REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ENVIRONMENT AND LAND CASE NO. 273 OF 2013

JOSEPH LEBOO & 2 OTHERS.....PLAINTIFFS

VS

DIRECTOR KENYA FOREST SERVICES & ANOTHER.....DEFENDANTS

(Application for injunction; applicants seeking to have respondents restrained from permitting the harvesting of trees from certain Blocks of Forests; principles upon which the court will determine an application for injunction; locus standi, whether the applicants have locus standi; locus standi in environmental disputes; community participation in forest management; proper procedure and requirements of the Forests Act and the rules in harvesting of trees and forest materials; whether prima facie case established; whether the applicants have demonstrated that the respondents failed to follow proper procedure; balance of convenience; whether the same lies with the applicants or with the persons to exploit the timber; prima facie case demonstrated; balance of convenience in any event lies on the side of conservation; application allowed; tree harvesting stopped pending hearing of the suit)

RULING

1. The application before me is the motion dated 6 May 2013 filed by the plaintiffs and brought pursuant to the provisions of Section 1A, 1 B, 3A of the Civil Procedure Act, Chapter 21, Laws of Kenya, and Order 40 Rule 1 of the Civil Procedure Rules, 2010, and "any other enabling provision of the law". The applicants are seeking orders that the respondents, their agents, servants and/or anybody claiming through them, be restrained from harvesting timber and fuel materials in eight blocks of Lembus forest within Baringo County, pending the hearing and determination of this suit. These 8 Blocks are Sabatia, Maji Mazuri, Kiptuget, Chemususu, Naivasha, Koibatek, Chemurgok and Esegeri.

2. The grounds upon which the application is based are that :-

a. The respondents have illegally allocated pre-qualified and unqualified saw millers to harvest timber and firewood materials in Lembus forest.

b. The laid down procedures as per the Forest Participation in Sustainable Forest Management Rules 2009 and the Forest Act has not been adhered to.

c. The community has not been involved as per the law governing the harvesting of timber and firewood from the forests.

d. The allocated saw millers are harvesting trees they were never allocated.

e. The respondent through pre-qualified and unqualified saw millers are harvesting unspecified trees.

f. The plaintiffs stand to suffer irreparable loss.

3. The application is supported by the affidavit of Joseph Leboo, the 1st plaintiff. He is the Chairman of the Lembus Council of Elders. The other plaintiffs are secretary and treasurer of the Council of Elders. Leboo has deponed that the respondents have illegally allocated pre-qualified and unqualified saw millers to harvest timber and fuel materials from the Lembus forest, without involving the community, in accordance with the law governing the harvesting of timber and firewood from forests. He has averred that the respondents did not follow the laid down procedure as per the Forest Participation in Sustainable Forest Management Rules, 2009 and the Forests Act, (Act No. 7 of 2005). He has further deponed that the saw millers are harvesting trees that they were never allocated and are also harvesting unspecified trees. He has stated that concern has been raised by environmentalists, and the entire local administration, about the massive destruction of forests. It is his view that they stand to suffer irreparable loss, and that unless the court intervenes, the environment will be completely distorted.

4. The application is opposed, but before I go to the gist of the reply, it is prudent that I give a little background to this suit.

5. This suit was instituted by way of plaint by the 3 plaintiffs who are Committee Members of the Lembus Council of Elders. The first defendant is the Director, Kenya Forest Service and the second defendant is the Forest Co-ordinator within Baringo County, where the subject forest blocks are situated. It is pleaded that in the month of March 2012, the defendants allocated pre-qualified and unqualified saw millers to harvest timber in the subject forest blocks. It is the claim of the plaintiffs that the defendants did the allocation without following the laid down procedure in accordance with the Forest Participation in Sustainable Forest Management Rules, 2009, which rules are made under the Forests Act, 2005. They have further pleaded that the harvesting by the saw millers was being done without a management plan being put in place as per the Forests Act, 2005. The plaintiffs have averred that the Lembus Council of Elders, who are beneficiaries of the forest, were never consulted nor involved, contrary to the law. They have stated that the community is in charge of maintaining the forests and are supposed to share in the proceeds of the said forests but have been left out. The main prayer sought in the plaint, is for the defendants to be restrained by way of a permanent injunction, from the illegal and irregular harvesting of timber and fuel wood materials, from the subject forest blocks. The plaintiffs also want the illegal allocation of harvesting timber nullified.

