/plant exists and is harmful; that it has colonized the entire area and that the issue cannot be called petty.

That the constitution is the Supreme law of the land and that there is this allegation of fundamental rights before a constitutional Court and that even if the petitioners had come before the Court under the Environmental Management and Coordination Act, Constitutional issues would have arisen.

*Mr. Letangule* asked this Court to give flesh and body to the constitution and said that if one can take four (4) hours to submit on this application these are very weighty issues

This petition was properly before this Court and the environmental Management and Coordination Act properly cited because of the remedies sought.

He referred to this litigation as that of public interest because of the public concern and the stake it has in it.

That specific sections of the constitution under which the petitioners have come to this Court have been cited and that preliminary issues cannot be raised when one has submitted himself to the jurisdiction of the Court throughout.

According to counsel medical reports of people whose limbs have been amputated have been annexed to the supporting affidavit and that it had been submitted that animals were dying and that life was being threatened.

That this plant was killing the backbone of the people's economic mainstay.

That schools and churches had been abandoned.

According to counsel, the weed/plant was a colonizer plant and that the Government was responsible for its introduction and its results as the content's of the former Chief's affidavit have not been controverted.

That the Director/General of the National Environment Management Authority had admitted that the weed/plant was harmful, and that though the Government had sent researchers to Namibia and South Africa to research on the Management and Control of this plant, nothing useful had been achieved.

That the Kshs.150,000/= given to Baringo District to fight the spread of the plant is nothing compared to the problems experienced by the residents.

According to ***Letangule*** the Minister's replying affidavit that he was preparing a cabinet paper without policy or project on the ground or money allocated to fight the spread of the plant was not enough.

That National Environment Management Authority did not carry out its mandate as provided under Section 9 of the environment Management and Coordination Act.

According to Counsel this Court has no restriction and can make orders to enforce the public complaints committee.

He urged Court to grant the prayers sought in the petition and also recommend the formation of a commission with local and technical experts with money allocated to it to implement and enforce the recommendations of public complaints committee.

Counsel did not urge for costs of the suit but asked for exemplary damages.

These are the submissions we heard and recorded from counsel for both parties. Counsel for both sides argued either for or against the petition with the seriousness it deserves and ably guided the Court on the law relating thereto.

Matters relating to the environment have become very important all over the world given the maxim that "***environment is life***."

The dispute was placed before us in the nature of a constitutional reference under ***Section 84(1)*** of the Constitution and *Sections 60, 70, 71* and *75* of the same cited therein. The main purpose of the case was for the protection of fundamental rights and freedoms of the individual under those Sections.

*Section 84(1)* under which the petitions was filed states as follows:

"*84(1) Subject to Sub-Section (6), if a person alleges that any of the provisions of Sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is legally available, that person (or that other person) may apply to the High court to redress*.

(2) The High Court shall have original jurisdiction:-

*(a) to hear and determine an application made by a person in pursuance of Sub-Section (1);*

*(b) to determine any question arising in the case of a person which is referred to it in pursuance of Sub-section (3)*

*and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Sections 70 to 83 (inclusive).*

*Sub-sections 3* and *4* of that Section deal with what should happen in the case of the allegation of contravention of *Sections 70 to 83* of the constitution which is made in proceedings before the Subordinate Court.

From our reading of these provisions the allegations of contravention of fundamental rights are restricted to *Sections 70 to 83* all inclusive. *Section 70* of the Constitution is concerned with the fundamental rights and freedoms of the individual to life, liberty, security and the protection of the law; freedom of conscience, expression, assembly and association and protection for the privacy of the

individual's home and other property and protection from the deprivation of property without compensation.

So far as I can make out from the Petition and the submission, the main complaints raised by the petitioners are hinged on *Sections 71, 75* and *81* of the Constitution, in so far as their protection to life, property and freedom of movement are said to have been infringed.

Being fundamental constitutional rights, when there is an infringement of any of them the first suspect culprit is the Government. This is why it is named as the first respondent, through the Attorney-General, in the petition.

Their main complaint is in paragraph 8 of the petition, and this is that

*"on or about 1982 the Government of Kenya through the Ministry of Agriculture sanctioned and authorized the introduction of the weed prosopis juliflora in Ngambo Location Marigat division, Baringo District by the Food Agricultural Organization (F.A.O.) in conjunction with the second respondent and/or its predecessor ostensibly to curb desertification*.

Paragraph 9 says:

*That the introduction of the weed prosopis juliflora in Ngambo Location of Marigat Division Baringo District was introduced as a joint project between the Government of Kenya and the Food Agricultural Organization (F.A.O.) under a partnership agreement".*

When counsel for the applicants submitted on the application, he stated that though this plant was introduced from South America, its risk was known to the 1st and the 2nd respondents and yet it was introduced in the petitioner's land carelessly and recklessly without proper research being carried out on it.

That when the effects and problems of the plant were brought to the attention of the respondents' they did not address them.

Pausing here for a moment answers are required to three initial questions, namely did the Government sanction and authorize the introduction of the plant prosopis juliflora in Ngambo Location of Marigat Division in Baringo District?

Did the 1st and 2nd respondent know the risk of introducing this plant in that area and/or was this introduction careless and/or reckless?

On the first question, there is a letter dated 1st November 2002 from the Community Museums of Kenya signed by its Director, one ***Eustace Gitonga***, to the Regional Director, Food Agricultural Organization, Nairobi.

It states as follows:-

*"During 1984/85 period F.A.O introduced two species of acacia-like plants (prosopis juliflora and prosopis braziliensis) at Lake Baringo basin. The plants have turned out to be major weeds which have colonized an expansive piece of land and extensive damage to the lake basin ecosystem. The inhabitant of the affected area are the Ilchamus people who belong to one of the smallest tribes in Kenya. The tribes' main occupation is agro-pastoralism and it has been severally interrupted by the*

*plants. The tribes' future is under threat. CMK is involved in some projects in the area through a Memorandum of Understanding with the community. Some of its objectives are to work in areas of environmental and biodiversity conservation as well as development of ecotourism.*

*Unfortunately the weed is impending our work and the community has asked us to look for a solution to the problem. We would appreciate very much if you could facilitate a meeting with ourselves to discuss a solution to the problem.*

*We look forward to your cooperation.*

*Yours sincerely:*

*Signed*

*Eustace Gitonga*

*Director*

This letter was copied to the Chairman, Ilchamus Community but there was no reply to it by the Director, Food and Agricultural Organization.

A similar letter dated 5th February 2003 was addressed to the same Director with copies, this time, to the Minister for Environment and Natural Resources and the Chairman of Ilchamus Community.

The Regional Director of Food & Agricultural Organization in Kenya, one *George Hanek,* replied to this letter, in his letter dated 20th February 2003

The letter stated as follows:

*"Dear Mr. Gitonga*

*Re: Fuelwood/Afforestation and Expansion in Baringo – Phase II*

*The Food and Agriculture Organization of the United Nations Representation in Nairobi acknowledges receipt of your two letters ref. CMK/1102/ADM/FAO/01 and CMK/0203/ ADM/FAO/01 dated 1st November 2002 and 5th February 2003 respectively.*

*It is true that trees of prosopis species were introduced to Baringo from other areas of Kenya under the FAO/GOK cooperative programme which was signed by both partners in July 1982. As indicated by the title, prosopis species were introduced in Baringo to provide fuelwood. The project was implemented by a team of Ministry of Environment and Natural Resources officials in the Department of Forestry Kenya Forestry Research Institute (KEFRI) of the same Ministry was also involved in the project*.

*After receiving your communication, we have consulted with KEFRI and were pleased to note that efforts have been going on to address the problem of unchecked spread of prosopis juliflora not only in Baringo, but also in other areas where the problem is even worse. KEFRI has produced various reports documenting current status of prosopis juliflora, which seems to be the major problem in several parts of the country. The documents also give recommendations and the way forward in an attempt to contain the species. One of these documents is a cabinet paper that is being finalized.*

*Our office is still consulting KEFRI and Forest Department at Karura. We will communicate with you as soon as these government partners have given us more details on the way forward. You may also wish to contact KEFRI or Ministry of Environment directly and contribute to the ongoing efforts.*

*Once again thank you for your concern on Lake Baringo basin. We can assure you that any proposals that are being developed to address unchecked prolification of prosopis in Baringo and elsewhere, will fully involve the communities in these areas.*

*Yours sincerely,*

*Signed*

*George Hanek*

*FAO representative in Kenya, a.i.*

Copies of this letter were sent to the Minister for Environment and Natural Resources & Wildlife *Hon. Dr. Newton Kulundu* and the Chairman, Ilchamus Community.

In another letter dated 4th March 2003 to FAO representative in Kenya the Director of Community Museums of Kenya sought a date for a meeting with the former and also explained the problems faced by the Ilchamus Community as a result of the unchecked spread of the plant.

In a reply to this letter dated 6th March 2003 the FAO representative in Kenya promised to communicate with the Director of Community Museums of Kenya on possible meeting dates after his consultations with Government partners (Ministry of Environment and Natural Resources and Forest Department) were finished. There is no record of such meeting dates.

From this correspondence, the Regional Director of FAO implicated Kenya Government in sanctioning the introduction of the subject plant in Ngambo Location Marigat Division, Baringo District through an FAO/GOK Cooperative Programme signed by both partners in 1982.

But there are no direct communications between the two parties on the matter except this litigation which brought in the Kenya Government through the submissions made before us except the allegations made by counsel for the petitioners regarding the 1st and 2nd respondents' inability or laxity to act on the complaints when they were raised, and this was done after a period of twenty (20) years

As regards the 3rd respondent, apart from its introduction in paragraph 4 of the petition, there are no specific complaints against it except in paragraph 14th thereof where it is stated that:

*"The petitioners hold the 3rd respondent liable for failing in its statutory duties as enunciated under its Establishing Act – THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, 1999(EMCA).*

Its failures or breaches are then enumerated in sub-paragraphs (a) to (e) of that paragraph which concludes with the following remarks:

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

But we are all aware this body came into existence with the enactment of the Environmental Management and Coordination Act (*Act No. 8 of 1999*) which came into operation on 14th January 2000.

Thus it was not there at the time prosopis juliflora was introduced in Baringo District in 1982 to be able to carry out an impact assessment and Audit of the effects of the weed before its introduction as envisaged in paragraph 14(a) of the petition. In any case there is no provision under the Act requiring the 3rd respondent to carry out impact assessment of any project. We shall revert to this later in this judgment.

