Waweru & another v Maombi Water Services Limited (Environment & Land Case 337 of 2013) [2023] KEELC 18710 (KLR) (17 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18710 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 337 OF 2013

FM NJOROGE, J

JULY 17, 2023

BETWEEN

JOHN KIGAA WAWERU ..... 1ST PLAINTIFF

SHADRACK NJUGUNA NJIHIA ..... 2ND PLAINTIFF

AND

MAOMBI WATER SERVICES LIMITED ..... DEFENDANT

JUDGMENT

1. The plaintiffs' case is that they were members of the Maombi Farmers Co Limited. It was also their case that Maombi Farmers Co Limited was the owner of LR No 10679 which was subdivided between its members. It was further the plaintiff's case that while Maombi Farmers Co Limited was being dissolved they set apart various parcels of land as public utilities. The said parcels of land included Kabazi/ Munanda Block 2/302 (the suit property) that is a hill. It was the plaintiffs case that some members of Maombi Farmers Co Limited formed a limited company, which is the defendant, and caused the suit property to be registered in its name to the exclusion of the members of the Maombi Farm. The defendant then received money from Safaricom Ltd. who put up a communication mast on the suit property and in return the plaintiffs and other members formed the Maombi Ona utilities Limited which also received money from Zain (now Airtel Limited) for a similar purpose. The plaintiffs now seek that the registration of the defendant as the owner of the suit property be revoked and the land to revert back to public its public utility status.

Pleadings

Plaint.

2. By the amended plaint dated April 14, 2010, the plaintiffs seek the following prayers:

    a. A declaration that land parcel No Kabazi/Munanda Block 2/302 is public land.

b. An order directing the District Land Registrar to cancel Title No Kabazi/Munanda Block 2/302 in the name of the defendant and in its place the Government of Kenya be registered as the proprietor on behalf of the plaintiffs and the persons they represent in this suit.

c. An order of eviction do issue against the Defendant and its representatives, agents and employees removing them from land parcel No Kabazi/Munanda Block2/302.

d. An order of permanent injunction restraining the defendant by itself, agents, servants and/or assigns from in any manner whatsoever interfering with the Maombi Community's use and enjoyment of land parcel No Kabazi/Munanda Block 2/302.

e. That the defendant do bear the costs of this suit.

3. The plaintiffs claim is that they have the authority of 383 people to file the present matter; that they were members of Maombi Farmers Co Ltd which was a land buying company; that it was wound up after LR No 10479 was subdivided amongst its members and title deeds issued; that during the dissolution of Maombi Farmers Co Ltd, Land parcel No Kabazi/ Munanda Block 2/302 among other plots was set apart as a public utility plot; that on or about July 27, 2005, they discovered that the defendant had illegally been registered as the proprietor of Kabazi/ Munanda Block 2/302; that their claim against the defendant is for a declaration that land parcel No Kabazi/Munanda Block 2/302 is public land and the same ought to revert back to the public through the government of Kenya and an order of permanent injunction restraining the defendant by itself, its agents, servants or assigns be issued stopping them from interfering with land parcel No Kabazi/Munanda Block 2/302.

Defence

4. The defendant filed it statement of defence on April 22, 2010 where it denied all the averments in the plaint and sought that their case be dismissed with costs.

Evidence of The Parties.

Plaintiffs' Evidence

5. John Kigaa Waweru testified as PW1. He adopted his witness statement dated August 10, 2011 as part of his evidence-in-chief. The documents in the list of documents dated February 10, 2012 was produced and marked as PExh.1 to 12. In his witness statement he stated that the suit property was excised from LR No 10479 which was owned by Maombi Farmers Co Limited. He also stated that Maombi Farmers Co Limited was formed by members who bought shares and in the year 1984, a certificate of ordinary shares was issued to each member who had completed paying their share contribution; that each member was issued with individual title deeds in the year 1988; that during the dissolution of Maombi Farmers Co Limited, various parcels of land were set apart as public utilities which included Kabazi/Munanda Block 2/302 which was set apart as a hill; that on July 27, 2005, the defendant caused itself to be registered as the proprietor of the suit property which was objected to by the former members of Maombi Farmers Co Limited; that various meetings were held by the provincial administration and it was agreed that they would fight for the suit property to return to the members of the community.

6. On cross-examination PW1 averred that he and Shadrack N Njihia instituted the present matter with the authority of the other aggrieved persons appearing in the list he produced in evidence as PExh.2; that document No 8 in Defendant's list of documents dated August 30, 2012, is a death certificate in respect of John Macharia Chege who is listed as No 152 in the authority to sue, who he died in the year 1996 and he did not sign the authorization list but added that his son signed it on his behalf. He also

stated that he is aware that there was an affidavit that indicated that some people in the authorization list, did not sign the authorization list; that PExh.2 is titled 'List of Aggrieved Persons,' does not state its particular purpose or that it is intended for use in court; that LR No 10479 belonged to Maombi Farmers Co Ltd; that he did not have the title in court; that he was not a member of Maombi Farmers Limited and that it was his father who was a member; that he is in possession of his father's share certificate though it was not among the documents that he had in court; that the suit property was set aside as a public utility; that he did not have the minutes of Maombi Farmers Co Ltd showing a resolution to set aside the suit property as a public utility; that instead of the name of the defendant the suit land should be registered in the name of Maombi Ona Utilities Co Ltd or as the public wishes; that Maombi Ona Utilities Co Limited is a private company and all the people listed in PExh.2 are members of the said company; that the company search CR12 for Maombi Ona Utilities Co Ltd dated July 13, 2009 contained the names of all the shareholders including himself; that from the copy of Memorandum and Articles of Association of Maombi Ona Utilities Co Ltd it was evident that it was a private company and it had received Kshs 170,000/= on behalf of the public from Zain Company (Now Airtel Company). He said that the money was for rent for a telephone mast but it was used in the court proceedings; that the residents of the area known as Maombi Farm had agreed that the area be regarded as public land; that he did not have anything to show that the 385 people who signed the authority were members of Maombi Farm; that he was not a member of the defendant and neither had the defendant ran any programmes that had been beneficial to the community; that the defendant brought Safaricom to the suit property to put up a mast; that Safaricom paid rent to the defendant for three years and that it was not true that the said monies were used to supply water to the community; that none of the surviving directors of Maombi Farmers Co Ltd were on the list of persons who authorised him to file the present case; that he did not have anything to show that the suit property is public land and that there were other parcels of land that had been set aside as public utilities and none of them were registered under Maombi Ona Utilities Co Ltd.