6. The defendants filed a Defence in which they denied the plaintiff's claims. They stated that the saw millers harvesting trees in the subject forest are qualified saw millers, who were awarded tenders, to harvest trees. They have denied the allegation that unqualified saw millers were awarded tenders to harvest any trees. They have asserted that all the laid down procedures and laws were followed in the tendering process, and in the allocation of trees to be harvested, by the successful saw millers. They have averred that the trees allocated to each saw miller are specific. They have further averred that there is a management plan for the year 2011-2015, which was prepared in the year 2011. They have contended that the Lembus Council of Elders is a stranger to them, and that the allegation that they are beneficiaries of the forest, is unfounded. They have also contended that the Lembus Council of Elders have no *locus standi* to file suit, and that they were not under any obligation to consult, or involve the Lembus Council of Elders, before harvesting the trees. They have put forth that the community was duly consulted and involved through the Forest Association in accordance with the laid down rules and regulations.

7. The plaintiffs/applicants first appeared before me *ex-parte* on 6 May 2013, and sought interim orders of injunction to restrain any further felling of trees, or the removal of forest materials from the subject forest, pending the hearing *inter-partes* of this application. I considered the request and granted the same. The order certainly affected the tree harvesters, and soon, an application was filed by the Timber Manufacturer's Association, and Comply Ltd (a private saw milling entity), to be enjoined to these proceedings as interested parties. I heard the application for joinder, and through a ruling delivered on 20 June 2013, I allowed the Timber Manufacturer's Association, and Comply Ltd, to be enjoined as

interested parties to these proceedings.

8. I also permitted the interested parties to file affidavits either in support, or in opposition, to the application for injunction. The interested parties filed replying affidavits, and it is clear, that they oppose the application for injunction. This application for injunction is therefore opposed by both defendants and the interested parties. It is now probably the opportune time for me to reveal the nature of objection, raised by the defendants and the interested parties, in their replying affidavits.

9. The replying affidavit of the defendants has been sworn by one Anthony K. Musyoka, who is the Ecosystem Conservator of Baringo County, of the Kenya Forest Service (KFS). Among other matters, he has deponed that the KFS resumed the harvesting of trees in the year 2010, after an eleven year ban. He has explained that Baringo County has a total gazetted forest cover of 70,252 hectares, out of which 16,523.76 hectares are under plantation forest, with the rest being catchment, biodiversity and conservation areas. He has stated that the Board of Management of KFS, on realizing that most plantations were over mature and deteriorating, approved the resumption of harvesting, to avoid loss of revenue. He has further stated that the trees to be felled were identified, and a five year felling plan was developed and approved by the Board of Management, KFS. The said plan was annexed in his affidavit.

10. He averred that the pre-qualification of saw millers is done "at a conservancy basis" by taking into consideration the financial and technical capacities of saw millers. He explained that the applicants are forwarded to the Forest Conservation Committee (FCC), for further evaluation and approval, and the approved names are forwarded to KFS Headquarters for licencing. He annexed a list of pre-qualified saw millers to his affidavit. He contended that the assessed plantation materials are subjected to a competitive tendering process as per procurement regulations, with all pre-qualified saw millers and fuel wood operators participating. Successful bidders are issued with "authority allocation letters", to harvest materials, once they have met set conditions. He annexed minutes and a bundle of allocation letters to his affidavit. He stated that the tendering process is only restricted to those who have been pre-qualified and there are no unqualified saw millers operating in Baringo County.

11. He further averred that the trees to be felled are marked, and that, there cannot be harvesting of unspecified trees. He further stated that the harvesting of plantation trees cannot be equated to "massive destruction", as the process is regulated through harvesting plans, to ensure sustainability. He denied that charcoal burning is allowed. He admitted some destruction of Kiplombe forest block owing to invasion by neighbouring forest communities but stated that they have taken measures to curb these illegal activities.