However, soon after the Act came into operation *Prof. Ratemo Michieka* was appointed its Director-General. In his undated report, after he received complaints about this weed/plant he says:-

*"I have received complaints about the destructive nature of prosopis. I therefore went on a fact finding mission and in particular to ascertain the plants environmental economic and social values to the people it was meant for. I am a crop protection scientist, specialized in weed science Research and curious on new invasive and noxious weeds like water hyacinth in Lake Victoria.*

*I had been briefed about the effects of prosopis on human's and animals and decided to take my environmental team to a place called Ngambo on the flat, beautiful fertile Njemps plains of Central Baringo District. Residents here are primarily pastoralists and a good number grow maize, beans, cowpeas, onions, paw paws and oranges. I witnessed "plantations" of prosopis which was mature, thorny and formed an impassable impenetrable canopy. The weed is domineering, a colonizer and produces allelochemics and exudates which suppress any other plants around. The weed reproduces by seeds and vegetatively and can be dispersed long distances by humans, livestock, birds, wind and water. Prosopis has virtually invaded all ASAL (Arid and Semi-arid) areas of Kenya.*

*The hard strong sturdy thorns have been nick-named "MSUMARI YA NORAD" and have caused untold sufferings to the people, cows, goats, donkeys and sheep.*

*ENCOUNTERS:*

*a child is brought to us with a pricked swollen pussy leg and needs immediate attention and elderly lady comes to us with a swollen arm having been pricked on the second finger but poisonous effect of the thorn affects the whole arm and has a swollen armpit, she can hardly raise her arm, an elderly man shows us a village they had abandoned because of fear of being enclosed in by the aggressive plant. We found children who eat the slightly "tasty" non-digestible pods which accumulate in the stomachs and cause constipation. We were told of extreme case where kids had been operated on to remove the seeds and "gum like" substances. Note that this is a hunger prone area and school children told us bluntly that they carry pods in the pockets for chewing during hunger "pangs"*

*Livestock numbers have been reduced tremendously. The allelopathic effects of prosopis have reduced pasture (grass species) to naught. Once the canopy establishes, no vegetation grows under and the locals must vacate the invaded areas!! They migrate in search of pasture. If an animal is trapped in the weedy enclosure no one dares rescue it the animal might starve to death there, reason, the owner might be pricked and have his limb amputated. No one gets out at night, chances of stepping on a thorn or being scratched are high, no one can go for anybody's help in case of fire or any assistance they will be pricked. Water channels, rivers and streams have their causes changed by prosopis.*

*Goats which eat the plant have had their teeth fall off, their mouth disoriented and their stomachs*

*swollen as there is no regurgating which takes place. Loss of cattle and goats is a problem now. In extreme instances the seeds "start germinating" inside the goats' stomachs. When they die and intestines opened, accumulated sprouting prosopis seeds are found inside.*

*The locals do not use the wood for fuel; they claim that it produces poisonous smoke. It is soft and easily attacked by insects and therefore "unfit" for fuel source and construction of houses. I personally saw several holes of insect damage on three stems which had been cut and placed outside a house.*

*My assessment of the "weed" is simple, prosopis species which was intended for biomass production might have been the wrong species, perhaps the thornless ones would have been better as long as it is non-allelopathic and produces no root exudates.*

*The prosopis I saw was worse than the dreadful water hyacinth. It must be eradicated by every means possible. It is now a weed whose economic value is totally out-rated by the losses it poses. It has every negative environmental impact to Kenya and should not be allowed to spread to our parks. It will be catastrophic to all of us and as a country we shall never afford to control it. It should not be allowed to invade the high potential areas as it will cause untold suffering.*

*This is my plea; let us use any weed control methods to eradicate the prosopis plants, seeds and vegetative root-sticks. We can use chemicals like glyphosate (round up) which is very costly or mechanical removal. Whatever method we employ it must be fast and should be done now.*

*Meanwhile all people are encouraged to plant many environmental friendly trees as much as possible. The Authority under the Environmental Management and Coordination Act (EMCA) of 1999 Section 42(1)(d) gives the Director-General powers to declare any invasive plants, weed etc. unwanted. This can be applicable in the case of prosopis."*

These are emphatic assertive remarks of a crop protection scientist specialized in weed science research and curious on new invasive and noxious weeds. These include hyacinth in Lake Victoria. These remarks arise from the authority given to the maker by the Environmental Management and Coordination Act which as I have stated before, came into operation on 14th January 2000.

*Section 31* of the Act establishes the Public Complaints Committee whose role is to carry out in-depth investigations of complaints against any person or authority on issues of environmental degradation and pollution.

Since the coming into effect of the Act, one complaint had already been lodged with the Committee on this plant before this petition was lodged in Court. *The Complaint, No. 67 of 2005,* was lodged by Community Museums of Kenya, a non-governmental organization, against Kenya Forestry Research Institute – Forest Department and Food and Agriculture Organization.

The committee gave its background and the nature of prosopis juliflora, and the introduction of the species of the plant in Kenya.

The reasons of the introduction of the plant in Kenya were given as:

*I. To curb soil erosion,*

*II. As a source of wood fuel*

*III. Poles for construction industry and*

*IV. To be planted in quarry reclamation*.

Disadvantages of the plant were also cited, namely:

*I. It eliminates under cover vegetation, and other tree species growing near it,*

*II. It reduces level of the ground water table.*

*III. It leads to death of livestock that feed on prosopis pods,*

*IV. It is generally harmful to humans and livestock, and*

*V. That dense thickets of the weed act as breeding grounds for mosquitoes which cause malaria.*

And apart from Baringo District, the Committee established that prosopis juliflora was also introduced in other parts of Kenya, including Bura, Garissa, Mandera, Marsabit, Mwingi, Taita Taveta, Tana River, Turkana and Wajir.

In Baringo District prosopis species was introduced in the early 1980's under the FAO/GOK fuelwood/afforestation Co-operative Programme in an effort to reduce pressure on natural vegetation through increased availability of the weed/plant.

The committee investigated the matter through onsite visits, consultative meetings, desktop research and public hearings and observed that the weed had invaded grazing land forming dense impenetrable thickets which were gradually replacing acacia and preventing the growth of pasture.

This was attributed to the fact that the weed poses an extended taproot system which extends to an area of thirty metres or more, thus helping it to absorb much of the soil moisture in the entire area thus chocking other plants.

From the committee's onsite visits there was visible evidence of severe colonization of shores of Lake Baringo and colonization of the entire swamp land between Lake Baringo and Lake Bogoria which form the main grazing area in the District.

The Committee also established that this weed had hindered the communities' normal pastoralist life.

The committee recommended that the plant be declared a noxious weed by the Ministry of Agriculture and later have it eradicated, that its planting should be outlawed, forbidden and declared as a dangerous weed with the communities adversely affected by the weed being encouraged to participate in its eradication.

It would appear that before the weed prosopis juliflora is declared noxious by the Ministry of Agriculture, no steps can be taken to eradicate it and there is no evidence yet that this has been done.

It seems from the provisions of *EMCA* the role of the Public Complaints Committee is simply to investigate complaints and make a report of its findings to the National Environment Council which is responsible for policy formulation and directions for the purpose of the Act – see *Sections 4* and ***5*** of the Act.

In respect to the one report of a complaint by the Community Museums of Kenya, or the recommendations of the Director-General, there are no records to show whether the investigation reports were compiled and forwarded to the National Environment Council or what steps were taken in respect thereof.

But one thing seems clear, that the Environmental Management and Coordination Act gives no power to the Council or the National Environment Management Authority to punish those who cause pollution to or degrade the environment except for the criminal aspects provided for under part 13 of the Act.

In respect to the dispute before this Court, therefore, given that the weed was introduced in Ngambo Location Baringo district in the early 80's much before the Act was established and that the much the Public Complaints Committee can do is investigate complaints and compile reports for further action elsewhere, it is no wonder therefore that National Environment Management Authority has taken no action to address the plight of the residents of that area under review.

The petitioners have complained about infringement on their fundamental rights by amongst others the 3rd and 4th respondents; with specific reference to those rights under *Sections 71*, *75* and ***81*** of the constitution. But given what the Public Complaints' Committee has done and the report made by 3rd respondent's Director-General and the limited scope of their role under the Act the petitioners' complaint against the 3rd respondent, subject to what will be said about this party hereinafter, does not hold any water.

The rights stated in the constitutional sections quoted above include the right to life, liberty and security – *Section 71* of the Constitution. In *Section 71(1)*

"*No person shall be deprived of his life intentionally save in execution of the sentence of a Court in respect of criminal offence under the law of Kenya of which he has been convicted*.

*Section 75* of the constitution prohibits compulsory acquisition or taking possession of anybody's property by the government without compensation while *Section 81* talks of freedom of movement. We have chosen and stressed on the three provisions of the constitution because the petitioners relied on them in their petition and submissions before us.

When counsel for the petitioners addressed us, he stressed that though the risk involved in planting prosopis juliflora was in the knowledge of the 1st and 2nd respondents, they never the less, introduced it in the petitioners' land carelessly and without carrying out proper research.

That since the introduction of the plant in the petitioners' land the latter had been reduced to paupers with the destruction of the communities' economic base and that they were threatened with eviction from their ancestral land since the plant had taken over the entire landscape.

According to counsel, this was tantamount to deprivation of the communities property without compensation and/deprivation of the right to a clean and healthy environment and that the victims have to be compensated.

Counsel submitted on the injuries and death of humans and livestock due to injuries inflicted by the thorns of the plant or by feeding on its pods, or poor movement structures due to impenetrable thickets.

When the initial complaint was lodged with the Regional Director of Food & Agriculture Organization by Community Museums of Kenya, the former replied that the plant was introduced in Baringo District

from other areas in Kenya under the FAO/GOK Cooperative Programme to provide fuelwood.

In the first Public Complaints Committee report in 1991 four reasons were given for the introduction of prosopis juloflora in Baringo district, namely, to curb soil erosion, as a source of fuel wood; provision of poles for construction industry and to be planted in quarry reclamations.

*Prof. Michieka* in his report also alluded to these reasons for the introduction of this plant in Baringo District. These reasons show a good intention by those who introduced the plant and not a deliberate careless and reckless one or in utter disregard of the community's welfare as is portrayed.

Counsel for the 1st and 2nd respondent submitted that it was misleading to say it was the Government which introduced the plant in Baringo District or that it was doing nothing to address the plight of the residents or that the plant is useless.

In his view Baringo District had changed for the better since the introduction of the weed in the area; because, according to him, there was need to afforest the area.

In his submissions several people were on the ground to try and control the plant. He referred to some petitioners in this case who attended a prosopis project implementation Committee meeting on 16th March – (the year was not given).