7. On re-examination, he stated that Maombi Ona Utilities Co Ltd was not a party to this case; that none of the prayers seek that Maombi Ona Utilities Co Ltd be registered as the owner of the suit property; that apart from the Kshs 170,000/= that was received from Zain, Maombi Ona Utilities Co Ltd did not receive any other monies; that the case was not brought for the benefit of Maombi Ona Utilities & Co Ltd but was brought for the benefit of the members of the public.

8. PW2, Rev Joseph Ndungu Mbugua testified orally and adopted his witness statement dated February 7, 2012 and filed on February 10, 2012 as part of his evidence-in-chief. In his evidence he stated that he was a former chairman of Maombi Ona Farm and that among the properties that were set aside for community use in the year 1984 was the suit property; that between the year 2004/2005, the directors of the company recommended and approved that a community based project, Maombi Water Project, to be issued with a title deed for Kabazi/Munanda Block 2/302 that had been left under the custody of the government of Kenya; the intention of having such a recommendation was so that the project could benefit the entire Maombi Farm Community members.

9. On cross-examination he admitted that he had been the chairperson of Maombi Ona Farm from the year 1975 for a period of thirty years; that he does not remember when the Maombi Water Project begun as he was not a member; that the land for the said project was allocated after the survey was done and that his committee sat and agreed that the water project be issued with a title deed. He stated that one of the managing directors of the water project was George Migwi. He admitted that if a title was issued then that was in order since that is what the Farm Committee had recommended. On re-examination, he asserted that the title they recommended to be issued was to help the community and not individuals.

10. PW3, Jackson Gichuru Wanderi, testified and adopted his witness statement filed on February 20, 2012 as his evidence-in-chief. In his evidence, he stated that he and 10 other persons were directors of Maombi Farmers Company Ltd which was formed in the year 1969; that between 1983 and 1984 certificates of ordinary shares were issued to each member who had completed their share contributions and paid survey fees; that in 1985, members balloted for their plots and title deeds were issued to individuals in 1988. LR No 10479 belonged to Maombi Farmers Co Limited and during the dissolution of the company, some parcels of land which included the suit property and which arose as a result of the subdivision of LR No 10479 were reserved for public utilities or for common use; in particular, LR No Kabazi/Munanda Block 2/302 was reserved for planting trees and grass for the purpose of soil conservation and to provide the community with firewood; that he was approached by a Mr George Mwaniki Migwi who was a former Managing Director of Maombi Farmers Company Limited who asked him to sign some documents that would assist Maombi Water Project to benefit from cash proceeds from Safaricom Ltd who were in the process of erecting a transmission mast on the suit property Kabazi/Munanda Block 2/302. He further stated that he signed the documents in good faith and thereafter on July 27, 2005, the defendant was registered as the owner of the suit property; afterwards, he and several other persons were invited by George Mwaniki Migwi to a lunch at a hotel in Nakuru Town and the former directors of Maombi Farmers Company Ltd were given Kshs 5,000/= as a token of appreciation in respect of which they signed petty cash vouchers; prior to the registration of the said land in the name of the defendant, a project called Maombi Water project comprising of 52 members had been registered; later on he came to learn that the defendant had been registered as a private company with only 6 directors who happened to be the only shareholders; when the members of the community came to learn of it, they started complaining and in 2008, they demonstrated and blocked the road leading to the Base Transmission Masts on the suit land thus shutting out both service providers who had built the masts form accessing them. They also approached the provincial administration complaining that the suit land had been acquired fraudulently by the defendant; that they also decided to register their own rival company and on December 10, 2008, the community elected new directors to that company in the presence of the provincial administration and on January 7, 2009, they registered a public limited liability company by the name Maombi Ona Utilities Company Limited.

11. On cross-examination he stated that he was a director of Maombi Farmers Co Limited from the year 1969; that as directors they had authorized that Maombi Self Help Water Project be given land; they did not authorize Maombi Water Services Ltd to be given the land; he did not follow up to see if Maombi Self Help Water Project had been issued with a title. He also admitted that the only project the Maombi Self Help Water Project was given was provision of water which had not been implemented yet. He still has a receipt issued by the Maombi Water Self Help Project. He stated that the suit property was set aside as a public utility but also admitted that he did not have the minutes to show it was set aside. He also confirmed that he only discovered it was only 6 individuals who benefited from the said project after signing the forms Migwi asked him to. He stated that the defendant was issued with a title deed fraudulently, but that he did not report the matter to the CID. He admitted to be a member of Maombi Ona Utilities Co. Utilities Co Ltd which is a private company and added that its members are members of the Maombi Farm community.

12. On re-examination he stated that he signed the documents so that the company would receive payments from Safaricom Ltd and that when they discovered that the title had been registered in the name of the defendant, he and others complained to the local administration.

13. PW4, Mary Njeri Allan testified orally and adopted her witness statement filed on February 10, 2012 as part of her evidence-in-chief. Her witness statement reiterated the contents of PW1's witness statement; her position is that the suit property was set aside as public land.