12. He added that KFS is currently developing "management plans", for all forests, including Lembus forest, and thereafter a "Forest Management Agreement" will be entered into with the communities to ensure benefit sharing.

13. The Timber Manufacturer's Association filed its replying affidavit through Benard Gitau Kimani, who is its Chairman. He had deponed that the saw millers are duly licenced to harvest forest produce in Baringo County, where the subject forest blocks are situated. He has stated that the saw millers are currently suffering losses, as a result of the interim order that I issued, and that a majority of them are servicing loans. He has stated that the saw millers have paid KFS millions of shillings to harvest trees which are ready for harvesting, but which they cannot now access, owing to the interim order that I issued. He averred that as pre-qualified saw millers, they undergo a competitive tendering process, after which they are issued with authority letters, to harvest forest materials, duly identified by KFS. He contended that their operations are within distinct boundaries and the trees to be felled are marked. In his view, if there are people destroying the forest, it is the neighbouring communities among the members of the plaintiff.

14. He pointed out that no miller has been arrested or charged in court with destruction of any forest. He asserted that at all times the communities are involved, and at no time are they by-passed. He deponed that the orders of injunction sought by the plaintiffs will directly affect the operations of the millers who depend on the raw materials obtained from the forest. He also contended that this court has no jurisdiction

to grant an injunction against KFS, which in his view, is a government agency, and that the plaintiffs are an amorphous body without capacity to sue. He asked that the plaintiffs be ordered to deposit security for costs since they do not appear to be people that can easily be found. He also averred that the applicants have not shown how they will suffer if the orders of injunction are not granted.

15. Comply Ltd on its part filed a replying affidavit through Nilesh Mehta, its General Manager. He stated that Comply Ltd has been duly licenced, to remove and plant trees, in Lembus forest. He averred that the company has been remitting the requisite fee and has incurred substantial financial resources towards procuring licences. He denied that unqualified saw millers operate in the area. He explained that harvesting of plantation trees is a regulated process through harvesting plans to ensure sustainability. All harvesting of trees were from authorized harvesting sites.

16. The plaintiffs filed further affidavits to rebut the contentions of the respondents and interested parties. They contested the allegation that they have been involved by the respondents. They also added that no Environmental Impact Assessment (EIA) was ever undertaken before the felling of trees was authorized. They contested the assertion that the FCC and the Community Forest Association (CFA) was consulted.

17. At the hearing of the application, Miss. Elizabeth Rotich and Mr. Tengekyon, learned counsels, appeared for the plaintiffs and they urged me to allow the application for injunction. Miss. Rotich summarized the case of the plaintiffs as being that the defendants have allowed the harvesting of timber in disregard to the Forest Act, 2005; the Forest Harvesting Rules, 2009; the Forest Participation in Sustainable Management, 2009 Rules; and the Environmental Management and Coordination Act (EMCA). She stated that there has been violation in the following ways :-

(a) That the forest to be harvested has not been demarcated by the defendant as required by Rule 13 of the Forest Participation in Sustainable Management Rules (hereinafter FPSM Rules).

(b) That no management plan has been put in place as required under Rule 11 of FPSM Rules.

(c) That the community within the forest has not been consulted as required by Rules 41 and 42 of FPSM Rules.

(d) That no EIA has been prepared as required by Sections 48, 58, 59 and Schedule 2 of EMCA.

(e) That the respondents have not shown that the trees to be harvested were marked as required by Rule 10 of the Forest Harvesting Rules (FH Rules), 2009.

(f) That no proper licence for harvesting has been issued as required by rule 22, FH Rules. She pointed out that none of the parties have displayed a harvesting licence.

(g) That the defendants have permitted charcoal burning in the forest.

(h) That the defendants have permitted the harvesting of indigenous trees in Sabatia forest block.

(i) that the respondents have not demonstrated a competitive bidding process as per Rule 17 FPSM Rules. She averred that it is the highest bidder who ought to be given the tender.