This meeting was chaired by the District Officer Marigat Division but there were no details to show the Government involvement in eradication process.

He referred also to a *Public Baraza* held on 29th December 2004 where the only Government representatives were Area Chief, two Assistant Chiefs, Councillor Ngambo ward and a Community Representative on Prosopis in the area.

We were also told of Government officials on the ground through Kenya Forestry Research Institute (***KEFRI***) with specific mention of one *Simon Choge* who swore a replying affidavit in support of that sworn by the Minister for Environment and Natural Resources.

This affidavit talks of what *Mr. Choge* has discovered after his research on the prosopis plant and/or his travels to various countries where the weed is grown.

It is not stated when his research began how far the Government has implemented the results of this research. But we note this research is taking place after complaints have been lodged over the disastrous effects of the plant.

The plant in issue here having been introduced in Baringo District through the Memorandum of Understanding mentioned in the letter from the Regional Director of Food and Agricultural Organization to Community Museums of Kenya, the first reactions we would have expected would have been for the Minister for Agriculture to declare the plant noxious because of the harm it had caused the residents of that District – under the Suppression of Noxious Weeds Act – Chapter 325 Laws of Kenya.

In the recommendations made by the Public Complaints Committee in the first case placed before it regarding this plant; namely Public Complaints Committee Complaint *No. 67 of 2005*, the declaration of prosopis juliflora as a noxious plant was one of them.

Apart from these complaints, this matter had also been highlighted in the print media and as earlier

stated, ***Prof.*** *Michieka* had researched on it and made a report thereon. One of his recommendations was to declare the weed noxious.

And even the letters exchanged between the Community Museum of Kenya and the Regional Director Food and Agricultural Organization in this regard were copied to the Minister for Environment & Natural Resources. He was therefore, aware of the problems involved.

Then there is this Hansard Report of the National Assembly where this complaint was raised; and the Minister for Environment replied.

All this information was in the domain of the 1st and 2nd respondents as early as the year 2003 and the heat it generated give rise to the present litigation because from the applicants view, the 1st and 2nd respondents had not shown serious concern for the welfare of the residents of Ngambo Location Baringo District.

It is true to say the 1st and 2nd respondents were not directly involved in the introduction of the plant in that area but from the letter of the Regional Director of Food and Agricultural Organization, the Government of Kenya had signed a cooperative agreement with the Organization over the programme to introduce the plant in that area in July 1982. It therefore was aware of the existence of the plant and when numerous complaints were raised over its effects, including that in parliament, wise counsel would have demanded that at least the Minister for Agriculture be advised to declare this plant noxious and bar its further planting; just to show the Government concern over the matter.

Only then would anybody wishing to use the plants for whatever purpose go in to fell them for posts, fodder, charcoal and other uses, thus helping the residents to eradicate the weed speedily. Paragraph 52 of the Minister's replying affidavit supports this view. But up to the time this petition is being heard, no such declaration has been made.

This silence and inaction on the part of the 1st and 2nd respondents gave the impression of neglect and carelessness and this is why the applicants came before this Court to seek its intervention.

It may well be the cost factor has played a big role in this apparent lack of serious action on the part the 1st and 2nd respondents to get directly involved in the eradication of prosopis juliflora and in particular by chemical method.

But with the magnitude of the problems people say they are facing in the infested areas, perhaps a vote could have been set aside in the budget since the year 2003 for a start in the eradication and management or control of the menace. This has not been done.

However, the 1st and 2nd respondents boast of having spent Kshs.150,000/= on the prosopis project and refer us to pages 291, 292 and 293 of the annexures to the replying affidavit.

On page 291 there is a letter directing preparation of three (3) cheques for the amount totalling Kshs.50,000/= to 3 self-help groups, Naitongaa FFS self help group Baskeinik FFS Self-Help Group and Yapenda FFS self-help group. We are talking about Kshs.16,000/= for each group in September 19th 2005.

On page 292 is another direction for the preparation of another cheque for Kshs.150,000/= in favour of three field farmer's schools on 20th September, 2005. There is an attached list to this letter giving the beneficiaries of this money as Naitongaa FFS self-help group – Kshs.50,000/=, Baskeinik FFS

self-help group Kshs.50,000/= and Yapenda FFS self-help group Kshs.50,000/=.

But the interesting thing about the correspondence over these cheques is that they are communication within Food and Agricultural Organization office which is not a Kenya Government Department.

With this kind of information and evidence I can safely conclude that the Kenya Government as such has not spent any money on the prosopis eradication project in Baringo District and it is the Food Agricultural Organization which has spent about Kshs.200,000/= on it.

We can, however, not say the Kenya Government through the 1st and 2nd respondent has folded its arms. Counsel says it has sent experts to Namibia, South Africa or the South America where a similar problem on prosopis juliflora has arisen to research on methods of management and control of the plant.

There are also resources at the disposal of Kenya Forestry Research Institute where *Simon Choge*, a Senior Research Officer has been researching on this plant since the year 2005. In his replying affidavit sworn on 28th May 2007 he avers that though the Government encouraged afforestation in various parts of the country for various reasons, it never advocated for the planting of this plant or any other trees species in any locality.

This may be so but when the Regional Director of Food and Agricultural Organization in Kenya wrote his first letter and referred to a co-operative programme between his organization and the Kenya Government over the introduction of this plant in Baringo and sent copy of this letter to *Dr. Newton Kulundu* Minister for Environment and Natural Resources, there was no response from the said minister to deny this assertion. This evidence was a confirmation that such cooperative programme between the 2 partners existed as early as July 1982 and that the Kenya Government was fully aware of and indeed agreed to the introduction of this plant in Baringo District in the years 1982-83.

It is no wonder then that when the issue of the plant was raised in parliament; the Minister for Environment agreed that it was introduced by the Government in the affected District only to backtrack on this reply when he swore the replying affidavit to say in paragraph 46 thereof that

*"my answer in the Hansard copy annexed to the affidavit of the deponent herein was given with the much information which I had been availed then. I have since been corrected by officers from KEFRI and the Forest Department and I am informed by those officers including Simon Choge did sufficient literature has come to my attention in support of the fact that the Government andnot introduce of sunction the introduction of prosopis julifora in Ngambo location as alleged by the petitioners. Records show that prosopis was introduced to Baringo before 1983 by institutions and individuals in attempt to afforest the said area."*

In my view, this is an afterthought. These complaints by residents of Ngambo Location Baringo District about the harmful effects of prosopis started being raised before the year 2005. They were directed at the Government all this time.

The Minister cannot convince me that upto the time he was answering the question on it in Parliament on 20th July 2006, he had not made discovery of the correct position, or about the cooperative programme entered into between the Government and FAO.

I find the government was involved in the introduction of this harmful plant into the District by signing the Cooperative Programme as one of the partners. No research had been conducted to

determine its effects on the people, their livestock and the environment. Nobody seems to have though about this or at all during that time.

But I feel that its intention was innocent, to afforest the area, curb soil erosion and provide fuelwood, not to harm anybody or in complete disregard of the welfare of the community. This would be an unfair assessment of the government's motive.

One issue which bothered us quite a lot was whether the complaint before us was suitable for a constitutional reference. In his replying affidavit, *Prof. Kivutha Kibwana* deponed in paragraph 65 as follows:-

*"That I honestly believe section 3 of EMCA does not create any rights for the petitioners under the Constitution. In any event I honestly believe that in law remedies under the Constitution should be resulted to when all other specifically designed and more efficacious remedies including statutory remedies are either not available or have been exhausted. The alternative, I believe with great respect for the petitioner's grievance, is to clog the Kenyan Justice system with petty disputes labelled "constitutional matters".*

We nearly conceded that the petitioner's complaints were not suitable for placement before a constitutional court but when we read section 3(3) of The Environment Management and Coordination Act which provides that:-

*If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without any prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders. Issue such writs or give such directions as it may deem appropriate to – (a to e)."*

and compared this provision with *Section 84(1)* of the Constitution, we found them similar and since we were convinced by virtue of *Section 3(1)* of the Act the matter before us were of a fundamental environmental importance, we felt the dispute was properly before us as a constitutional issue.

In any case, as *Section 3(3)* of the Act and *Section 84(1)* of the constitution gives this court inherent jurisdiction to address the issue, "*without prejudice to any other action with respect to the same matter which may be available*," and therefore feel properly seized of the requisite jurisdiction to deliberate over this matter before us and that the applicants chose the correct forum to lodge their complaint.

Under *Section 3(1*) of the Environmental Management and Coordination Act:-

*"Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment."*

Subsection 2 of the Act adds that:-

*"The entitlement to a clean and healthy environment under subsection (1) included access by any person in Kenya to the various public elements or segments of the environment for recreational educational, health, spiritual and cultural purposes."*

The language used in *Section 3(1)* of the Environmental Management and Coordination Act is the

same as that used in section 70 of the Constitution which provides for fundamental rights and freedoms of the individual.

Counsel for the 1st and 2nd respondents supported the replying affidavit that the issues raised by the petitioners were not constitutional in nature and that they could be resolved through other provisions of the law – like the Environmental Management and Coordination Act. But as we have found, this Act is limited and does not give the National Environmental Management Authority (*NEMA*) created under it, even power to enforce its own recommendations.

It is an Act for administrative purposes only and that its recommendations have to be remitted elsewhere for implementation and/or enforcement.

Moreover, environmental issues have gained prominence the world over such that they have been cause for various international conferences, agreements and/or treaties.

Kenya has attended most, if not all, of these conferences and either ratified or signed these agreements or treaties.

Examples include A Report of the United Nations Conference on the Human Environment held in Stockholm between 5th to 16th June 1972 where Kenya sent a strong delegation. This delegation effectively participated in the deliberations and this caused the opening of the United Nations Environment Secretariat in Nairobi Kenya; in 1973.

There is also a report on the Rio Declaration on Environment and Development as a result of an international conference held in Rio de Janeiro between 3rd and 14th June 1992. This report reaffirmed the declaration of the United Nations Conference on Human Development and sought to build upon it.

Then we have the Kyoto Protocol to the United Nations Framework convention on Climate Change adopted in New York on 9th May 1992. These conferences, treaties and/or agreements involve World Governments, just to demonstrate their importance. Kenya has participated in them and though the Act of Parliament dealing specifically with environmental issues came into force in January 2000, by virtue of Kenya's participation, ratification and signature to these treaties, agreements or convention it is bound by them.

