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YOUR REF:

OUR REF: 200.1.8244/10

DATE: 25<sup>th</sup> February, 2013

**Executive Director**

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Attn: Mr. Michael Gachanja

Dear Sirs,

**RE: H.C PETITION NO. 14 OF 2010**

**ABDALLA RHOVA HIRIBAE & 3 OTHERS VS A.G. & 6 OTHERS**

1. We refer to the above matter and to the judgment delivered by the Hon. Mumbi Ngugi, J. on 4<sup>th</sup> February 2013. A copy of the judgment has already been supplied to yourselves.
2. Here-below is a summary of the salient issues arising from the judgment.

***The Petition***

3. The Petitioners had sought the following prayers in their Re-amended Petition dated 10th May 2011;
  - (a) A declaration that the respondents, by failing to develop a conservation development and conservation master-plan for the Tana Delta has infringed the rights of the petitioners and the people of the Tana Delta as envisaged by Article 28 and 42 of the Constitution;
  - (b) An order of Mandamus directed at the Respondents to develop, in consultation with all the stakeholders and inhabitants of the Tana Delta, a multiple and comprehensive Conservation and Development Master-plan for Land use, Development, Livelihood and biodiversity ecological protection.
  - (c) An order of Prohibition directed at the respondents prohibiting them and their agents, servants or employees from undertaking any decision or action in respect of the land and natural resources pending the hearing and determination of this

cause or until such time as land use master plan for the Tana Delta is developed in accordance with the orders of this honorable court.

- (d) That there be no costs to this application in view of its public interest Nature.

**Issues for Determination**

4. The Court framed the following four (4) issues for its determination:-

- (a) Whether the court had jurisdiction to hear and determine the petition;
- (b) Whether there was a misjoinder of parties;
- (c) Whether the respondents had violated constitutional or statutory provisions and thereby violated or threatened to violate the petitioner's constitutional rights;
- (d) Whether the court could grant the reliefs sought.

5. In brief, the court then proceeded to determine the Issues as follows.

**Jurisdiction**

6. The respondents argued that the court did not have jurisdiction since the petitioners had sought Judicial Review remedies which the court had no jurisdiction to grant. The court held that it had jurisdiction. It noted that Article 23 of the constitution allows the court to grant appropriate relief including orders of judicial review. On the issue of *Res Judicata*, the court observed that the case Malindi High Court JR Misc. Civil Appl. No. 20 of 2008 was not heard and determined on its merits, and therefore, the issues were still alive, therefore the court had jurisdiction to hear and determine the matter.

**Application of the New Constitution**

7. The Respondents argued that the rights that the Petitioners claimed to have been infringed did not exist in the former Constitution, therefore they could not be enforced relying on the current Constitution. The court held that the rights that the Petitioners were alleging have been infringed, were in existence in the previous Constitution and continue to exist in the current Constitution 2010, and therefore the court could make a determination on the violations.

**Whether there was a Misjoinder of Parties**

8. The respondents argued that the petition was defective owing to a misjoinder of parties, owing to the fact that it is only the state that has a duty to protect and guarantee the fundamental rights and freedoms, therefore Attorney General should have been the only respondent. The court held that, the Constitution of Kenya 2010, was a departure from the previous constitution that only recognized vertical Application of the constitution. It noted that the constitution of Kenya 2010, provided for both vertical and horizontal application of the constitution and the bill of rights.

**Applicable Constitutional Provisions**

9. The court relied on the following Constitutional Provisions;
- (a) Article 10 which lists the national values and principles (including participation of the people, protection of the marginalized and sustainable development) and provides that they bind all State organs, State officers, public officers and all persons whenever any of them;
    - (i) applies or interprets this Constitution;
    - (ii) enacts, applies or interprets any law; or
    - (iii) makes or implements public policy decisions.