18. She further asserted that the community has not been consulted as required by Part 4 of the Forests Act, 2005, and that the respondents, have not shown that any Community Forest Association exists. As to the capacity of Lembus Council of Elders, she stated that the same is an existing body, and ought to have been consulted by the respondents, and that they have locus. She contended that the respondents must follow proper procedure as set down by the statutes before allowing timber harvesting. As to the list of licencees displayed by the respondents, Miss. Rotich pointed out that the same is undated and unsigned, and that Comply Ltd does not even appear in that list. It was her view that the interested parties have not assisted in any way, to demonstrate that proper procedure was ever followed, and that , they have taken an active role in the destruction of the forest. She stated that none has displayed a valid licence.

19. Mr. Maritim, learned counsel for the respondents, contested any reference to EMCA. He contended that the plaintiffs have not pleaded in their plaint any violation of EMCA. He relied on the replying affidavit of Antony Musyoka to demonstrate that proper procedure was followed. As to consultation, Mr. Maritim was of the opinion that Rule 41 of the FPSM Rules are not couched in mandatory terms. He argued against the perception that the harvesting of trees is tantamount to destruction and that management of forests involves both harvesting and re-planting.

20. Mr. Mongeri, learned counsel for the Timber Manufacturer's Association, raised several points of law in opposing the application. He *inter alia* asked that the further affidavit of the plaintiffs be expunged as it was not filed with leave; that the defendants have been wrongly sued as Section 4 of the Forests Act, 2005, establishes the KFS with capacity to sue and to be sued, and that it is KFS which ought to have been sued; that an order of injunction cannot issue against KFS pursuant to Section 16 (2) of the Government Proceedings Act, Chapter 40, Laws of Kenya, as KFS is a government agency; that no authority to swear the affidavits has been annexed by Joseph Leboo as required by Order 1 Rule 13 of the Civil Procedure Rules, 2010; that the title of the application only refers to the Civil Procedure Rules and there should be no reference to any other statute. In answer to the contention that none of the parties annexed any licence to harvest trees, Mr. Mongeri stated that the licences are attached to the application for joinder as interested parties. It was his view that the applicants have not demonstrated a *prima facie* case to warrant an injunction. He was also of the view that the balance of convenience lies, with the respondents and interested parties, as the saw millers have paid millions of shillings and stand to suffer the most loss. He stated that the plaintiffs have no interest in the forest and that the mandate of conserving the forest lay with KFS, who have discretion on who ought to participate, in the management of forests.

21. Mr. Koech, learned counsel for Comply Ltd, associated himself with the submissions of Mr. Maritim and Mr. Mongeri. He added that Comply Ltd is duly licenced and that if the injunction is granted, his client stood to suffer irreparable loss.

22. I have considered the application, the material in support and in opposition, and the submissions of counsels. This is an application for injunction. In the case of ***Giella vs Cassman Brown (1973) EA 358***, the Court of Appeal provided the guidelines to be followed by the court when faced with an application for injunction. The court of appeal stated as follows :-

> *"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.*

23. It also ought never to be forgotten that when faced with an application for injunction, the court is essentially being asked to make a decision, on how best to preserve the subject matter of the dispute, pending the hearing and determination of the suit.

24. If I am to summarize the case of the plaintiff's, it is their position that the harvesting of trees has not been in accordance with the requirements of the Forests Act, 2005 and various rules thereunder, and that the requirement of an EIA, has not been fulfilled as required by EMCA. The applicants have particularly singled out the FPSM Rules, and the Harvesting Rules. Before I go into the nitty-gritty of the core issues, I think it is important first to sort out some preliminary points of law that were raised.

25. It was raised by the respondents and the interested parties, that the plaintiffs have no *locus standi* to sue in this matter. It was their argument that the mandate to protect forests is that of KFS and the plaintiffs have no business in the same. This suit raises fundamental questions on the management of forests which is a public good. In my view, any person is free to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such person to demonstrate, that the issues being raised, concern him personally, or indeed, demonstrate that he stands to suffer individually. Any interference with the environment affects every person in his individual capacity, but even if there cannot be demonstration of personal injury, such person is not precluded from raising a

matter touching on the management and conservation of the environment. In other words, in an environmental matter, *locus standi* as known and applied under the common law, is not applicable. Kenya has indeed adopted this position in the Constitution. I can particularly single out Articles 42 and 70 which provide as follows :-

Article 42. Every person has the right to a clean and healthy environment, which includes the right—

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

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

> *(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;*
>
> *(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or*
>
> *(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.*
>
> *(3**) **For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury**.* (emphasis mine)

26. A reading of Articles 42 and 70 of the Constitution, above, make it clear, that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.