Just as the enjoyment of the rights allowed under section 70 of the Constitution are subject to the respect for the rights of other people, so has the Environmental Management and Coordination Act provided for this under *Section 58* of the Act where the proponent of any project is required to prepare an impact assessment report for submission to the Authority before he/she can be issued with a license to commence and finance such a project. This is intended to protect other users of a clean and healthy environment from pollution.

In the case before us no specific wrong has been alleged against the 3rd and 4th defendants in relation to the introduction and/or management of the harmful plant, prosopis juliflora.

In respect to the 3rd respondent it is accused of having failed to carry out its mandate. But from the initial report from its first Director-General which recommended the eradication of the plant and the recommendation s made by the public complaints committee in *PCC Case No. 67 of 2005* I am satisfied the 3rd respondent took steps in accordance with the mandate given to it by the Act; and that it is not properly enjoined in this petition as a respondent. No wonder then that a previous *Case No. 115/2006* filed by the petitioners against the 3rd respondent amongst others was withdrawn by notice dated 21st

August 1988. Why this respondent was still enjoined to this petition is not satisfactorily explained to us.

In respect to the 4th respondent apart from the descriptive part relating to it in the 5th paragraph of the petition no specific claim has been made against it anywhere in the petition either.

Apart from it holding the land in the area in trust for the government of Kenya, we were told to-date no titles had been issued to most of the residents there to own land, it has no mandate to do anything over such land, save to report the goings on thereof to the Government of Kenya. In these circumstances, we are not convinced the 4th respondent was also properly enjoined to these proceedings either.

Moreover, under the constitution it is the Government which protects and guarantees the fundamental rights and freedoms of its people. 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 and 4th respondents to this petition was a misjoinder of parties and is an abuse of the Court process – *Rodgers Mwema Nzioka v Attorney-General and Others [2006] KLR.* We are not even sure there was need to enjoin the 2nd respondent to these proceedings, as he is adequately represented by the 1st respondent.

In *Rodger's Case* one of the reasons for its dismissal was the joining therein of the Chairman, Kwale County Council, amongst other individuals, as a party.

In respect to the 1st and the 2nd respondent, the main constitutional complaint against them related to sections *71, 75* and obliquely *Section 81* of the Constitution, protection of right to life and deprivation of land from the residents of Ngambo Location without compensation as well as difficulty in movement for humans and livestock due to impenetrable thickets of the plant. These three featured prominently.

As regards the right of protection to life, the section provides that:

*"No person shall be deprived of his life intentionally save in execution of the sentence of a court …"*

The complaint herein was that the plant had caused serious health hazards to the residents of Ngambo location Baringo District because of its sharp, strong thorns which cause ailments when they prick anyone.

And here we were referred to a number of medical reports of patients who had been pricked by such thorns and what the medical examinations in respect of their ailments revealed.

One of such patients, *Samentita Samaria Lengiyaa* was taken to *Dr. Wellington K. Kiamba* with a complaint of having been pricked by the thorn and the big-leg toe amputated. *Kiamba* referred to the injuries sustained by *Lengiyaa* as of soft tissue in nature.

The same doctor also examined *Stanley Leterewua*. The complaint was similar to that of *Semantita*, he had been pricked by the thorn of the plant on the head which got swollen.

The doctor classified this injury as grievous harm.

Another patient was *Kabon Ngochillah*. She also complained of being pricked by the thorn on the right foot resulting into cellutis and chronic osieomyelitis. The doctor classified the degree of injury as grievous harm. None of these injuries resulted in loss of life. No doubt injuries were sustained by those

affected but in none of them does *Section 71* of the Constitution apply.

Nobody is shown anywhere in the pleadings or submissions as having been deprived of his/her life intentionally. No such complaint was raised in the petition. Not even paragraph 11 of the petition which tabulates injuries caused by the plant reveals any loss of life.

For this reason, it is therefore difficult for this court to be persuaded that *Section 71* of the Constitution as strictly applied, was properly quoted in this case.

There is no dispute that thorns of this plant cause or can cause injuries to the body. But this is true with any thorns from any other trees and if the victim does not seek immediate medical attention the repercussions can be grave where, say, tetanus sets in..

*Section 75* of the Constitution, on the other hand, provides for compulsory acquisition of property belonging to individuals by the government for the purpose of setting up projects which are for the benefit of the public at large, but that in such case provision should be made for those deprived of their rights to those lands compulsorily acquired to be paid reasonable compensation.

There were no pleadings or submissions to implicate the Government through the 1st and 2nd respondents with compulsorily acquiring individuals lands, which individuals were this or which specific lands were acquired.

The pleadings and submissions simply show that a few areas in Ngambo location were selected for the purpose of planting the weed/plant, on demonstration basis, for the purposes of providing fuel wood, prevent soil erosion, provide fodder for livestock and to provide timber.

Within 20 years of introduction these intended benefits are no more as the harmful effects of the plant have out-weighed the benefits due to the plants' invasive nature, completely unforeseen in the circumstances.

And it is not clear as to who actually introduced the plant in that area. The letter by the Director-General of the Food and Agricultural Organization referred to a cooperative programme where FAO and the Government of Kenya were partners. Nothing more to show the Government's active involvement in the matter.

This programme was not availed to us for scrutiny to show what it entailed but that FAO who was a party to it, most probably, the originator of the idea, is not a party to this case for obvious reasons, I find myself in difficulty to hold Kenya Government responsible for the problems it has caused.

I say "*probably the originator of the idea"* because of the correspondence relating to the provision of Kshs.200,000/= to three groups which have set up projects for the management and control of the plant which were circulated within FAO's offices only.

And given that people in that part of Kenya still use the land communally as none or very few of the residents have secured title to their land, it is difficult to ascertain whose land was acquired for the purposes of this demonstration or what acreage for the ascertainment of measure of compensation. In fact one of the suggestions, made during the submissions, not made as one of the prayers, which I found disturbing, was for this Court to order the formation of a Commission to carry out certain tasks.

In the first place, not being one of the prayers sought in the petition, the Court has no jurisdiction to

make such an order. In the second place, if it was one of the prayers sought in the petition which had succeeded, it would be against the law for the Court to be seen to abdicate its mandate by transferring its functions to a body without the requisite jurisdiction to call for and record evidence for the purpose of assessing damages in a constitutional reference where there is no provision for summoning and recording evidence of witnesses on oath.

I am not convinced the facts of this case are similar to those in the case of *Dominic Arony Amolo v. Hon Attorney General – H.C. Misc. Application No. 494 of 2003* which was straight forward and where the Constitutional Court recommended that evidence be taken by a competent Court to assess damages. Nor do I believe the case of *Ms. Shehla & Others v. Wapda,* which was a public litigation case, applies in this case either.

The constitution is itself a living instrument. It means what it says. If there is anything to be added to or subtracted there from then this can only be done through an amendment. Thus, the question of putting flesh or body to it without such amendment as urged does not arise.

I cannot say this is a representative suit because the provisions of *Order 1 Rule 8* of the Civil Procedure Rules were not applied neither can I say this is a public litigation because though there are other areas in Kenya, including Bura, Garissa, Mandera, Marsabit, Mwingi, Taita Taveta, Tana River, Turkana and Wajir where the plant was introduced, this litigation is only restricted to ten petitioners from Ngambo Location Baringo District.

One thing I wish to state here is that this litigation is nevertheless important to this country as it brings to light the plight of Kenyans in Baringo District as a result of the introduction of a plant otherwise thought to be beneficial to them but which has turned out to be disastrous, twenty (20) years since introduction.

Though this plight was brought to the notice of the Government as early as the year 2000, no tangible action has been taken to contain the situation. The victims are still asking for help forcing them to file this petition in this Court while the Minister responsible says in his affidavit that he is still waiting for a cabinet paper. Surely this is not good enough.

In the first public report prepared by the Director-General of National Environmental Management Authority, *Prof. Michieka* stated in paragraph 5 of the last page thus:

*"This is my plea, let us use any weed control method to eradicate the prosopis plants, seeds and vegetative rootsticks. We can use chemicals like glyphosphate round up which is very costly or mechanical removal whichever method we use it must be fast and should be done now".* Emphasis ours.

I am sure this report reached relevant authorities including the Government. With the force with which the Professor wrote his report, it was only prudent that necessary action be taken as fast as possible to arrest the further spread of the plant but this was not done leading the community teaming up on its own as was gathered from minutes of meetings as seen in the reports dated 16th March 2004 and 29th December 2004.

But this notwithstanding, having filed the case in court, sufficient material was to be laid before it to establish who between the partners in the cooperative programme introduced the plant Mathenge, as it has been nicknamed, in Ngambo Location Baringo District? Whose lands were acquired compulsorily or who has lost his/her life as a result of the plant. None of these has been established.

And that there were two partners and one of whom, FAO, is not a party to this case and that the other party, the Government, is only a party because of allowing the introduction of the plant in the area I am unable to find that the prayers sought against it have been established on a balance of probabilities.

There is no evidence of deprivation of the petitioner's rights to life nor is there evidence of compulsory acquisition of land by the government for public utility purposes.

I am fully aware a clean and healthy environment is a very important human rights issue. I am also aware those who introduced the subject plant in Ngambo Location, Marigat Division Baringo district had the welfare of the residents of the area at heart, to curb soil erosion, provide a source of woodfuel, provide poles for construction industry and to be planted in quarry reclamation.

It is only after twenty (20) years that it was realized the plant had a bad side effect. Nobody would have thought of or foreseen such bad effect initially to think of researching on it before introducing it in the area under review.

In my view, the side effects of the plant realized twenty (20) years after introduction appear too remote to hold the 1st respondent liable for not researching on it during its introduction in 1982.

For those reasons, and much as I have great sympathy with the plight of the applicants and what I have commented about the 1st and 2nd respondents' laxity in the whole exercise, I have no option but to *dismiss this petition.*

On costs, this is a case I would order that each party should be ordered to bear their own costs thereof.

But as the majority decision by my sisters is in favour of the Petitioners, orders will be made as per that decision.

*Delivered, dated* and *signed* at Nairobi this 11th day of December 2007.

D. K. S. AGANYANYA

JUDGE

JUDGMENT NO. OF ANG'AWA J

I: PROCEDURE

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

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

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

with the petitioners right and way of life.

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

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

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

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

II: Constitution Reference

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

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

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

Community Museums of Kenya Ltd Against The Kenya Forestry Research Institute (KFRI)

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

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

A) Background of report

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

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

A perennial deciduous thorny shrub or small three 12 meters high and 1.2 in diameter." [The plaint]

has a thick brown or blackish thorny bark and evergreen leaves sweet scented yellow/green flowers."

"the tree takes 15 years to mature."