14. On cross-examination, she confirmed that she and her late husband were members of Maombi Farmers Co Ltd.; that she authorized the plaintiffs to file the present matter herein and that her name was at No 218 on the authorization list and that the signature appearing thereon was hers. The Plaintiff's case was then marked as closed.

Defendant's Evidence

15. DW1, Johnson Njuguna Ngaruiya testified orally and adopted his witness statement dated December 21, 2015 as part of his evidence-in-chief. He produced the CR12 of Maombi Ona utilities Company Limited which showed that it is a private company and the plaintiffs and seven others are its directors; that though the said company is not a party to the present proceedings it has prayed that the suit property be registered in its name. He produced the articles of Maombi Ona Utilities Company Limited and documents that also showed that the plaintiffs are the directors of Maombi Ona Utilities Company Ltd. The death certificate of John Macharia Chege was produced as DExh.4 that showed by the time the suit was being instituted, he was deceased and yet the plaintiffs claim that they were authorized by him to institute the suit. He produced a letter from the Ministry of Water and irrigation to the chairman Maombi Services Water Project which forwarded a copy of the design report, estimated bills of quantities for the water project. He testified that they went to the Catholic Diocese of Nakuru who bought pipes which have never been installed to date. He produced the letter dated July 26, 2006 as DExh.6. He testified that the suit property was never reserved as public utility land; that they approached the previous directors of Maombi Farmers Company Ltd, namely, Mr George Migwi, Mr J J Ngeta, and Ms Mbugua, by making a director's resolution which assisted them to get the title deed of the suit property since they were a self-help group; that they tried to raise money from its members by asking for Kshs 4000/= from each but those efforts failed and so they approached Safaricom Ltd. who promised to help; however, the help so promised would not come to them as a self-help group and so they incorporated the defendant and the plaintiffs have not been barred from becoming members; that after they got into a lease with Safaricom Ltd; the plaintiffs barred Safaricom Ltd from accessing the suit property. They also intercepted and obtained some money from Safaricom. It was also his evidence that they were less than fifty members and so they were not able to incorporate a public company and that the plaintiffs were not barred from joining them. He testified that they had tried to meet with the plaintiffs but they had declined and so he sought that the plaintiff's suit be dismissed with costs.

16. On cross-examination he admitted that the defendant is a private company. He also admitted that the farm has over 1000 members. He further admitted that he was not from the family of John Macharia whose death certificate he had produced. He confirmed that they had the consent of Maombi Farm Company Members Ltd to incorporate the defendant but he did not have anything to show the same. He also stated that they went to the CID Nakuru to report the threats by the plaintiffs but he did not have any evidence of that report; he confirmed that it was the plaintiffs who wanted the dissolution of the defendant; that however the land should not revert back to the government to hold it in trust for the members; that they have a title in the defendant's name. He also admitted they have been receiving Kshs 150,000/= per year and that they are holding the land for their members.

17. DW2, James Kiarie Ndegwa gave oral evidence and adopted his witness statement dated March 13, 2012 as part of his evidence-in-chief. His evidence is that he had been indicated in the authority document (at No 127) as having consented to the present suit and yet he had not given any such consent. He testified that he did not sign the said list.

18. On cross-examination he confirmed that he does not know plot No 302; that he knew about Maombi Water Services Limited as he was its chairman; that he knows about Maombi Water Services Limited land which they bought and gave to Kamoi cattle dip; however he does not know the parcel number of the plot on which the Kamoi cattle dip is located; that the land was bought from one Josephine by a group comprising of 34 persons but he did not have that evidence with him; that money was obtained from CDF in order to build a cattle dip; that the defendant got money from Safaricom; that the suit property is not the land that they had purchased; that the suit property is some hilly land which is not arable and which was left unallocated by the Maombi Farmers Company Ltd and that he does not know if it has a title.

19. On re-examination he stated that there were 35 people who obtained money to provide water services and they went and bought land. He also stated that they went to the government and got Kshs 700,000/= and built a cattle dip and as members they have no complaint against the defendant, Maombi Water Services Ltd.

20. On cross-examination by the court he confirmed that they got money from Maombi Water Services and purchased land from one Josephine. He also confirmed that they built a cattle dip with Kshs 750,000/= that they had gotten from the government and that the cattle dip and the bore hole are on one plot. He admitted that he was the chairman of Kamoi cattle dip. He also admitted that Safaricom has a mast on the suit land and that Maombi unites the people and uses the money they get from Safaricom. He confirmed that he does not know if the land has a title deed but also stated that Safaricom would not have come in and develop the land without being shown the title.

21. DW3, Peter Njoroge Waweru testified orally and adopted his witness statement dated March 8, 2012 as part of his evidence-in-chief; he stated that though his name and national identity card appear in the authority (at No 283) at together with he never consented to the institution of the present suit and the signature on the authorization list does not belong to him.

22. On cross-examination he stated that he is a secretary in respect of a land parcel bought by Maombi Water Services Ltd and the land had a borehole; that he does not know the suit property plot No 302; that he does not know who sold Maombi Water Services the land; that he is a member of Maombi farm and that the land on which Safaricom has built a communications mast is not registered in anyone's name; that it did not belong to an individual; that he does not know how the defendant got itself registered as owner of the land; that the residents were only interested in water supply and a cattle dip; he stated that the land with a Safaricom mast is within the Maombi Farm and it is situate on a hill. He also confirmed that he does not know if Safaricom still pays the company any money. On re-examination he stated that he does not know if the land with a mast is fenced and if the public is allowed to access it. The defence then closed its case at that point.