27. This position was in fact the applicable position, and still is the position, under the Environment Coordination and Management Act (EMCA), 1999, which preceded the Constitution of Kenya, 2010. Section 3 thereof provides as follows :-

> ***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) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.*
>
> *(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 of pollution and other losses that are connected with or incidental to the foregoing.

(3) ***A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury*** *(emphasis mine) provided that such action—*

(a) is not frivolous or vexatious; or

(b) is not an abuse of the court process.

(5) In exercising the jurisdiction conferred upon it under subsection (3), the High Court shall be guided by the following principles of sustainable development;

(a) the principle of public participation in the development of policies, plans and processes for the management of the environment;

(b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment are not repugnant to justice and morality or inconsistent with any written law;

(c) the principle of international co-operation in the management of environmental resources shared by two or more states;

(d) the principles of intergenerational and intragenerational equity;

(e) the polluter-pays principle; and

(f) the pre-cautionary principle.

28. It can be seen that Section 3(4) above permits any person to institute suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. Litigation aimed at protecting the environment, cannot be shackled by the narrow application of the *locus standi* rule, both under the Constitution and statute, and indeed in principle. Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest, that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment. I am therefore not in agreement with any argument that purports to state that the plaintiffs have no *locus standi* in this suit.

29. The second point of law that I wish to tackle, is the argument that this suit is bad in law as the persons sued have no capacity to be sued. The issue was raised, that it is the KFS which ought to be sued. I have seen no provision of the law, and none was provided to me, which bars any suit against the Director of the Kenya Forest Service in that capacity. Neither have I seen any law, which bars any suit against the very person who is in charge of the forests, who is the 2nd defendant. I agree that probably it would have been best to sue KFS, or at least enjoin KFS as defendants in this cause, but there is no law broken in suing the Director KFS, and the Baringo County Forest Co-ordinator. In any event an appropriate amendment can

be made to introduce KFS into this suit, without changing in any way the character of this litigation.

30. It has also been argued that an order of injunction cannot issue against the KFS. First, this suit strictly as filed is not against KFS. But even it were, there is no law that states that an injunction cannot issue against the KFS. Reliance was made on the provisions of Section 16 (1) of the Government Proceedings Act, Chapter 40, Laws of Kenya. The said Section 16 states as follows :-

> ***16.*** *(1) In any civil proceedings by or against the Government the court may, subject to the provisions of this Act, make any order that it may make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:*
>
> *Provided that -*
>
> *(i) where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and*
>
> *(ii) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property, or to the possession thereof.*
>
> *(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order will be to give any relief against the Government which would not have been obtained in proceedings against the Government.*

31. KFS is not a government agency, but a statutory body created by Section 4 of the Forests Act, 2005, and a suit against KFS, or against any of its personnel, is not a suit against the Government. The provisions of the Government Proceedings Act do not apply to the KFS, or to a suit against its personnel. I will say no more on this argument.

32. It was also argued that the supporting affidavit is defective for want of an authority to swear. The affidavit sworn by the 1st plaintiff was sworn on his own behalf and on behalf of the other plaintiffs. The deponent is Chairman of the Lembus Council of Elders and the other plaintiffs are Secretary and Treasurer. I do not doubt any capacity of the plaintiff to swear the affidavit on his own behalf and on behalf of the others. Even if no authority was displayed, the deponent is a litigant, and at worst the affidavit may be deemed to be his own affidavit. I am unable to strike out the said affidavit for want of an authority. It was also raised that I ought to strike out the further affidavit of the respondents as it was filed without leave. But I have seen from the record that I indeed gave leave to the applicants to file the further affidavit, and in the premises, any objection to the further supporting affidavit is unwarranted.