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

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

16. The effected areas where this plant is found is

Baringo

Bura

Garissa

Mandera

Marsabit

Mwingi

Taita Taveta

Tana river

Turkana and Wajir

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

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

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

19. The life of the pastoral community was:-

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

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

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

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

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

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

21. They therefore recommended:-

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

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

21.iii). The Minister for Environment and National Resources lift the ban on the utilization of Prosopis products "to be facilitated by the National Environmental Management Authority and implemented by the Forest Department and other relevant lead agencies."

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

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

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

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

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

22.v) Political good will is required.

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

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

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

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

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

B) Effects – Director General

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

"The Environment

"A saviour plant becomes a dreadful noxious, colonizer weed "Prosopis."

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

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

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

C) Effects – The Minister of Environment and Natural Resources

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

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

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

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

D: Effects – The community

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

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

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

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

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

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

III: Petitioners

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

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

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

on the environment and on the people.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

i) The Sustainable Development Principle

ii) The Polluter pay principle . . .

iii) The Precautionary principle

35(d) A declaration that the introduction of the weed Prosopis Juliflora . . . amounted to and still amount to the breach of the petitioners right to sustainable development as envisaged and set out in the Environmental Management and Coordination Act 1999.

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

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

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

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

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

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

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

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

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

i) Total eradication of weed Prosopis Juliflora

ii) Plantation of indigenous and environmental friendly trees and grasses

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

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

ii) Assess and quantify the loss resulting from death of livestock, loss of pasture lands, farm lands, playing fields, riparian lands and loss of homes and other social amenities.

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

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

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

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

b) Exemplary damages

c) Costs in this petition

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

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

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

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

39. This constitution reference is to in effect declare that the right to life by the petitioners have been comprised. The government has failed in his duty by failing to implement the Public Complaints Committees recommendation that the Minister of Agriculture do declare the plant a noxious weed. The Minister of Environmental and Natural Resources Admitted in Parliament that the Government of Kenya

and the World Food Program were in effect responsible of introducing the plant. They – the Government require 3 billion shilling to control the plaint.

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

"(f) Rehabilitated and restore degraded ecologic

Article 8 b

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

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

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

The first is:-

i) Public participation and development plans

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

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

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

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

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

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

44. The applicable international instruments relied on case:-

i) Stockholm declaration of Human Environmental 1972

ii) The Rio Declaration on Environment and Development 1992.

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

IV: Respondents 1 and 2

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

46. The Minister for Environment and Natural Resources depended on an affidavit in reply stating that the Government has in effect taken steps to arrest the situation. The plaint was introduced to the area by individuals and institutions. The evidence though shows that the Minister admitted introducing the said plaint in 1982 to the area but this was before the 1999 Act No.8 on the Environmental Management Co-ordination Act. Infact the Secretary General has powers to declare and not permit the said plant to be introduced under section 42 of the act.

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

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

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

50. In the case law of

Stephen Kinotho & Others v Attorney General

Misc application 833/04

And in the case law of

Rev Dr. Timothy Njoya & Others V The Attorney General

Hc Misc App.82/2004 OS

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

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

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

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

35(e) A declaration that the petitioner right to life as set out in section 71 of the constitution has been compromised by the introduction of the weed Prosopis Juliflora to warrant this honourable courts intervention.

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

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

Inge Anna Ida Brown v The Minister of Road & Other

Hccc1298/03

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

Republic v EL Mann (1969) EA 357.

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

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

i) Sallon v Commissioner of Excise 1966 3 WL 1223

ii) Rose Moraa v G.A Odhiambo & Another

Hccc1351/07 (OS)

And Cherry v Commission (168) IWLR 242

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

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

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

IV) Argument by the 3rd Respondent

59. The Petitioners accused the 3rd respondent for failure to take out an assessment and or audit of the environment. The 3rd respondent argued that they have no obligations to do this, more so, because the act came into force in 1999.

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

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

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

C. Issue before the constitution court.

63. The respondents raise issues as to:-

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

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

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

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

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

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

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

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

65. The rest of claim ought to be struck out as they do not comprise constitutional issues as required by law. The Petitioners have to show procedurally that as applicants they must be precise and to the point in relation to section 60,65 and 84 of the constitution so that the respondent knows he exact nature of the case before them. (Stephen Kimotho & Others v Attorney General & Others Hccc 83/04, Nyamu J referring to Cyprian Kubia v Stanley Kamaya Mwendwa Misc. application 612/02 Khamoni J). The nature of a case must be set out with reasonable degree and precision of what is being complained: (Aanaritta Karimi Njeri v Republic 1979 KLR 154) a petition should therefore not throw general section of the constitution to court and claim that they are right (Dr. Korwa Adan & Others v attorney General Misc.666/90). In the case law of Rev. Dr. Timothy M. Njoya & Others v Attorney General (supra) where

in a Preliminary Objection the matters that had been raised were of statutory interpretation and not of constitution interpretation that can be entertained by a constitution court. The prayers sought by the Petitioners, they argued are therefore an abuse of the process of court. The correct statute that is in place to deal with the matter in issue is the Environmental Management Co-ordination Act EMCA and the Civil Procedure Act. The former act deals with the issue of Environment. The Petitioners by coming to the constitution court oust the jurisdiction of the court.

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

The Right to life

67. I am are aware that the rights under the Environmental Management Co-ordination Act (EMCA) Section 3(i) states deals the right to life is the same as embodied in section 84 of the Constitution of Kenya. Each Kenyan is entitled to the right of life, a right to a clean and healthy environment. The respondents claim the petitioners failed to show that their right had been violated and or breached and therefore the petitioners have no remedies available to them. The Petitioner on the other had have shown how the Prosopis Juliflora has misplaced the populace interfered with the development and social life style. The respondent have therefore failed to put in place a management program or make the crisis a national issue.

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

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

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

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

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

72. The Petitioner had asked this court to interpret the words the “the right to life” as protected

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

The right to property.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The tree has lately become a threat to the dry land ecosystem. It has invaded human and livestock health and also interfered with the infrastructure such as roads, foot paths and watering point among others . . . currently we are in the process of declaring it a national disaster which will solicit support from various sectors geared towards addressing he problems in Kenya.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He recommended, inter alia that there be:-

i) Enforcement of Laws on alien species

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

iii) Clearing and removal of alien plants from land

iv) ---------

v) Public awareness campaign.

84. This constitution court rejects the argument by the three respondents that they were not aware nor were they responsible in introducing the plant Prosopis of Juliflora to the semi arid areas of Kenya.

They did in fact introduce the plant, albeit for good intention, which has since created havoc in the life style of the indigenous people of the area.

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

In another case of :-

Telles and Others V Bombay Bin Co & Another

(1987) RC (Constitution) 35

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

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

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

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

Right to property

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

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

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

92. The respondents added through respondent No.3 that the EMCA Act is a new legislation.

The proper proceeding for the petitioner is not under the constitution but under the act.

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

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

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

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

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

VI: Finding of the court on the Interpretation of the Constitution of Kenya

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

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

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

(i) Locus.

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

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

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

They state they have a right to (i) sustainable Development

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

their rights infringed when they have been deprived of the sustainable development.

ii) Polluter must pay.

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

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

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

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

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

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

Dated this 11th Day of December 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

J U D G M E N T OF RAWAL J

This Petition raises very complex issues of Laws relating to Constitution and the Environmental Management and Coordination Act (Act 8 of 1999). The said Act shall be referred as 'EMCA' for the purposes of this Judgment.

Ten Petitioners have filed this petition invoking provisions of sections 60, 70, 71 and 75 of the Constitution and Provision of EMCA and Noxious Weed Act (Cap 325 Laws of Kenya). They seek *inter alia* declarations that:

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

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

(e) A declaration that the Petitioners right to life, as set out in section 71 of the Constitution has been compromised by the introduction of the weed Prosopis Juliflora to warrant this honourable court's intervention.

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

(j) A declaration that the failure by the Respondents to take affirmative steps towards eradication of the weed/plant Prosopis Julifora amounts to breach of the right to own property and from compulsory denial of that right as set out in Section 75 of the constitution of Kenya, due to the invasive nature of the weed.

In addition to the said declarations the Petitioners seek Orders of total eradication of Proposis Juliflora (hereinafter referred to as '*The Plant*') and appointment of a Commission to assess and quantify the loss visited upon the environment and to residents of Baringo District by the Plant amongst other loss and injury to animals and land, orders for compensation and Exemplary Damages.

I have perused the Judgment of Hon. Aganyanya J and fully adopt the facts of the case as stated therein. What I intend to do is to give my summary in this judgment.

The Petitioners' case is supported by affidavits filed by 1st to 6th Petitioners and on the annextures attached to those affidavits.

Briefly the Petitioners aver that the Plant was introduced and planted to their area known as Ngambo in Marigat Division of Baringo District around the year 1982 under a joint project of Food Agricultural Organization and Government of Kenya.

The Plant spread at an alarming rate and totally colonized the area degrading the environment and livelihood of the residents as well as forcing them to abandon their homes.

The adverse effects of the Plant are particularized in Para 11 of the Petition – namely

11. The introduction of the weed Prosopis Julifora has had adverse effects on the environment and the socio-economic well being of the Petitioners and other occupants of the affected areas throughout the Republic of Kenya.

(a) Due to its fast – spreading nature, the shrub forms extensive impenetrable thickets that gradually choke up all other indigenous plants and grasses leaving much of the soil bare and prone to erosion.

(b) Loss of treasured pasture land – the weed does not allow other grasses to grow.

(c) Loss of livestock – this is due to the poisonous thorn of the shrub.

(d) Its thorns pose a big problem to human movement, livestock and machinery. They cause paralysis of limbs leading to amputation of affected limbs, massive punctures to machinery and blockage of roads and footpaths.

(e) Blockage of rivers, causing flooding.

(f) Displacement of people from their homes (the weed has taken over entire homes and schools).

(g) Loss of playing fields.

(h) Perpetual anxiety and apprehension due to the continuing adverse effects of the weed.

(i) Destroyed the economic base of pastoralists community and particularly the petitioners bringing about massive poverty.

These particulars are reinforced by facts averred in affidavits in support sworn by several Petitioners.

Complaints were made to the Government through various Agencies on which no action was taken. Thereafter the complaint was made to the Public Complaint Committee established under EMCA being PCCC No. 67/05.

The said Committee amongst other orders directed that the Plant be declared Noxious by the Minister for Agriculture and thereafter be eradicated and that its planting should be outlawed and forbidden and the same be treated as a dangerous plant. No substantial action by any concerned authority was taken despite the report of the said Committee.