- (b) Article 19 which provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies and also providing that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.
- (c) Article 42 that provides for the right of every person to a clean and healthy environment, which includes the right;
  - (i) 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
  - (ii) to have obligations relating to the environment fulfilled under Article 70.
- (d) Article 60 which provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles;
  - (i) equitable access to land;
  - (ii) security of land rights;
  - (iii) sustainable and productive management of land resources;
  - (iv) transparent and cost effective administration of land;
  - (v) sound conservation and protection of ecologically sensitive areas;
- (e) Article 69 under which the State shall;
  - (i) ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
  - (ii) encourage public participation in the management, protection and conservation of the environment;
  - (iii) protect genetic resources and biological diversity;
  - (iv) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
  - (v) eliminate processes and activities that are likely to endanger the environment; and
  - (vi) utilize the environment and natural resources for the benefit of the people of Kenya.
- (f) Article 70 under which if a person alleges that a right to a clean and healthy environment recognized 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.

***Determination on whether there was a violation by the Respondents***

10. The court held that there was indeed a violation of the rights of the Petitioners Guaranteed in Articles 60 and 69 of the Constitution, and hence a need to have the Respondents review the long term plan prepared, and any long term or short terms plans be carried out.

### **Reliefs given**

11. The Court ultimately gave judgment in favour of the Petitioners and made the following orders;
  - (a) The 3<sup>rd</sup> and 6<sup>th</sup> Respondents (TARDA & WRMA) do furnish the Petitioners and other stake holders within 45 days of the 4<sup>th</sup> of February 2013, the existing plans that they are required by statute to prepare or obtain in respect of the utilization of the land and resources of the Tana Delta.
  - (b) The 3<sup>rd</sup> Respondent(TARDA) re evaluates its short term, medium term and long range plans for the Tana Delta in consultation and with the participation of the petitioners, the communities in the area and all state and private entities involved in the projects in the Tana Delta to ensure that they comply with the requirements of Article 60 and 69 of the Constitution;
  - (c) That the 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents facilitate periodic monitoring of the projects that have already commenced to assess their impact on the Tana Delta wetlands and the interests of the communities which derive a living from the Tana Delta;
  - (d) Each party bears their own costs.
12. It is our considered opinion that the judge was fair and balanced in her analysis and conclusion and that the Petitioners succeeded in their call for a holistic control of the process of approval of development projects in the Delta in light of the interests of the communities in the Delta and the resources available therein.

### **Implications of the Judgment**

13. From the foregoing, it is apparent that Tana and Athi Rivers Development Authority (TARDA) and the Water Resources Management Authority (WRMA), must furnish the Petitioners and other stakeholders (meaning the residents of the affected area and your two organizations which fit in here perfectly!), with all the existing plans they are required to prepare with respect to utilization of the land and resources in the Tana Delta.
14. The Tana and Athi Rivers Development Authority must, in consultation and with the participation of the inhabitants of the Tana Delta area, re evaluate its short term, medium term and long term plans for the Tana Delta.
15. Projects in the Tana Delta which have already commenced be frequently monitored by Tana and Athi Rivers Development Authority, the Water Resources Management Authority and Mumias Sugar Company Limited, to assess its impact on the wetlands and the inhabitants.

### **Post-Judgment Course of Action**

16. After the delivery of the judgment on 4<sup>th</sup> February 2013, a few days elapsed before the typed copy of the same was available to the parties.
17. Thereafter, despite spirited efforts on our part to have the decree extracted from the judgment promptly, the same was only available on 22<sup>nd</sup> February 2013 whereupon we noted that the Deputy Registrar of the court had omitted crucial aspects of the court's orders relating to the public participation in the evaluation and preparation of the development plans by. We promptly wrote to the court highlighting this serious omission and now await the corrected decree which will then be served on TARDA,

WRMA & Mumias Sugar Co. Limited TARDA (copies of our letter of 22<sup>nd</sup> February 2013 thereof and the decree are enclosed for your perusal and record).

Yours faithfully,

**WARUHIU K'OWADE & NG'ANG'A ADVOCATES**

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