Submissions

23. The plaintiffs filed their submissions on March 6, 2023 while the defendant filed its submissions on March 20, 2023. Submitted for the plaintiff: the following issues arise for determination: (a) Is the parcel of land Kabazi/Munanda Block 2/302 public, private or community land; (b) Is the Defendant a public or private company; (c) Whether the registration of the defendant as proprietors of the suit land is regular; (d) Whether there was fraud provided as against the defendant; (d) Who should bear the costs of the suit. Citing Article 63 of the *Constitution* of Kenya, 2010, and Section 6(1) of the *Community Land Act*, that from the evidence in this matter the suit property is community land; that the community was not in support of the defendant possessing the suit property; that the suit property was among the parcels of land set apart as public utility plots. Relying on *Kenya National Highway*

Authority vs Shallien Masood Mighal & 5 Others [2017] eKLR, that once the suit property was set apart as public utility, no person not even the directors of Maombi Farmers Company Limited had the right to transfer it to a private entity and therefore the said transfer was void ab initio; that the land ought to be converted back to community land in accordance with the *Community Land Act* and the Community Land Regulations, 2017.

24. Submitted for the defendant: the following issues arise for determination: (a) Whether the plaintiffs have authority of 383 others to sue on their behalf; (b) Whether the suit property was set aside as a public utility; Whether the defendants were registered as owner of the suit property fraudulently or illegally; (c) Whether the plaintiffs are entitled to the prayers sought; (d) who ought to bear costs. On issue (a), that the list produced by the plaintiff as the authority to sue did not state at the top of any of the pages the purpose of the list; that the person indicated as No 152 had died years before the list was signed which shows that the list may have been made for a different purpose before the case was filed; that thirteen individuals who signed the list swore affidavits disowning their signatures on the document and further two of them gave evidence that they did not sign the said letter of authority. On issue (b), that it was not proved that the suit property had been set aside as a public utility. On issue (c), that the *Community Land Act* came into force on September 21, 2016 while it was registered as the owner of the suit property in the year 2005. Citing *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR*, that the Act cannot apply retrospectively; that the plaintiffs did not come to court with clean hands as they also registered a company known as Maombi Ona Utilities Company Limited and they desire that the suit property be registered in its name. In respect of issue (d), in event that the plaintiffs suit succeeds, that each party bears its own costs for the reason that the defendant's directors have demonstrated that they had a genuine intention to benefit the community when they incorporated the defendant.

Analysis and Determination

25. After considering the pleadings, the evidence and the submissions, the following issues arise for determination:

    a. Whether the plaintiffs had the authority to institute the present suit;

    b. Whether Kabazi/Munanda Block 2/302 is public land;

    c. Whether the title deed issued to the defendant ought to be cancelled;

    d. Whether the title is registered in the name of name of the government as proprietor on behalf of the plaintiffs and the persons that they represent in this suit;

    e. Who should bear the costs of the suit.

26. Regarding the first issue and on a preliminary basis, it is to be noted that in respect of the issue of authority to file the present suit, the plaintiff produced a consent dated March 12, 2010 given by the Hon. Attorney General to institute the suit with respect to the suit property and an authority to sue signed by various members. The plaintiffs claim to have authority.

27. The defendant alleges that the plaintiffs did not have the authority to file the present suit as the letter of authority contains members who were dead before the institution of the present suit and others who swore the affidavits that they did not give the consent for the institution of the present suit. The defendant produced the death certificate of John Macharia Chege who is indicated to have signed the letter of authority at No 152 and yet by the time of the institution of the suit he was dead. The plaintiffs

on the other hand countered the defendant's argument by admitting that John Macharia Chege was deceased by the time of institution of the present suit but his son had signed the authority on his behalf. DW2 and DW3 testified in court and indicated that their names were listed at No's 127 and 283 respectively on the letter of authority which they alleged they did not sign. PW1 admitted that he was aware that there were affidavits signed by people that indicated that they did not give the authority for the institution of the suit.

28. Order 1 Rule 8 of the *Civil Procedure Rules* provides as follows:

> 1. 'Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as of all in same representing all or as representing all except one or more of them.
>
> 2. The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.
>
> 3. Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the court to be made a party to such suit.'

29. In this matter the plaintiffs produced as PExh.2 an authority to sue. The list is titled 'List of Aggrieved Persons, Maombi Ona Farm'. It contains 385 members some of whom have not signed such as No's 14, 28, 42, 160 among others. During cross-examination PW1 admitted that the said list does not state its purpose or that it was intended for use in court. Further it has been demonstrated that one John Macharia Chege was deceased at the time of the institution of the suit and as indicated before, James Kiarie Ndegwa, a defence witness, has averred that his consent was not sought and yet his name appeared on PExh.2.

30. The court in the case of *John Kivure & 7 Others v Benson Mlambo Mwakina & 4 Others; County Government of Taita Taveta & 20 Others (Interested Parties) [2020] eKLR* held as follows:

> ' From the material on record, it is clear that the list of persons that the plaintiffs presented as having authorized the bringing of the suit on their behalf is not authentic. It is clear that only the 8 plaintiffs signed the Letter of authority. It is also clear that even the list attached which is alleged to be a list of members who authorized the suit, not all of the named persons appended their signatures. The list suggests that the plaintiffs may just have listed down names from the list of the Group Ranch, inserted identification numbers and telephone numbers. It is instructive to note that not all the names have the identification and telephone numbers. From the material before court, I am not satisfied that the list appended was authenticated.'

31. It is however noted that the suit has been brought on behalf of the public. The redeeming grace that so suitably befits the plaintiffs in the present suit is that they had the presence of mind to seek and obtain the prior consent of the Attorney General's granted vide a letter dated March 12, 2010 to bring the present suit. The letter of authority signed on the Attorney General's behalf by Ms Wanjiku A. Mbiyu grants the two plaintiffs herein consent to institute proceedings for appropriate relief in relation to 4 properties which include the suit property which is described as a 'hill'. Other properties are described

as their land reference numbers and assigned the utility of quarry, office block, and cattle dip in that letter.