I should state here that these averments are reinforced by the replying affidavit of Avington Muusya Kaingi the Director General of National Environment Management Authority. It has annexed an Application for Import Permit for a Biological Control Agent for the Plant. Although it is conceded by the learned counsel from 1st and 2nd Defendants that the application to import those Beetles was rejected, the application does cry out for the immediate Management Programme to curb the menace resulting from the Plant.

In June, 2005, a report was made by two officials of Kenya Forestry Research Institute on the experience from South Africa in respect of the Plant. It is recognized that the spread of Plant has had serious impacts on both the agricultural productivity of the land (mostly for livestock production), ground water resources and biodiversity. This was recognized in the year 1977. (see page 4 of the report.

On page 6 of the said report it is stated: namely:

Isotopic analysis have shown that invading Prosopis uses ground water and available soil water, but its effects on ground water recharge is still not certain. Large-scale studies in the areas on invasion suggest that water use by Prosopis ranges from 350-500 mm per year. Given the low rainfall of the affected areas (about 250 mm per year) and low ground water recharge rates (4%) and the use of all the rainfall that infiltrates the soil, the net loss of 350 to 500 mm per year is likely to have a significant short and long term impact on the amount of water in the aquifers.

It has also been established that the invading Prosopis not only uses more ground water than the natural vegetation they replace, but also replace valuable grazing lands with impenetrable thickets that cost more to clear than the market value of the land, making these lands economically valueless.

These studies have therefore been used to justify that need to invest in Prosopis management and control in South Africa. It is considered one of the 44 species legally declared as noxious weeds (hence removal required by law), and one of the 10 most invasive plant species in the country prioritized for

urgent management and control.

The same report also mentions that experiences in South Africa and elsewhere have shown that large areas of prosopis invasions are unsuitable for economic exploitation in comparison with the conventional timber industry because of multi-stemmed nature of the plants and associated small log dimensions.

I do point out this factor at this stage as it was contended by the 1st and 2nd Respondent that the Plant can be economically exploited for several purposes including timber and firewood (see the affidavit of Simon Choge who is also a co-author of the said report).

The negative effects of the Plant are shown and reiterated in all the documents annexed to the affidavit of the Director General of National Environment Management Authority. They also emphasize that threat from the Plant outweigh any current benefits. Its negative effects are described in similar terms as has been done by the Petitioners. (see paper on Challenges of Eradicating Proposis in Kenya (ANN:SCI).

It is also suggested that the dilemma of the prosopis is one of the many problems brought about by the introduction of new species without proper scientific study on their long term effect on the environment.

The effects of the Plant on the human health are suggested to cause disease like allergies, asthma and infection of the lungs. It is also indicated that the habitat it forms have also been shown to harbour mosquitoes and tsetse flies which are vectors of livestock and human diseases and that honey produced by bees that have fed on nectar from prosopis flowers is said to cause allergic reactions especially in children.

In the documents annexed in replying affidavits of the Respondent it is also stated that the Baringo District was identified as one of the critical areas in the country under ASAL project launched by the Government of Kenya and it introduced national policy framework and appraised by the World Bank and other development partners including FAO which was originated from the UN conference on Renewable Energy held in Nairobi in 1981 where Government of Australia pledged financial assistance to Kenya to grow trees for wood fuel. Eventually the plant was found to be unsuitable. (see the report by C.I. Leena Churu (annexed to the affidavit of the Director General of NEMA).

The disadvantages of the plant in the said report are the same as those mentioned by the Petitioner.

The other reports are similar in their contents. We may finally mention the report by Ex Director of National Environment Management Authority (NEMA) which begins with a very serious and threatening note: namely

*"Mention the word 'prosopis' to anyone from the arid and semi-arid areas (ASAL) of Kenya and you will create chills down his/her spine. It creates agony, poverty and curses to anyone who has encountered with the Plant".*

In the portion of his paper titled 'Encounters' Prof. Ratemo W. Michieka reiterates

"ENCOUNTERS

A child is brought to us with a pricked, swollen pussy leg and needs immediate attention; an elderly

lady comes to us with a swollen arm having been pricked on the second finger but poisonous effects of the thorn affects the whole arm and has a swollen armpit, she can hardly raise her arm; an elderly man shows us a village they had abandoned because of fear of being enclosed in by the aggressive plant. We found children who eat the slightly “tasty” non-digestible pods, which accumulate in the stomachs and cause constipation. We were told of extreme cases where kids have been operated on to remove the seeds and “gun-like” substances. Note that this is a hunger prone area and school children told us blatantly that they carry pods in the pockets for chewing during hunger “pangs”

Livestock numbers have been reduced tremendously. The allelopathic effects of prosopis have reduced pasture (grass species) to naught. Once the canopy establishes, no vegetation grows under and locals must vacate the invaded areas!! They migrate in search of pasture. If an animal is trapped in the weedy enclosure, no one dares rescue it, the animal might starve to death in there, reason, the owner might be pricked and have his limb amputated. No one gets out at night, chances of stepping on a thorn or being scratched are high; no one can go for anybody’s help in case of fire or any assistance, they will be pricked. Water channels, rivers and streams have their courses changed by prosopis.

Goats, which eat the plant have had their teeth fall off, their mouth disoriented and their stomachs swollen as there is no regurgating, which takes place. Loss of cattle and goats is a problem now. In extreme instances the seeds “start germinating” inside the goats stomachs!! When they die and intestines opened, accumulated sprouting prosopis seeds are found inside”.

I have strived to give in some details the background and effects of the plant as shown from the case of the Respondents to reject the contention raised by them that it was not the Government of Kenya who introduced the plant into Kenya and that the Petitioners have failed to prove the damages resulted from the introduction of the plant to their area.

The Government has been actively participating in its introduction at least in eighties and trying to find a solution to the problem of invasive plant as back as in 2003, when they arranged for a workshop for Integrated Management.

Lastly my attention was drawn to the Ministerial Statement made in the Parliament on 20th July, 2006 by the Minister of Environment and Natural Resources. Accepting the adverse effect of the plant he declared and we quote:

*“Currently, we are in the process of declaring it a national disaster which will solicit support from various sectors geared towards addressing the problem in Kenya.”*

He also stated that they require close to KShs.3 billion to effectively work on that issue.

It is averred by the Petitioners and not substantially controverted that the Government has till to-date failed to form any policy or set aside any budgetary fund to address the problem.

Without going much into detail, the feeble attempt was made by the Minister to explain his Ministerial Statement and by the 1st and 2nd Respondent to show that the plant has economic benefit which can outweigh the adverse effect. I do observe that from the expert opinions set out in the documents annexed to the replying affidavits from all the respondents, one cannot escape the naked truth that the plant is a menace and great threat to the environment and lives of the residents – adults as well as children – of Ngambo, and its advantages have seriously been outnumbered by the disadvantages.

I may agree that the Government was aware and taking actions by way of study and Research tours of its representatives as well as through some isolated workshops and meetings with the residents of affected areas. What they have shown the court are some pictures of some several uses of the plants, creation of self-financed farmers' field school and payment of Shs.150,000/= towards the fees towards the project. What happened since the year 2005, we are kept in dark. While these projects are initiated without showing any result on the ground, the plant continues its menace.

Be that as it may, before I consider the whole case, it may be appropriate to dwell on some fundamental issues raised by the Respondents against the propriety of the Petition. They are:

(1) whether the Petition is competent, in its form and contents.

(2) whether the Petitioners have shown any violation of their fundamental rights.

(3) If so, whether the Petitioners' rights as alleged are breached

(4) Whether the remedies sought for are available to the Petitioners.

I intend to deal with first issue for obvious reasons. If we agree as to its incompetency or impropriety, there shall be nothing further for me to decide.

The petition is premised as stated hereinbefore under sections 60, 70, 71 and 75 of the Constitution along with two Acts.

After conceding that the Petitioners have alleged that their constitutional rights are violated and the allegations are serious in nature, it was contended by the Respondents that what is prayed by the Petitioners can be obtained by the procedure prescribed in EMCA. It is stressed that section 3(3) of EMCA provides similar remedies as those provided under section 84(2) of the Constitution. It is also contended that the Petitioners are claiming their personal rights and the Petition not being a public interest case, they ought to have exhausted the statutory actions before knocking at the doors of the Constitutional Courts.

Section 84(1) and (2) of the Constitution provides:

(1) Subject to subsection (6), if a person alleges that any of the provisions of sections 70 and 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained person) then, without prejudice to any other action with respect to the same matter which is lawful available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction—

(a) to hear and determine an application made by a person in pursuance of subsection (1);

(b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3),

and make such orders, issue writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).

Subsection 3(1) and (3) of EMCA stipulate:

3. (1) *Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the Environment.*

*(2) XXXXXXXXXXXXXXXXXXXXXXXXXXXX*

*(3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate to –*

*(a) prevent, stop or discontinue any act or omission deleterious to the environment.*

*(b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment.*

*(c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act.*

*(d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and*

*(e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act or pollution and other losses that are connect with or incidental to the foregoing.*

Close scrutiny of both provisions, as stipulated hereinbefore, would disclose, without much difficulty, the difference in the scope of the two.

Section 3(3) of EMCA only provides the scope of the orders, writs and directions as enumerated in clauses (a) to (e) of subsection (3) of section 3. Section 3(1) is restricted only to the right of clean and healthy environment which could or could not be a part or parcel of one of the rights enshrined in sections 70 to 83 of the Constitution.

Moreover, our supreme law has given an open doors to all whose Constitutional rights are violated or who fear for such violation irrespective of any availability of any other lawful action to them.

I would hesitate to and cannot take a wider interpretation of the provisions of section 3 of EMCA and would not accept that the Petitioner's all claims as alleged would be adequately vindicated by recourse to the High Court under EMCA.

The second objection to the competency is that the Petitioners have not indicated in the title of the Petition, the specific provisions of section 70 and section 75 of the Constitution, which are alleged to have been violated.

The case of Cyprian Kubai v Stanley Kaiyoengi Mwanda (Misc Civil Application 612 of 2002) was cited to support the said contention.

However I do note that in his Ruling Hon. Khamoni J specifically stated that where applicable the sub-

paragraphs of the section alleged to have been contravened plus the relevant act of that contravention be mentioned so that the Respondent and the court shall be in a position to know the nature and extent of the Applicant's case. On general view, I do not see any objection to the said observations, but I am, in this case, not shown how the Respondents or the court have been in difficulty to know the nature or extent of the Petitioners' case and their claims.