33. An issue was raised, that the applicants, in the title to their application, only made reference to the Civil Procedure Act, and therefore there ought to be no reference to any other provision of the law. That cannot be the position. Order 51 Rule 10 provides as follows :-

> *(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.*
>
> *(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.*

34. No doubt, it is a desirable practice to have all statutory provisions relied upon in an application stated, but, a failure to do so, does not make the application defective, and neither does it preclude the

applicant from relying on statutory provisions that have not been indicated. This argument also fails.

35. Let me now go to the substance of the case. The point raised by the plaintiffs is that there are various violations of the Forests Act, the Rules thereunder, and EMCA.

36. First the plaintiffs have stated that they have not been involved as a community. The counter-argument is that the community has been involved, and even if they have not, KFS is under no obligation to involve the plaintiffs as they are not a forest community organisation. However, despite stating that the community has been engaged, no documents were displayed by the respondents to show any engagement with the community. Public participation is an important component of environmental management. This is indeed enshrined in the Constitution at Article 69 (1) (d) which provides that the State *"shall encourage public participation in the management , protection and conservation of the environment"*. No sort of public participation has been demonstrated by the respondents apart from stating that 60 community scouts were hired from Esageri CFA. The applicants have averred that they needed to be consulted in any exploitation of the forests. Even if the respondents thought that the applicants don't deserve to be involved, then they ought to have involved the CFAs which has not been demonstrated. I think prima facie, the applicants have demonstrated that there was a need for public participation which the respondents never satisfied.

37. An important issue which does not seem to be in dispute is that there is no management plan for Lembus Forest, despite the same being mandatory. Antony Musyoka, in his affidavit, at paragraph 24 deponed as follows :-

> *"Kenya Forest Service is currently developing management plans for all forests including Lembus Forest and thereafter Forest Management Agreement will be entered to with the communities thereby instituting proper structures that will ensure benefit sharing."*

38. It is not therefore denied that no forest management plan is in place. Section 45 of the Forest Act, 2005, requires a management plan, and any activities not included in the management plan, require consent of the Board, but for which an Environmental Impact Assessment (EIA), must be conducted. The same provides as follows :-

> *S. 45 (1) Any activities within a forest area which are not included in a management plan shall only be undertaken with the consent of the Board granted in accordance with this section.*
>
> *(2) A person intending to undertake any activity referred to in subsection (1) within a forest area shall apply in that behalf to the Board, and the application shall be accompanied by the results of an independent Environmental Impact Assessment conducted in respect of the proposed activity.*
>
> *(3) Where the Board intends to grant its approval under this section, it shall cause a notice of such intention to be published in the Gazette and in at least two newspapers of national circulation, and posting a notice in such manner as to bring to attention of the persons likely to be directly affected by such activity, and giving a period of not less than ninety days within which any person may make objections to the Board.*
>
> *(4) The Board shall deliberate on any objection received and deliver its decision to the objector within a period of sixty days from the date of receipt thereof.*
>
> *(5) Any objector aggrieved by a decision of the Board under this section may within sixty days after receipt of such decision appeal to the High Court.*

39. Rule 5 (1) of FPSM requires a 5 year management plan for every forest and Rule 5 (6) of FPSM Rules bar KFS from issuing any authorization without a site-specific plan in place. These two provisions are worded as follows :-

> *Rule 5 (1) The Service shall prepare or adopt a management plan covering a period of at least five*

years in respect of every state forest.

(2) A person who wishes to make an application to the Service for an authorization under these rules shall prepare a site-specific forest management plan in accordance with guidelines prescribed by the Service.

(3) The Service shall evaluate the site-specific forest management plan submitted under paragraph (2) based on social, economic, environmental and sustainability factors and shall, with or without modification, review and approve the application.

(4) A person authorised under these rules to undertake activities for more than one year shall prepare an operations plan for every year, on which all operations shall be based, and activities shall not commence unless such operations plan has been approved by the Service.

(5) The Service shall evaluate the operations plan prepared under paragraph (4) to ensure that it conforms to the site-specific management plan and to sustainable forest use.

(6) The Service shall not issue an authorization without a site-specific plan in place, except for forest management agreements and permits for minor activities not significantly and irreversibly affecting forest resources.