32. I have examined the pleadings in this case. It can be gathered that the plaintiffs have not come to court for their personal benefit. In fact, at paragraph 4 of the plaint the plaintiffs stated as follows:

> ' The plaintiffs have been granted by the Hon the Attorney General Attorney General's consent in writing to institute these proceedings in so far as they constitute public nuisance and involve litigation over public land.'

The original of the Attorney General's letter of consent was filed with the plaint.

33. Section 61 of the *Civil Procedure Act* provides as follows:

> '
>
> ' 61. Public nuisance
> (1). In the case of a public nuisance, the Attorney-General, or two or more persons having the consent in writing of the Attorney- General, may institute a suit though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.
>
> (2). Nothing in this section shall limit or otherwise affect any right of suit which may exist independently of its provisions.'

34. In the case of *K Kimani & 11 others v Nyali Masjid Trust (Registered Trustee) & 6 others [2005] eKLR* it was quite succinctly stated as follows:

> ' The plaintiffs are several persons (12) named individually against Defendants (7) who are named individually in the plaint. It is not therefore correct to say that 'there are numerous persons having the same interest in one suit one or more such persons may sue or be sued or may be authorized by the court to defend in such a suit'. Order 1 rule 8 does not apply here.'

35. In the present case only two plaintiffs are mentioned in the title to the pleadings, though paragraph 5 of the plaint states that the plaintiffs have the authority of 383 other persons to institute the present suit on their behalf 'in so far as the suit land is public property and to which the persons appearing in the list are entitled to benefit.'

36. The import of this pleading is that notwithstanding the inclusion or non-inclusion of the persons named in the list as co-plaintiffs in this case, the suit remains one of public nuisance and in respect of what has been labelled by the plaintiffs as public property. What is involved in this dispute is land that involves a hill. Hills are protected in the *Environmental Management and Co-Ordination Act* 1999 owing to fragility of the ecosystem they host hence the need for conservation. Also, among the rights involved in this case are the rights of the members of the public to water supply from the natural environment. The right to a clean and healthy environment is also affected. In brief, what this court is stating is that this is a case that is more about the environment than personal interest. Even if that were not the case, in the current legal and constitutional dispensation that places a premium on environmental conservation, the court is inclined to construe the circumstances of this case within the principle in dubio pro natura that is, 'When in doubt, in favor of nature.' This means that when in doubt as to whether the activity harmful to the environment should proceed, the doubt should be resolved in favour of protecting the environment. The *Constitution* is strict about environmental

management and conservation and equitable sharing of accrued benefits. Article 42 thereof provides as follows:

> ' 42. Environment
>
> 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.'

37. Article 69 of the *Constitution* provides as follows:

> ' 69. Obligations in respect of the environment
>
> (1) The State shall—
>
> (a) Ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
>
> (b) Work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
>
> (c) Protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
>
> (d) Encourage public participation in the management, protection and conservation of the environment;
>
> (e) Protect genetic resources and biological diversity;
>
> (f) Establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
>
> (g) Eliminate processes and activities that are likely to endanger the environment; and
>
> (h) Utilize the environment and natural resources for the benefit of the people of Kenya.
>
> (2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.'

38. Article 70 gives every person the right to approach court for remedies if a right to a clean and healthy environment is threatened with infringement or violated. It provides as follows:

> ' 70. Enforcement of environmental rights

(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.

(2) On application under clause (1), the court may make any order, or 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.'

39. The cumulative construction of the provisions of the *Constitution* set out herein above leads to the conclusion that the plaintiffs, by themselves and even without any sort of pretext that they are bringing the present action on behalf of other members of Maombi Farm, had the locus to commence and sustain the present litigation. There is therefore a constitutional imperative that allows a citizen to approach court for environmental justice whether or not he is personally affected by the act complained of. There being no need for authority from any other person for the institution of the present suit, the authority attached by the plaintiffs in the plaint is irrelevant. The defects in that authority are therefore of no consequence. In any event I have observed that there was a motion filed by the defendant dated September 19, 2012 to have the names of 17 aggrieved persons in the authority filed by the plaintiff struck out. That application was not prosecuted and when it came for withdrawal by consent of the parties on November 30, 2012 before Ouko J (as he then was) no consent order was recorded and it has never been addressed to date. It would be unhealthy for the administration of justice that at judgment, an interlocutory application by the defendant to be left hanging around and in the interests of justice and for avoidance of doubt, I hereby dismiss the same for want of prosecution. Finally, I also dismiss the objection by the defendants to the effect that the plaintiffs are not entitled or that they do not have authority to bring this action. The consent they received from the Attorney General under Section 61 CPA and the provisions of Article 70(1) as read with Article 42 and Article 69, grants them unqualified authority to lodge the present suit which is not in any way detracted from or otherwise extenuated by the full or partial grant, or lack of, authority from any other persons within or without the farm.