I am, on the other hand, of a strong view that in respect of a case where the weighty issues of the Constitution are raised, the courts would appreciate if the parties focus on them rather than to raise technical issues unworthy of the magnitude of the matter.

It was further argued that the Petitioners have failed to provide adequate evidence to prove their allegations and that they have not shown what specific loss and damage they have respectively suffered. In my considered opinion the sufficiency or otherwise of the evidence is an issue of proof of the claims and cannot by itself be a ground to make the matter incompetent or an abuse of the court process.

I may have support for my observations from the case of Albert Ruturi and Ors v The Minister for Finance and Another HC Misc. Application No. 908 of 2000 wherein the court observed:—

"We must be goal oriented i.e. vigilantly uphold the Constitution of Kenya and do justice according to the Law in the context of our Socio-cultural Environment, and avoid paying undue attention to abstract technical strictures and procedural snares merely for the sake of technicality which may have the effect of restricting access to justice which is itself a Constitutional right which cannot be abrogated or abridged by brazen or subtle schemes or maneuvers."

I further observe that in this petition, the court is asked and is expected to interpret the Constitutional Provisions i.e. "*the meaning of right to life and right to the property."*

Obviously, only on this ground, this court sitting as a Constitutional Court shall have jurisdiction to interpret those rights.

I thus come to the conclusion of this issue and reject the objection as to competency of this petition.

Interpretation of Fundamental Rights

With the globalization in the sphere of environmental law and other fundamental human rights of the people, the task of the Judiciary to interpret those rights has, at once, become complex as well as challenging.

Needless to say that the Judiciary as a bastion of the rights of the people is the safeguard and watchdog of the rights which are fundamental to human existence, security and dignity.

Several schools of thought have been in existence on what the philosophy or the approach of the Judiciary should be while exercising those powers donned under the Constitution.

I may not go into details of those schools here, but I do find that it is beyond doubt or debate that in our democratic nation, the old school of thought articulated by Sir Francis Bacon, that "*Judges must be like lions, but yet lions who sit at the feet of the throne*", has no place.

I am however mindful of the principle that the Legislature has the power to legislate and we as

Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in our Constitution.

I shall not like the Constitution to represent a mere body or skeleton without a soul or spirit of its own. I do not expect its makers had aforesaid vision, or that picture for our Constitution.

I shall in conclusion adopt the school of interpretation of the Constitution being a living tree with roots whose branches are expanding in natural surroundings. I do agree it must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits. I thus reject the vehement urge from the Respondents to give a literal meaning to rights enumerated in section 70 of the Constitution.

(A) Right to life:

Section 70 of the Constitution provides:

Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely—

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provision of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms of others or the public interest.

This section, in my humble opinion, sets out the natural and original human rights of mankind which any and every human being should have in order to lead a dignified and secured physical, social and economic life till his natural death. These are unalienable rights of human beings.

All the three learned counsel for the Respondents vigorously argued that the right to life only means right not to be deprived of physical existence as has been spelt out in section 71 of the Constitution. Section 71 of the Constitution provides:

71. (1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.

(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in those cases hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case—

(a) for the defence of any person from violence or for the defence or property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) for the purpose of suppressing a riot, insurrection or mutiny; or

(d) in order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war.

Naturally, this section provides protection of deprivation of physical body of a person except in the circumstances stipulated therein.

The Learned Counsel for the Respondents simply urged that, that is the only right the makers of the Constitution meant by right of life which has been generally granted in section 70 but specified in section 71.

The cases of R.M. and another v A.G. 2006 e KLR, was cited to support their contention that the statutory provision should be interpreted in a limited or strict manner vis-a-vis the International Conventions and the Constitutional Provision.

I may point out that the said case was considering the Constitutionality of section 24 of the Children Act and the court declined that the said section is ultra vires section 82 of the Constitution. After considering that the Children Act, while being aware of the International Convention, was enacted choosing the aspects suitable to the local situation, and the court held what it held in the said case.

The court did not discard the possibility of the court adopting broader view or using the living tree principle of the interpretation of the Constitution where there are, amongst others, including ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation.

The court also approved the interpretation of the right to life in P.K. Waweru v A.G. Others (2006) 1 KLR (E & L) 677. They also recognized that the case was in the field of environmental law and thus the court did rule that life was more than soul and body.

I may add here that even though in our Constitution the words '*human rights'* is not found, its chapter V, if acted upon in its true letter and spirit, is a complete charter of human rights. That includes section 70 which is the basis, or better, the soul and heart of the fundamental rights. In my considered opinion, Sections 71 to 83 are not the definitions or interpretations of the basic human rights capitulated in section 70 as the learned Defence Counsel would like us to see.

I get strength in so stating from the very words of section 84(1) which mentions infringement of rights granted in sections 70 to 83. If what the learned counsel are contending is true than nothing would be easier for the makers of the Constitution not to include section 70 amongst other sections. This fact strongly shows that section 70 grants rights which are inalienable and they are not included or interpreted in any of the sections from 71 to 83. That section has, in my considered view, a place of its own and cannot be diluted or limited or interpreted by any other sections of the Constitution.

In the conclusion I would boldly state that the 'right to life' including the right to live with human dignity would mean the existence and continuance of such right up to the end of natural life. Taking any lesser interpretation will be an affront to the dignity of human life and any hindrance or limitation to enjoy the right to live would be derogation of the most fundamental right of any human being, and I do hold so.

Thus I would without hesitation agree to the observations made in the Waweru's case when they said

while interpreting section 71, that right of life is not just a matter of keeping body and soul together.

Thus, in my considered view, right to life does include a clean and healthy environment which guarantees the full enjoyment of natural resources of the nation and earth.

(B) Right to property:

Once again I am cajoled to accept literal meaning of this right to be synonymous with compulsory acquisition by taking possession of the property.

Section 70 sub clause (c) mentions protection for the privacy of the home and other property and from deprivation of property without compensation.

Looking to the language of the said sub-clause as well as that of section 75 I am of the opinion that right to property does not only mean right from compulsory acquisition by any person or organ of the Government.

Section 71, also grants the security of home and that of other property.

In this case, it shall be sufficient to observe that fundamental human right of property and its protection can be breached by other means in the modern age, and I shall hesitate to stick to the strict interpretation of the right as a lion sitting on the foot of the throne.

I adopt the observation made in the case of Martha Karua v Radio Africa Ltd t/a Kiss F.M. Station & 2 Others (2006)e KLR at page 14 namely *"perhaps we should also add that the fundamental rights and freedoms have over the years acquired an international dimension which can no longer be ignored by the municipal courts. Courts should therefore recognize that there is international public law dimension to the chapter 5 (right and freedoms) and also that the interpretation should also be guided by the underlying of the right or freedom."*

Moreover, I need not stress or observe that the tenacity of the observations made in R. v. El Mana (1969) EA 357 is largely whittled down over the time and during development of the Constitutional Law in our jurisprudence.

In the premises I do hold that what Section 75 confers is the right of the government to acquire private properties as prescribed therein. Section 75 was very necessary to be a part of the constitution, so as to allow the government to acquire properties for public interest and purposes. In short it is an exception to the general right of property enshrined in Section 71 of the constitution.

Whether the Petition is a Public Interest case –

Although this issue is not directly canvassed by any of the parties except by cursory remarks from the counsel for the Respondents. I feel it is my obligation to take up the same considering the circumstances and serious impacts on the people and environment due to introduction of the plant.

I have reiterated and shall do it once more that serious adverse effects of the plant have been observed and the problem is loudly recommended to be addressed on the most urgency basis.

Section 3(1) of EMCA stipulates that every person in Kenya is entitled to a clean and healthy environment.

Section 3(3) gives remedies for contravention of the said right.

Section 3(4) gives the right to any person to knock the door of the court by stipulating:— namely,

"(4) A person proceeding under subsection (3) of this shall have the capacity to bring an action notwithstanding that such a person cannot show the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided such action:-

(a) is not frivolous or vexatious; or

(b) is not an abuse of the court process"

This provision thus speaks a volume of a person's locus standi as in the case of the public interest.

I shall, like the court in Rodgers Mwema Nzioka v A.G. & Others (2006)e KLR at page 16 did, adopt a portion from the case of Booth v Mombasa Water Company Misc. Application No.1052 of 2005.

"Our constitution is not a cloud that hovers over the beautiful land of Kenya – it is linked to our history, customs, tradition, ideals, values and on political, cultural, social and economic situations. Its dynamics and relevance is deeply rooted in these values. Cut off from these factors it would become redundant and irrelevant. I refuse to accept that the Constitution is a skeleton of dry bones without life and spirit. The least it is expected to have and which we cannot deny it is the spirit of its framers. To me we must give it much more".

Like the court in the said case of Rodgers Muema Nzioka vs A.G. H.C. Petition No. 613 of 2006, I also cannot be persuaded to limit the ambit of public interest or agree to confine it only to past definitions or categories. Our Constitution inspires us to give public interest the widest leverage and to uphold it.

I do not think that the facts and circumstances of this case can give me any option but to treat the case as a public interest case, and I do so hold.

The next question to be dealt is whether the right to life and right to property of the Petitioners as alleged are proved and whether they are violated and if so by whom.

It is contended that all the Petitioners are ordinary residents and communal land owners of all that land forming the geographical area known as Marigat Division in Rift Valley province of the Republic of Kenya and they with other residents of the area are pastoralists and engage in small scale farming for sustenance and livelihood.

They have particularized the injurious harm of the Plant which are specified hereinbefore.

The 1st Petitioner was the chief of Ngambo area from November 1968 to 1993. He has vividly stated in his affidavit how the plant was introduced in or about 1982. He named the officials of FAO and Forest Department who approached him. He depicts the picture of Ngambo before its colonization by the plant and its aftermath. He also avers that his homestead was invaded by the plant and that he was forced to vacate his home.

He then mentions the actions which he with others took to address the problem and to seek intervention from the Government and that till to-date no substantive action is taken to arrest the grave situation.

I have, in earlier part of this judgment detailed the actions, damages by the plant, directions by Public Complaints Commission and recommendations by several experts to address the situation.

Supporting affidavits filed by the Petitioners also showed that 9th and 10th Petitioners suffered physical injuries by being tricked by thorns of the plant which resulted in amputation of toe and severe cellulites as well other injuries. The plant having interfered with roads and paths makes it difficult for the children to go to school. The people have been made homeless and nursery school of the area is closed.

I have also observed the views of researchers and ex-director general of NEMA agreeing in all fours with the Petitioners as regards the serious and dangerous effect from the plant on humans, animals and natural resources.