40. An "authorization" is defined in Rule 3 of FPSM as "including a permit, timber-licence, special-use licence, contract, joint management agreement, concession, community forest management agreement and cultivation-permit" Rule 11 of FPSM Rules require KFS in every year to determine the areas of State forest suitable for private sector harvesting under timber licences. The same rule provides that a timber licence shall only be issued for a plantation area identified in the management plan as suitable for commercial harvesting. It is worded as follows :-

Rule 11 (1) The Service shall in every year determine the areas of State forest suitable for private sector harvesting under timber licenses.

(2) The Service shall only issue a timber license for a plantation area identified in the management plan as suitable for commercial harvesting.

41. I have taken the trouble of laying down the foregoing provisions of the Forests Act, 2005 and the FPSM Rules, to demonstrate the importance of a Management Plan. It is clearly discernible, that a management plan is critical in the management and sustainability of forests. The respondents only annexed a felling plan, but no management plan, and it has not been claimed that the two documents are one and the same.

42. The respondents and interested parties' arguments, were that the trees being harvested are the mature and over-mature trees and that there is a plan for re-planting. But how do we know this, since there is no management plan ? Without a management plan, it is difficult for me to be convinced that the trees being harvested are indeed over-mature, and that there is a plan to ensure continuity of the forest, after harvesting. Without a management plan, it is highly doubtful whether the respondents, or KFS, could issue permits for felling and harvesting of trees. It is a mystery, how the defendants and KFS, could have marked the trees for harvesting without there being a management plan for the forests.

43. The applicants have also raised the issue of licencing of the saw-millers. They have raised issue as to whether such saw millers hold valid licences. Rule 13 of FPSM provides as follows :-

13 (1) The Service shall, once every year, pre-qualify suitable persons for the harvesting of timber in state forests following the procedure set out in this rule.

(2) The Service shall invite applications for pre-qualification by placing a notice -

(a) at a conspicuous place at the Service Headquarters.

(b) in two newspapers of national circulation; and

(c) on the website of the Service, or equivalent electronic means available to the public,

Detailing where a person can obtain an application form for pre-qualification, where the completed application form may be submitted , and when the submission is due.

44. The respondents submitted minutes of KFS of 13 November 2012 and 7 February 2013 indicating some deliberation on disposal of forest materials in Baringo County. The minutes of 7 February 2013, show that the materials were offered to 31 prequalified saw millers, and bids accepted for Chebartigon 1 (F), Saimo 1 B, Katimok 2 T, Katimok 2 K, Katimok 2 (z) 12, Saimo 1 F, Saimo 1 J, forest blocks. I am not sure that these minutes cover all the areas of the forests in issue in this suit, as to me, the minutes appear to cover only a little part of the forest and neither am I certain that these areas comprise the Lembus forest blocks in issue here. The Minutes of 13 November 2012, show that forest materials (not specified what this exactly comprised) were offered to 21 prequalified firms for wood materials in Katimok 1 (AF), 1 (C) and 1 (F), for the highest price above the reserve price. Again, I am not sure that these minutes cover the forest in issue, and if so, I do not think that they cover the expansive areas of forests in this suit. But more importantly, it has not been demonstrated that there was a notice as required by Rule 13 (2) of FPSM. The respondents and interested parties have not shown that the process required by Rule 13 FPSM, was followed, and from the material placed before me, I do not see how the respondents, or indeed KFS, prequalified the saw millers operating in the forests in issue, without going through the process of advertisement which is required by Rule 13 of the FPSM. Even if the interested parties have licences, there is serious doubt as to whether these licences can be considered to be valid, given the provisions of Rule 13 FPSM.

45. The applicants also raised issue that the trees to be felled have never been marked or specifically identified. Yet again, without a management plan, to show what trees, and when planted, are to be harvested, there could very well be a probability that the trees being felled are not the proper trees, and that they are being felled by persons who have not gone through the pre-qualification process contemplated by the Forests Act. I have seen that Rule 10 of the FH Rules, require felled timber to be marked. No marking has been shown by the respondents or interested party on any felled timber.