40. Regarding whether Kabazi/Munanda Block 2/302 is public land, it is noteworthy that a certificate of official search dated June 5, 2009 of the suit property shows that Maombi Water Services Ltd is the registered owner of the suit property. A letter dated July 27, 2004 written by the chief to the site acquisition agent Safaricom indicating that the suit property belonged to Maombi Farm, that it was surrendered to the government as it was hilly and rocky for conservation purposes and was grateful to Safaricom Ltd for establishing the Base Transmission (BT) station. At the hearing, minutes were produced dated September 30, 2008 of a meeting between the Maombi community representatives and the District Commissioner (Nakuru North) over the suit property. A letter from the District Commissioner dated March 3, 2009 addressed to Safaricom Ltd stated that Maombi Ona Utilities

Company Ltd represents the local community in transacting with the suit property and that the defendant had fraudulently acquired title to the suit land which title the District Commissioner had confiscated and it awaited transfer to the rightful owner, and also that Safaricom could proceed to deal transact with Maombi Ona Utilities Company Ltd over the land; minutes dated October 9, 2008 of the meeting held between the District Commissioner (Nakuru North) and the members of Maombi Water Services Ltd, Maombi Community representatives and Safaricom Ltd representatives were produced; It can be seen from those documents that it was agreed that (a) Zain was to deposit a cheque with the District Commissioner (b) the defendant was to dissolve itself as a private company and form a public company by December 31, 2008, (c) elections of new officials were to be conducted thereafter; (d) Safaricom was to sign a new agreement with the officials of the newly formed public company. Minutes of the meeting held on October 10, 2008 between the interim officials of Maombi Community and Maombi Water Services Co. Limited, were also produced. From those minutes it becomes clear from the discussions that the formation of Maombi Ona Utilities Company Ltd was to facilitate transactions with Zain Ltd who could not contract with an unregistered company. The meeting was inconclusive on any issue.

41. A letter dated November 11, 2008 from Zain to Maombi Community which referred to the meetings held by the provincial administration and the members of the Maombi farm community over the suit property, was produced. It sums up the agreement at that meeting as follows: (a) that Zain was henceforth not to deal with the officials of Maombi Water Services Ltd; (b) Zain was to refer all issues of the community through the interim officials (John Kigaa Waweru, Lucy Kiniaru and Ben N Wagitau; the representation was to be confirmed officially after the community elected officials for the organization; (c) Zain was to deposit with the DO Kabazi Division a cheque for Kshs 170,000/= for the year's rent, and the said amount would be released to duly confirmed officials of the Community upon resolution of the controversy; (c) Zain was to proceed with the work at the site after the contents and resolutions reached in the meeting were communicated to the members. Attached to the letter is a copy of a cheque issued by Celtel Kenya (which must be the same entity known by the name Zain) to Maombi Ona Utilities Co Limited for Kshs 170,000/=.

42. Minutes dated December 8, 2008 of the District Officer's Baraza that was held in Maombi Cattle dip grounds on December 4, 2008 were produced. The suit land was the subject of those proceedings. A representative of the defendant however addressed the meeting defending the defendant's activities and defended the defendant's title, saying that the company is a private company; that it had approached the area Chief, the DO, the DC and the Nakuru County Council for ownership of the hill; that development projects that included the Maombi water and dip projects, the Kamuohi water and dip projects, and the Ngomongo culverts had been implemented.

43. It emerged at the meeting of December 8, 2008 that a bitter struggle had commenced between the community and the company once the former failed to get any support from the provincial administration. Minutes dated October 9, 2008 of the meeting held between the District Commissioner (Nakuru North) and the members of Maombi Water Services Ltd, Maombi Community representatives and Safaricom Ltd representatives were cited at the meeting. A participant reported that at the DC's meeting, a panel had been selected to arrive at a decision on modalities for the inclusion of the community into the defendant Company, and the formalization of its returns to the Kenya Revenue Authority and Registrar of Companies. The letter dated November 11, 2008 from Zain to Maombi Community was read to the meeting. The cheque from Zain was also exhibited at the meeting. The Kabazi area Councillor who addressed the meeting said that the hill belongs to the community. Some speakers spoke of the prohibitive conditions that the defendant company had laid to apparently deter the public from joining it. The local chief is recorded as having stated that he had written to Safaricom over the matter, that the project was initially meant to benefit the entire

community but the defendant had shut out the community from the benefits; that since the 'hill had been returned to the community,' the defendants' directors would be asked to return monies previously paid to them by Safaricom which had not been accounted for to the community. In his closing remarks the District Officer present stated that it had been proved that the hill and all the public utilities thereon belonged to the community and no person should claim ownership thereof. He recommended that the community should have representation and a committee should be formed to address issues relating to public utility land on the farm globally since it was foreseeable that the telecommunication companies may at one time cease their operations on the hill and the committee would still serve the remaining community interests regarding public utility land. She is also recorded as having stated that the defendant being a private company can no longer administer the public utility land comprised in the hill and therefore the hill must be restored back to the public.

44. The defendant's case on the other hand was that it was registered on February 18, 2005 as a private company because its members were less than 50 and so they could not form a public company. The directors of the defendant testified that they obtained the consent of the former directors of Maombi Farmers Limited to form the defendant in order to rehabilitate the borehole on land Parcel No Kabazi/Munanda Block 2/302 which had been reserved for the Maombi Water Project. It was also the defendant's case that the members were not able to raise sufficient money and so they approached Safaricom Ltd to put up a mast on the suit property. The defendant's directors stated that Safaricom Ltd was not willing to enter into an agreement with a self-help group hence they formed the defendant. It was the defendant's case that it entered into a lease agreement with Safaricom Ltd and used the money for the benefit of its members. It was further the defendant's case that the plaintiffs incorporated another company known as Maombi Ona Utilities Company Limited which they intend that the suit property be registered in its name.

45. In support of its case the defendant produced the CR12 of Maombi Ona Utilities Co Limited which showed the plaintiffs as some of its directors, articles of association for Maombi Ona Utilities Co Limited, the death certificate of John Macharia Chege registered on January 19, 1996 which showed that he died on January 9, 1996, a letter dated March 20, 2006 from the Ministry of Water and irrigation to the members of the defendant, a design report of Maombi Services Water Project dated February, 2006 and a letter dated July 26, 2006 to Maombi Water Project from the Catholic Diocese of Nakuru.