I also note that, in the meetings held to address the management of the Plant called by Governmental authorities in conjunction with NGOs, the majority number of the public had recommended the eradication of the Plant.

In the papers presented by various experts in the replying affidavits, it comes out loud and clear that Government has not given a clear policy on plants' utilization, management and control, as it seems to view that plant's disadvantages have been dramatized out of proportions and that in absence of any appropriate approach there will be continued resentment from the local people, as they are not guided as regards what to do in these difficult circumstances.

With all the relevant information I have, from the documents and affidavits produced by all parties, it shall be a an understatement, if I cannot boldly state, that there is a serious problem faced by the residents of Ngambo, whose daily life is hampered due to the colonization of the plant. Their children are not having full scope of their right to enjoy the land on which their ancestors lived their lives, their animals are deprived of grazing pastures and are in continuous threat of being adversely affected by pods, and that the people are severally improvised.

Their right to live a dignified life is jeopardized by the existence of the colonizing plant. The Petitioners are residents of this area and, without anything more and simply from the circumstances of the case, I shall have no hesitation to find, and I do so, that there is an infringement of their right to life as understood by the makers of the Constitution and the signatories of Rio Declaration noting that the Government of Kenya being its signatory.

I shall also refer to the interpretation of the word 'person' in section 123 of the Constitution which includes a body of persons corporate or unincorporated to reinforce my finding that the right to life of the Petitioners are violated in the circumstances of this case.

Similarly it is averred that the residents of Ngambo were using the Community land as pastoralists and small scale sustenance farmers. This fact is not overtly denied. Their homes were made inhabitable and they are unable to undertake their acts of livelihood on the communal land. This inability is as a result of plant and its colonalization.

It is common ground that the land in question is trust land and as per section 115(1) of the Constitution the same is vested in the county council. I shall note provisions of section 115 which stipulates:

115. (1) All Trust land shall vest in the county council within whose area of jurisdiction it is situated:

Provided that there shall not vest in any county council by virtue of this subsection—

(i) any body of water that immediately before 12th December, 1964 was vested in any person or authority in right of the Government of Kenya; or

(ii) any mineral oils.

(2) Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual;

Provided that no right, interest or other benefit under African customary law shall have effect for the purposes of this subsection so far as it is repugnant to any written law.

(3) Notwithstanding subsection (2), provision may be made by or under an Act of Parliament enabling a person to be granted a right or interest to prospect for minerals or mineral oils on any area of Trust land, or to extract minerals or mineral oils from any such area, and the county council in which the land is bested shall give effect to that right or interest accordingly:

Provided that the total period during which minerals or mineral oils may be prospected for on, or extracted from, any particular area of land by virtue of any grant or grants while the land is not set apart shall not exceed two years.

(4) Subject to this Chapter, provision may be made by or under an Act of Parliament with respect to the administration of Trust land by a county council.

Thus as per the law the city council shall hold the trust land for benefit of the persons who are ordinarily residents and shall give effect to such rights etc under the African Customary Law.

Without anything to the contrary shown, the residents of Ngambo had right or interest on the land and to use the same as they have alleged. There is no denial that the residents were not using the land as such.

It is urged by the Respondents that the Petitioners have not shown any legal right and that no specific purpose is set apart by the county council as per section 117(1)(c) of the Constitution.

Although the arguments as canvassed may look attractive or convincing initially but after closely perusing the said provisions of section 117 quoted below, I do not think the said argument is well placed.

Section 117 – stipulates:

117. (1) Subject to this section an Act of Parliament may empower a county council to set apart an area of Trust land vested in that county council for use and occupation —

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

or

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

(c) by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof, and the Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be effected.

(2) Where a county council has set apart an area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.

3. Where a county council has set apart an area of land in pursuance of this section, it may, subject to any law, make grants or dispositions of any estate, interest or right in or over that land or any part of it to any person or authority for whose use and occupation it was set apart.

4. No setting apart in pursuance of this section shall have effect unless provision is made by the law under which the setting apart takes place for the prompt payment of full compensation to any resident of the land set apart who—

(a) under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land; or

(b) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart,

5. No right, interest or other benefit under African customary law shall have effect for the purposes of sub-section (4) so far as it is repugnant to any written law.

I say so because of the simple and clear language of section 115(2) which imposes obligations on the county council to hold the land for benefit of ordinary residents and give effect to such rights, interest or other benefits in respect of the land vested in them.

Section 117 has a different purpose to serve which provides for the compensation for residents who had interest vested as per section 115. The primary object of the Trust land is to be held for the purposes stipulated in section 115 of the Constitution.

I thus agree with the Petitioners that as residents of Ngambo their community right enshrined in the Constitution has been deprived.

Having found so I shall now proceed to determine the issue as to who was responsible for the violation and how far they are liable for such violation.

The Petitioners have blamed the Government, the Minister of Environment and National Resources and NEMA for degradation of the environment and the breach of their rights as alleged.

Particulars of their respective failures are enumerated in the petition—namely;

12. The Government of Kenya (read 1st and 2nd Respondents) is liable for the damage and loss brought about by the weed Prosopis Juliflora.

Particulars:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The three Respondents have denied that they have committed failures of their duties – constitutional or statutory — and have filed replying affidavits:

1. Affidavit sworn by the Minister Hon. Professor Kivutha Kibwana sworn on 31st May, 2007.

2. Affidavit of Simon Choge, a Senior Research Officer Institute sworn on 25th May, 2007.

3. Affidavit of Dr. Avington Muusya Mwinzi, the Director General of NEMA sworn on 13th October, 2006.

I may point out that the documents annexed to affidavits of Simon Choge and Dr. Mwinzi are mostly duplicated.

In short, the affidavit on behalf of the 3rd Respondent categorized the various projects of Research undertaken by NEMA. It also refers to the recommendation of Public Complaint Committee which is also relied upon by the Petitioners.

Similarly the affidavit mentions the Ministerial Statement observed herein before and relied upon by the Petitioners.

Thus in short NEMA denies that it has failed to comply with its statutory duties prescribed under section 9 of EMCA.

The affidavit of the Minister refers to a pilot project and research by Simon Choge. It gives background of the introduction of the Plant.

Like the submissions made by the counsel that the introduction of the plant was not at the behest of the Government, the affidavit of the Minister also avers the same. But the exhibits annexed to the research with reports do mention that the Government was a joint partner with the institutions and/or organizations which initiated the Plant. In paragraph 12 of the affidavit however it is stated that the Government encouraged afforestation programmers in many parts of Kenya in 1970s and 1980s. I also note that there is no substantiation in the averments of non involvement of the Government when the 1st Petitioner has specified names of the officers of the Government Department who approached him to introduce the plants. The Minister has also agreed that the land is communally owned (Para 18 of the affidavit).

In short, it avers the benefits of the Plant and stresses on the necessity of a policy to manage and supervise the plants without mentioning the policy or even the proposed plans to be undertaken. He explains his Ministerial Statement by stating he was not properly briefed when he made the same.

The affidavit, we observe specifically, has no documents annexed to substantiate his averments.

The second affidavit of Simon Choge has been appropriately dealt with in earlier part of this Judgment. In short the facts of the case of the Respondents also point out definitely that the plants have posed serious adversity and even though eradication may not be possible financially or practically, no attempt to show or make any specific plan or policy to evade the problem is coming forth.

I also note with anxiety that the Minister has not, apart from total lack of policy, asked for budgetary provision to address the problem. From their own case it emerges that the Government of South Africa has made huge budgetary provision to address similar problem.

It is thus quite clear that at present the Government is without a policy or a financial plan. I entirely agree with the Petitioners in this respect.

I agree without reservation that the plants have become dangerous and that the Government is just showing a feeble semblance of any efforts to solve the grave situation on ground.

I shall also venture to state that even if the Government was not initially involved in the introduction, which I respectively reject in view of the facts of the case, can the Government be trusted to be left with the problem when it has not till to-date done anything substantive despite being aware of the seriousness for a long time?

I am aware the court was told, Government works after formation of policy which is yet to be developed. In absence of any proposed policy or financial plan, it shall be absolutely unjust to leave the solution of this grave matter to the government.

What this court should do in face of this obvious indifference from the Government?

I do reiterate my observations and findings made hereinbefore and in the circumstances of the matter and in the premises aforesaid I would give following directions so that the Petitioners' case is substantially vindicated.

(a) That a right to a clean and healthy environment free from pollution of any kind that is detrimental to human health, wealth and/or socio-economic well being and ultimately the human life is a fundamental right to life as enshrined in Section 70 of the Constitution of Kenya.

(b) That the right to a clean and healthy environment is fundamental attribute of people and the aggression to the environment occasioned by the week Prosopis Juliflora amounts to a breach of this right which this Hon. Court is empowered to address and remedy accordingly.

(c) That the introduction of the weed Prosopis Juliflora has caused and continues to cause more harm than good to the environment and its harmful effects and damages far surpass any reasonable and beneficial use that it could be put to and it thus ought to be eradicated and/or managed with expediency.

(d) That the Petitioner's right of life as set out in (a) is compromised by the introduction of the week Prosopis Juliflora to warrant the intervention by a constitutional court.

(e) That the failure by the Ministry for Environment and Natural Resources to take affirmative steps towards eradication of the weed/plant Prosopis Juliflora amounts to breach of the right to own property.

(f) That a commission comprising of technical and local experts be appointed by the Government under terms and reference to be set out by this Honourable Court inter alia to:

*i. Assess and quantify the loss visited upon the environment and to the residents of Baringo District by the weed Prosopis Juliflora.*

*ii. Assess and quantify the loss resulting from the introduction and non-action by the Government.*

*iii. Assess injury to persons and commensurate and make a finding and report to court its assessments and findings.*

*iv. Assess and ascertain the injuries occasioned to individuals resident in the areas affected by the weed Prosopis Juliflora and recommend commensurate monetary compensation thereto.*

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

g. 1st to 2nd Respondents to implement the Public Complaints Commission recommendations with respect to the complaint on Prosopis Juliflora in PCCC No.67 of 2005 between Community Museum of Kenya and Kenya Forestry Research Institute and Food Agricultural Organization.

h. The Costs to the Petitioners by the 1st and 2nd Respondents.

I am really grateful to the studious and well reasoned judgments by Hon. Mr. Justice Aganyanya and Hon. Lady Justice Ang'awa. I also express my appreciation to all the counsel before the court for their immense and learned assistance.

As Ang'awa J. has substantially agreed with my findings, we shall grant the orders given in her judgment and my judgment and allow the Petition accordingly.

Dated and signed at Nairobi this 11th day of December 2007.

K.H. RAWAL

JUDGE

11.12.07