46. The respondents have also not shown that any EIA was conducted. The argument of the respondents is that in the pleadings of the plaintiffs, there is no reference to the EMCA. That may be so, but if the harvesting herein was being done without a management plan, an EIA was imperative. That is what Section 45 of the Forests Act, which I have outlined above, requires. So although no direct reference was made to EMCA in the pleadings, there has been reference to the Forests Act, and the Forests Act, demands an EIA. It has not been said that an EIA was ever conducted, and even outside the provisions of S.45 of the Forests Act, I doubt whether the respondents could allow felling of trees without an EIA, since the felling of trees is an important element that has capacity to alter the ecosystem of an area.

47. The issues raised by the applicants in this suit, question the manner in which the respondents and KFS conduct their affairs and how they manage the forests. They not only raise weighty issues of sustainable management of forests, but also question the integrity of the whole process leading to the harvesting of trees. These are not light issues. The respondents must clearly demonstrate that they are operating above board and within the confines of the law. The issues raised are extremely critical to the proper and sustainable management of forests.

48. Forests are so important, such that the Constitution has given them a special mention. It is the target of the country, which is stated in the Constitution, at Article 61 (1) (d), to attain a forest cover of 10% of the land of Kenya. This cannot be attained, unless the respondents can demonstrate that a proper management plan is in place for every forest. I am alive to the principle of sustainable development, and that the harvesting of trees, is not necessarily the equivalent of destruction of forests. However, for the principle of sustainable development to work, a plan needs to be demonstrated and strict adherence to

constitutional and statutory principles be made.

49. For the circumstances of this case, I am of the view that the applicants have placed before this court substantial material, that questions whether the respondents, as custodians of forests, have been abiding by their constitutional and statutory duties. I have no doubt that the applicants have demonstrated a prima facie case with a probability of success.

50. As to irreparable loss, which cannot be adequately compensated by an award of damages, I stated earlier that the demonstration of loss is not a requirement in a suit of this nature. The loss is really to the environment and all of the Kenyan citizenry (probably even the whole world) is to be affected. But if I am to fit the issues herein to the contemplation of the principles in ***Giella v Cassman Brown***, then I can say that , if the forests being cut are not the proper trees, and that there is no management plan in place, then there is no doubt that there is danger of irreparable loss. How can you compensate such loss by an award of damages ?Trees are important components in ensuring environmental balance, and I do not see how you can compensate the imbalance by an award of damages.

51. It was argued that the trees are over-mature and therefore loss of revenue may be occasioned. But no material was given to me to show when the trees were planted, their optimum harvest period, and when they were to be harvested. In any event, trees ought not to be considered purely on the basis of their commercial value. That is a narrow way of looking at an important resource such as trees. Trees sustain biodiversity and are important carbon sinks. Their value to the environment, far surpasses the narrow view of trees as being purely commercial in nature, and that applies for plantation forests as well.

52. Assuming that I am wrong, and assuming that the case of the applicants is doubtful, the balance of convenience still tilts in favor of the applicants. The balance of convenience does not lie with the saw millers or the respondents. Where the interests of environmental protection and those of private individuals, out to make a profit are weighed, the interest of environmental protection ought far outweigh those of private individuals. There is need to exercise caution, and it would be better for me to exercise caution, and error on the side of protecting the forests, rather than error on the side that may very well bring an environmental catastrophe.

53. For the reasons contained hereabove, this application for injunction succeeds. I issue the following orders :-

> (a) That pending the hearing and determination of this suit, the respondents and their agents/assigns and any person authorized by them, or by the Kenya Forest Service, are hereby restrained from harvesting trees or timber or removing any tree materials from Sabatia, Maji Mazuri, Kiptuget, Chemususu, Naivasha, Koibatek, Chemurgok, and Esegeri Blocks of Lembus Forest.
>
> (b) The costs of the application shall be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF OCTOBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. K.S. Tengekyon present for the plaintiff/applicants.

Miss J.J. Ngelechei present for the defendants/respondents and holding brief for Mr. Mongeri for

Timber manufacturers Association (Interested parties).

Mr. K. Koech present for Comply Ltd (interested Party).