46. It is curious that despite the plaintiffs' claim that the suit title was irregularly obtained by the defendant, the defendant never called any evidence to demonstrate that it was legally acquired. Besides, the evidence called by the plaintiffs shows that on numerous occasions the issue of the use of the suit land has been the subject of deliberations, some of which involved public officials well placed to determine if the land is public land or not. There is evidence that the District Commissioner and the District Officer and the Chief dealt with the case and their opinion was that the suit land was public land.

47. This court has noted that uncontroverted evidence was adduced by the plaintiff to the effect that in 1984 each member of the Maombi Farmers Company was issued with shares for their respective share contributions and title deeds were issued in 1988 as seen from the copy of title to Kabazi/Munanda Block 2/240 (Maombi Ona) belonging to PW4, Mary Njeri Allan. PW4's title was issued on November 14, 1988. By that time the defendant was obviously not yet incorporated and neither was it said to have been under incorporation then and so could not have obtained shares either by itself or its promoters. The defendant was incorporated long after that distribution. This court is therefore persuaded and indeed convinced that the suit land was one of the portions that were surrendered to the government and left unallocated at the end of the land distribution exercise. Indeed, the court takes judicial notice that in many of the land buying companies of the 1960s and 1970s the prevailing practice was to

surrender portions of land for public use while distributing land to their members. That surrendered land must be regarded as public land under Article 62(c) of the *Constitution* of Kenya 2010.

48. From the evidence adduced by the plaintiff it is evident that that the suit land comprises of a hill and it was left unallocated on environmental conservation grounds under the name of the Government of Kenya and was not registered in the name of any individual by the time of surrender which was before 1988. By then the *Environmental Management and Co-Ordination Act* 1999 had not been enacted but it appears that there was still recognition of the need to conserve the environment. The issuance of title to the suit land to the defendant occurred on July 27, 2005 long after the issuance of title to members of Maombi Farmers Co Ltd. Section 44 of the EMCA provides as follows:

'

' 44. Protection of hill tops, hill sides, mountain areas and forests
The Authority shall, in consultation with the relevant lead agencies, develop, issue and implement regulations, procedures, guidelines and measures for the sustainable use of hill sides, hill tops, mountain areas and forests and such regulations, guidelines, procedures and measures shall control the harvesting of forests and any natural resources located in or on a hill side, hill top or mountain area so as to protect water catchment areas, prevent soil erosion and regulate human settlement.'

49. Section 45 of the same Act provides as follows:

'45. Identification of hilly and mountainous areas

(1) Every County Environment Committee shall identify the hilly and mountainous areas under their jurisdiction which are at risk from environmental degradation.

(2) A hilly or mountainous area is at risk from environmental degradation if—

(a) It is prone to soil erosion;

(b) Landslides have occurred in such an area;

(c) Vegetation cover has been removed or is likely to be removed from the area at a rate faster than it is being replaced; or

(d) Any other land use activity in such an area is likely to lead to environment degradation.

(3) Each County Environment Committee shall notify the Authority of the hilly and mountainous areas it has identified as being at risk from environmental degradation under subsection (1).

(4) The Authority shall maintain a register of hilly and mountainous area identified under subsection (1) to be at risk from environmental degradation.'

50. Sections 46 and 47 of EMCA provide as follows:

' 46. Re-forestation and afforestation of hill tops, hill slopes and mountainous areas

(1) Every County Environment Committee shall specify which of the areas identified in accordance with section 45(1) are to be targeted for afforestation or reforestation.

(2) Every County Environment Committee shall take measures, through encouraging voluntary self-help activities in their respective local community, to plant trees or other vegetation in any area specified under subsection (1) which are within the limits of its jurisdiction.

(3) Where the areas specified under subsection (1) are subject to leasehold or any other interest in land including customary tenure, the holder of that interest shall implement measures required to be implemented by the County Environment Committee including measures to plant trees and other vegetation in those areas.

47. Other measures for management of hill tops, hill sides and mountainous areas

(1) The Authority shall, in consultation with the relevant lead agencies, issue guidelines and prescribe measures for the sustainable use of hill tops, hill slides and mountainous areas.

(2) The guidelines issued and measures prescribed by the Authority under subsection (1) shall be by way of Gazette Notice and shall include those relating to—

(a) Appropriate farming methods;

(b) Carrying capacity of the areas described in subsection (1) in relation to animal husbandry;

(c) Measures to curb soil erosion;

(d) Disaster preparedness in areas prone to landslides;

(e) The protection of areas referred to in subsection (1) from human settlements;

(f) The protection of water catchment areas; and

(g) Any other measures the Authority considers necessary.

(3) The County Environment Committee shall be responsible for ensuring that the guidelines issued and measures prescribed under subsection (2) in respect of their counties are implemented.

(4) Any person who contravenes any measure prescribed by the Authority under this section or who fails to comply with a lawful direction issued by a County Environment Committee under this section shall be guilty of an offence.

51. Within the context of the plethora of provisions in EMCA aimed at the protection of hilltops and hills, it is not indicated by the defendant that the any environmental impact assessment (EIA) in accordance with the provisions of Section 58 of the *Environmental Management and Co-Ordination Act* as read with Schedule 2 of the Act was conducted on the suit land either regarding its allocation or

any proposed activities thereon. If only the defendant had indicated the manner in which allocation and issuance of title was done, this court could have had insight as to whether the provisions of EMCA were observed. It must be stated that had the defendants also demonstrated that all other steps had been undertaken regularly but the EIA process omitted, their title would still have been tainted with irregularity by virtue of the provisions of EMCA cited herein above. However, when the defendant was faced with the challenge to its title, it resulted to disputing the locus of the plaintiffs, which objection I have already ruled on herein before. It forgot that the burden had shifted to its shoulders to prove that it had obtained its title in a legal manner as stated in the Court of Appeal Case of *Munyu Maina v Hiram Gathiha Maina [2013] eKLR.*

52. In the absence of such proof of regular and legal acquisition of the suit title as aforesaid, it is quite clear that first, the allocation or transfer and issuance of title to the defendant was irregular and secondly, no study of the potential environmental effects of such allocation or the activities on the land including the cutting of roads on the hill terrain to access the base transmission stations was conducted. It goes without saying that environmental anthropological operations on the hill environment will highly elevate the increase risk of incidence of soil erosion and general land degradation. The upshot of the foregoing is that this court arrives at two findings, one, that the suit land is public utility land, the utility being the very purposed conservation of environment for public good that prompted its non-allocation to individuals and surrender to the government, and two, that the allocation and issuance of title to and all the activities on the suit land are illegal.

53. I agree with the plaintiffs and with the decision in Kenya National Highway Authority v Shallien Masood Mighal & 5 Others [2017] eKLR that once the suit property was set apart as public utility, no person not even the directors of Maombi Farmers Company Limited had the right to transfer it to a private entity and therefore the said transfer was void ab initio; Section 26 of the *Land Registration Act* provides as follows:

> ' 26.
>
> (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'

54. By virtue of Section 26 (1) (a) of the LRA this court has the mandate to cancel a title that has been obtained illegally, unprocedurally or through a corrupt scheme. Since the title of the defendant in the present case has been proved to have been obtained illegally, it is liable to be cancelled by this court in these proceedings.

55. As to whether the title to the suit land ought to be registered in the name of name of the government as proprietor on behalf of the plaintiffs and the persons that they represent in this suit this court has no

difficulty in finding that that should be the case. In the case of *Kibagenge Farmers' Co-Operative Society Limited & 4 others v Isaac Kipleting Maiyo & another [2020] eKLR* the court observed as follows:

> ' 42. However, the fact remains that depending on whoever comes into control of the Society's leadership, both the plaintiffs and the defendants having publicly confessed so in these proceedings, are bound to retain the public user of the suit land as a cattle dip and the same having been originally reserved for a public purpose, it should not be reallocated to any private use by any of the Society's members at will. There is no evidence before court that the residents of Kibagenge and in particular Koiyo Farm and the surroundings are about to surrender the age-old practice of animal husbandry in favour of a livelihood that may not require utilization of the suit land, or evidence that their herds will be so reduced as not to require expansion of the existing cattle dip, which according to evidence, is in use till now. The suit land is indeed a remarkable heritage that needs to be preserved for future generations based on the principle of inter-generational equity, if only to ensure that grandchildren and great grandchildren of the original members and shareholders of Kibagenge Kalenjin Estates Limited partake of the benefits of the wisdom and foresight of their forefathers engendered in preserving the suit land as a public utility. Besides, any change of user of land that may affect the livelihood of an amorphous mass of persons should not be conducted willy nilly without a comprehensive study of its consequences on the community. This can be catered for under Section 58 of the Environment Management and Co-ordination Act (EMCA).'

56. The land in this case having been reserved for the higher purpose of environmental conservation in contrast to the cattle dip in the case (supra), there is indeed even greater constitutional mandate on all citizens and authorities to have the same protected. In the Kibagenge Farmers Co-operative Society Limited case (supra), the court proceeded to state as follows:

> ' 43. The main apprehension of the defendant is that the land may be disposed of by the plaintiffs for non-public purposes if it is not registered in the name of the government and the suspicion is not entirely misplaced, although the plaintiffs also suspect the defendants of an intention to deal with the land in a manner conflicting with its original purpose! Given the possible future changes in leadership, attitudes and intentions within the Society and the likely forays of external interests into the dispute, I find it agreeable that retaining the registration of the land in the name of the Society is a risk that should not be taken at all. The land ought to be registered under an entity that would instill more public confidence that the land is safe from personal interest and in this court's opinion this is the office of the Permanent Secretary to the Treasury of Kenya under the Permanent Secretary to the Treasury (Incorporation) Act, CAP 101.'

57. In the case of *Zephania Khisa Saul v School Committee St. Anne's Secondary School [2021] eKLR* the court ordered that the plaintiff shall cause subdivision of transfer half an acre of land out of Kakamega / Mabusi/424 on which the school water project is located to the Permanent Secretary to the Treasury to hold in trust for the defendant.

58. I find that in the present case it is also safer to have the suit land registered in the name of the Permanent Secretary to The Treasury to hold in trust for the persons who obtained their land from LR No LR No 10479 and the farm residents who are the bona fide members of the Maombi Farm community. I also find that any person who desires to deal with the suit land in any manner should hold prior consultation with the said community.

59. The upshot of the foregoing is that I find that the plaintiffs have established their claim on a balance of probabilities against the defendant and the defendant having occasioned this litigation shall bear its costs in full. I therefore make the following final orders:

    a. A declaration is hereby made declaring that land parcel No Kabazi/Munanda Block 2/302 is public land;

    b. The District Land Registrar shall cancel Title No Kabazi/Munanda Block 2/302 issued in the name of the defendant and in its place the Permanent Secretary to the Treasury in the Government of the Republic of Kenya shall be registered as the proprietor and to hold the land in trust for and on behalf of the Maombi Farm Community who are persons ordinarily who obtained land from or are resident within what was formerly known as Maombi Farm, that is the land formerly known as LR No 10479;

    c. The defendant and its representatives, agents and employees shall remove themselves and their belongings from land parcel No Kabazi/Munanda Block2/302 within 90 days of this order in default of which they shall be forcibly evicted;

    d. An order of permanent injunction is hereby issued restraining the defendant by itself, agents, servants and/or assigns from in any manner whatsoever interfering with land parcel No Kabazi/Munanda Block 2/302;

    e. The defendant shall bear the costs of this suit.

Dated, signed and delivered at Nakuru via electronic mail on this 17th day of July 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU