



**Kajulu Kithimo Welfare Association (Suing Through its Registered Officials John Omollo Ondiek and Joseph Aswes Dianga) v National Land Commission & another; Crossley Holding Ltd (Interested Party) (Land Case E001 of 2022) [2023] KEELC 22253 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22253 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**LAND CASE E001 OF 2022**

**E ASATI, J**

**DECEMBER 14, 2023**

**IN THE MATTER OF: KAJULU KITHIMO WELFARE ASSOCIATION**

**AND**

**IN THE MATTER OF: CLAIMS OF LANDS IN KIBOS, MIWANI, KIBIGORI**

**AND CHEMELIL FARMS IN KISUMU COUNTY MEASURING ABOUT**

**18,684.4899HA**

**BETWEEN**

**KAJULU KITHIMO WELFARE ASSOCIATION (SUING THROUGH ITS REGISTERED OFFICIALS JOHN OMOLLO ONDIEK AND JOSEPH ASWES DIANGA) ..... PLAINTIFF**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> DEFENDANT**

**THE PRIVATIZATION COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**CROSSLEY HOLDING LTD ..... INTERESTED PARTY**

**JUDGMENT**

1. *Vide* the Complaint dated 17<sup>th</sup> January, 2022, Kajulu Kithimo Welfare Association through John Omollo Ondiek And Joseph Aswes Dianga, described as its registered officials, sued the Defendants herein seeking for:-



- a. a declaration that the conduct of the colonial administration in forcefully alienating the Kithimo land being the Kajulu Community ancestral land in Miwani West, Miwani Central, Miwani East, Miwani North, Nyangore and Chemelil all measuring a total of 18,684,489 Ha (about 46,711,224.75 acres) in 1901 – 1906 without compensation or alternative lands amounts to a historical injustice.
  - b. an order that the Kajulu Community be entitled to compensation for their parcels of land that are deemed to have been compulsorily acquired by the government, particularly the 16,645.1 acres confirmed by the National Land Commission to be in the name of state corporations and Chemelil Sugar Company Ltd.
  - c. an order to quash and/or otherwise stop the renewal of the lease in respect of the remaining farms measuring 39,460,124.75 acres in Kithimo land being the Kajulu Community ancestral land in Miwani West, Miwani Central, Miwani East, Miwani North, Nyangore and Chemelil whose lease have since expired between 2002 – 2005 and give the plaintiff first priority during issue of fresh lease.
  - d. costs of the suit.
2. The 2<sup>nd</sup> Defendant entered appearance and vide 2<sup>nd</sup> Defendant’s Statement of Defence dated 9<sup>th</sup> February, 2022 denied the plaintiff’s claim and put the plaintiff to strict proof thereof.
  3. The 1<sup>st</sup> Defendant entered appearance dated 5<sup>th</sup> April, 2022 and *vide* the Defence dated 24<sup>th</sup> April, 2023 denied the Plaintiff claim and put the Plaintiff to strict proof thereof.
  4. The interest party was later admitted into the suit through the court order dated 24<sup>th</sup> July, 2023.
  5. The case of the Interested Party was contained in the Replying Affidavit of Epainito Apono Okoyo sworn on the 9<sup>th</sup> June 2023. He deposed that the Interested Party is the owner and registered proprietor of all that parcel of land known as LR 7545/3 (I.R.NO. 21038) within Miwani area in Kisumu County. That the Interested Party is engaged in sugar cane farming wherein it has made massive investments in the parcel of land and is protected under article 40 of the *Constitution*. That the Interested Party’s proprietary interests should not be subjected to these proceedings as its lease over the said parcel has not expired.
  6. He deposed further that the court lacks the requisite jurisdiction to entertain this suit as the court has been approached in breach of section 5 (1) (e) of the *National Land Commission Act* 2012. That this court could only be approached by way of an appeal or Judicial Review in view of the decision of the National Land Commission in National Land Commission Historical Injustices Committee Case NLC/HLI/103 OF 2017 *Kajulu Kithimo Welfare Association Vs National Government*. That the suit is bad in law, misbegotten and incurably defective and unsustainable by dint of the decision in *Henry Wambega & 733 Others vs Attorney General & 9 others* [2020] eKLR.
  7. On 25<sup>th</sup> April, 2023 directions were taken that the case be canvassed by way of written submissions.

### **Submission**

8. Written submissions dated 26<sup>th</sup> May, 2021 were filed by the firm of Amondi and Company Advocates on behalf of the Plaintiff. Counsel submitted that the issues for determination in the case are;
  - a. whether or not this court has jurisdiction to entertain the suit.
  - b. whether the plaintiff had evidence before the court.



- c. whether the plaintiffs were the ancestral owners of the suit parcels described as Kajulu/Kithimo lands and more specifically lands in Kibos, Miwani, Kibigori And Chemelil Farms in Kisumu County measuring about 18.684.4899Ha.
- d. whether the plaintiffs were forcefully evicted from the said ancestral lands in Kibos, Miwani, Kibigori, And Chemeli Farms in Kisumu County and if so, whether they were compensated or granted alternative parcels.
- e. whether there is a valid cause of action against the 2<sup>nd</sup> Defendant.
- f. whether the plaintiffs were duly compensated for the 16.645.1 acres confirmed by the National Land to be in the name of state corporation Miwani Company Ltd and Chemelil Sugar Company Ltd.
- g. whether the plaintiffs are entitled to compensation for their forceful eviction from their ancestral lands being Kibos, Miwani, Kibigori And Chemeli In Kisumu County measuring a total of about 18,684.4899 Ha.
- h. whether the plaintiff should be granted first priority during the renewal of the leases in respect of the 39,460.12475 acres in Kithimo land being the Kajulu Community ancestral lands in Miwani West, Miwani Central, Miwani East, Miwani North, Nyangore And Chemelil whose lease have since expired between 2002 – 2005.

9. Counsel submitted that the National Land Commission has not filed a substantive response to the main suit hence the averments against it remain uncontroverted.

10. On whether or not this court has jurisdiction to entertain the suit, Counsel submitted that the substance of the suit is that the 1<sup>st</sup> Defendant in a determination issued on 7<sup>th</sup> February, 2019 disallowed the Plaintiff's claim in respect of the ancestral land rights in Kithumo land measuring 18,684.4899Ha whose lease have since expired between 2002 – 2005 but recommended that the 2<sup>nd</sup> Defendant do settle the landless. That the 1<sup>st</sup> Defendant in a communication through gazette notice dated 6<sup>th</sup> April, 2023, amended its decision dated 7<sup>th</sup> February, 2019 thereby acknowledging the Plaintiff's ownership rights and their entitlement to compensation.

Counsel submitted that as held in Civil Appeal 51 of 2016 *Chief Land Registrar & 4 Others -vs- Nathan Tirop Koeh & 4 Others* and Mombasa Court of Appeal Civil Appeal No.8 of 2019 *Safepark Ltd -vs- Henry Wambega, National Land Commission & 10 Others* this court is seized with authority to deal with historical injustice claims. Counsel further relied on Section 15(3)(b)(i) and (iii) of the *National Land Commission Act* which provides the circumstances under which historical injustices claims can be adjudicated on by the ordinary court namely;

- i. That if the claim does not contradict any law that was in place at the time the injustice was committed and
- ii. if the claim is not debarred under Section 7 of the *Limitation of Actions Act* Cap.22 or any law.

Counsel submitted that the claim herein fits in both conditions. That there can be no limitation of time in respect of the pursuit of the plaintiff's fundamental rights to property as envisaged under article 40 of the *Constitution*.

11. Counsel submitted that the Plaintiff is seeking for compensation at Kshs.1,627,800.00 for breach of fundamental rights in the Bill of rights in terms of their right to housing in which damages/



compensation can only be adjudicated through a civil suit. And secondly, compensation for their forceful eviction at Kshs.55,401,800,000/=.

12. That the substantive law when dealing with compensation for breach of the right to housing is found in Section 13(7)(a) of the *Environment and Land Court Act*, No.19 of 2011. Counsel relied on the case of *Kenya Bus Services Ltd & 2 Others –v-s The Attorney General* [2006] KLR 272 to support this submission.
13. Relying on the case of *Delmonte Kenya Ltd –vs- County Government of Muranga & Another* [2019] eKLR Counsel submitted that in addition to the issue of historical injustices and the right to compensation, the suit substantively addresses the dominant question of the Plaintiff's property right to renewal of the lease to the suit property.
14. That in its decision dated 7<sup>th</sup> February, 2019, the 1<sup>st</sup> Defendant only delved into land measuring 16,564.1 acres that were subsequently registered after independence in names of two state corporation but ignored to address the remaining 39,460.12475 acres whose leases also since expired. That the court has jurisdiction to entertain and hear the plaintiff through a fresh suit by way of plaint on the unaddressed issues of the remaining 39,460.12473 acres of land.
15. On whether the Plaintiff had evidence before the court, Counsel submitted that pursuant to directions taken on 24<sup>th</sup> Aprils, 2023, the witness statement and documents filed by the Plaintiff are treated as the evidence tendered. Counsel relied on the case of Embu ELCA 26 of 2019 (Formerly Embu HCCC Appeal 47 of 2018 *Kenyata Njiru –vs- Eustance Njiru Mutuku* where it was held inter alia that under Order 11 Rule 3(2)(c) of the *Civil Procedure Rules* the court is empowered to direct the admission of statements without calling the witness and the production of documents without calling the authors.
16. On whether the plaintiffs were the ancestral owners of the suit parcel measure 18,685.4899Ha, Counsel submitted that the 2<sup>nd</sup> Defendant in a gazette notice dated acknowledged the right of the Plaintiffs and further that the Plaintiffs were entitled to compensation.  
That the Plaintiffs are the descendants of the original owners of the suit land. That the earlier recognition of the Plaintiffs' ownership can be traced to a letter dated 4<sup>th</sup> November, 1909 in which the Provincial Commissioner, Kisumu, one John Ainsworth wrote to the acting Commissioner of Lands that the lands are held in trust for them by the current registered owners.
17. Counsel submitted further that the 1<sup>st</sup> Defendant in a determination issued on 7<sup>th</sup> February, 2019 erroneously disallowed the Plaintiff's claim in respect of the ancestral land rights. That the 1<sup>st</sup> Defendant failed to consider the overwhelming evidence of the nature of the eviction carried out by the colonial government in 1901 to 1906 which claim was captured in the claimant's claim and document. That in as much as the 2<sup>nd</sup> Defendant has stated that the privatization process has since been abandoned by the government it has not been demonstrated that any attempts whatsoever have been made to commence negotiation with the plaintiff who legitimately claim ancestral ownership rights.
18. On whether or not the Plaintiffs were forcefully evicted from the ancestral land, Counsel submitted that the Plaintiffs have demonstrated that their alienated land formed the foundation of the larger sugar estates. That there was no compensation for those evicted from the ancestral lands as the colonial era established that the natives, the Luos lacked any legal rights over the land.
19. On whether there is a valid cause of action against the 2<sup>nd</sup> Defendant, Counsel submitted that the 2<sup>nd</sup> Defendant is a creation of statute, formed pursuant to the provisions of Section 3 of the *privatization Act* 2005. That the core relevance of the 2<sup>nd</sup> Defendant in this matter stems from the fact that the



Plaintiff have laid a claim to land that is currently registered in the names of two public entities namely Miwani Sugar Mills Ltd And Chemelis Sugar Company LTD.

20. On whether or not the Plaintiffs are entitled to be compensated, Counsel submitted that by its decision published in a gazette notice dated 6<sup>th</sup> April, 2023, the 1<sup>st</sup> Defendant amended its earlier decision and acknowledged the Plaintiff's ownership rights and entitlement to compensation. That there is no evidence that the Plaintiffs were ever compensated for their ancestral land.
21. Counsel submitted further that the Plaintiffs are entitled to compensation for their forceful eviction from their ancestral land. Counsel submitted that such customary rights even under the Constitution could not be extinguished unless after compensation.

That after the plaintiffs' ancestors' dwellings on the land were destroyed without regard to the rights of occupation hence rendering them landless thus their rights under article 43 and 19 of the Constitution (access to social economic rights) including the right to own land and develop a home were violated. That the evictions were in breach of article 27(4) and 47 of the Constitution as they targeted members of Luo community hence discriminative on the basis of ethnicity, culture and belief. Relying on the decision in Mitu-Bell Welfare Society –vs- Kenya Airports Authority, Counsel submitted that the Plaintiffs have a remedy not just under domestic but also under international law.

Counsel submitted further that compensation of Kshs.300,000/= for each of the 5426 registered members of the Kajulu Kithimo Welfare Association is sufficient to compensate them for eviction. Further, that the Plaintiffs are entitled to compensation equivalent to the actual value of the land which according to the valuation report prepared by Prime Valuers and signed by Joseph N. Inoti is Kshs.55,402,8000,000/-.

That the total compensation due therefore is Kshs.57,030,600,000/-

22. On whether the Plaintiff should be granted first priority during the renewal of the lease in respect of the remaining farms measuring 39,460.12475 acres; Counsel submitted that the circumstances surrounding the issue of lease in respect of the suit parcels is that after the Luos were evicted from the suit land, they were loosely informed that they would get back their land after expiry of the lease whose terms they later realized were 99 years. That the leases were granted to the Asian community by the colonial government. That the Plaintiffs were in occupation of the suit parcels from as far as 1877 upto 1889 when they were ordered out to pave way for the Indian Coolies who were working on the construction of the Mombasa/Kampala Port Florence railway line at Kisumu.

That the Plaintiffs are therefore entitled to and indeed have legitimate expectation based on sound public policy that the suit parcels would revert to them or that they would be given priority in respect of re-issue of renewal of new leases upon the expiry of the old ones. Counsel relied on the case of Kenya Airports Authority –vs- Mitu-bell Welfare Society & 2 Others [2016]eKLR in defining what legitimate expectation is.

23. Written submissions dated 17<sup>th</sup> July, 2022 were filed by Sarah Juma, Senior Litigation Counsel for the Hon. Attorney General.
24. On the issue of whether this court has jurisdiction to entertain this matter, Counsel submitted that the court's jurisdiction has been ousted because the National Land Commission had already heard the matter on 16<sup>th</sup> August 2018 and gave a determination dated 7<sup>th</sup> February, 2019. That this fact is already admitted by the Plaintiffs in both the plaint and documents placed before the court. That the Plaintiffs complained that notwithstanding the evidence adduced before it, the National Land Commission did not address the issue of historical injustices, that they failed to carry out investigations and that they failed to establish that the colonial administration violated their property rights.



25. Counsel submitted that Section 29 of the [National Land Commission \(Investigation of the Historical and Land Injustices\) Regulations](#) provides that;

“A person aggrieved by the decision of the Commission may, within twenty-eight days of publication of the decision appeal to the court”.

Counsel submitted that if the Plaintiffs were dissatisfied with the findings of the National Land Commission, they should have lodged an appeal or done so by way of Judicial Review.

Counsel relied on the case of [Almar Farm Limited –vs- National Land Commission & 2 Others](#) [2021]eKLR to submit that where there is a clear procedure for redress of any grievance prescribed by the [Constitution](#) or an Act of Parliament, that procedure should be strictly followed.

26. Counsel submitted that the court may not be well suited and equipped to canvass this matter because there is no evidence that has been presented to show the nexus between the people listed in the long list provided in the plaint and ownership of the parcels in contention.

That it will require very rigorous verification process to determine the ancestral lineages to determine whether indeed the people in the list are indeed descendants of the ancestors and indeed entitled to compensation for the land. That the National Land Commission already carried out the investigations and found no link. That the National Land Commission *vide* gazette notice of 6<sup>th</sup> April, 2013 reconsidered its position and admitted the claim and recommended that a task force be formed to investigate on those that require compensation.

27. Relying on the case of [Daniel Kaminja & 3 Others \(Suing as Westland Environmental Caretaker Group\) –vs- County Government of Nairobi](#) [2019] eKLR Counsel submitted that since it is clear that the matter is being handled by the National Land Commission the suit before court is moot.

28. On whether there is a valid cause of action against the 2<sup>nd</sup> Defendant;

Counsel submitted that from the pleadings it is not clear what relief the Plaintiff is seeking against the 2<sup>nd</sup> Defendant. That pursuant to Section 5(1) of the [National Land Commission Act](#), the Commission pursuant to article 67(2) of the [Constitution](#) has power to manage all public land on behalf of the National and County governments. That the Privatization Commission does not have the mandate to resettle people on lands that it does not own. That there is no valid cause of action against the 2<sup>nd</sup> Defendant.

29. No submissions were filed by the 1<sup>st</sup> Defendant.

30. Counsel for the interested party submitted *vide* the written submissions dated 29<sup>th</sup> September 2023 that the court lacks jurisdiction to hear the suit and that the suit is *res judicata*.

31. Relying on the cases of [Owners of the Motor Vessel “Lillian S” vs Caltex Oil Kenya Ltd](#) (1989) KLR 1 and [Samuel Kamau Macharia vs Kenya Commercial Bank Ltd & 2 Others](#), Civil Appl. No. 2 of 2011, Counsel submitted that the [National Land Commission \(Investigation of Historical Land injustices\) Regulations](#) 2017 provide for the avenue and timelines within which an aggrieved party dissatisfied with a decision of the Commission may lodge an appeal. That the Regulations provide that a person dissatisfied with the decision of the Commission may within 28 days of the publication of the decision appeal, to the court. That since the dispute herein was the subject of the decision by the Commission the Plaintiff ought to have filed an appeal and not a fresh suit.

32. Further, relying on the provisions of section 7 of the [Civil Procedure Act](#) and the case of [Henderson vs Henderson](#) (1843) 67 ER 313 Counsel submitted that the Plaintiff having litigated over the same



matter before the National Land Commission is caught by the doctrine of *res judicata*. Counsel urged the court to strike out the suit with costs to the Interested Party.

### Issues for determination

33. From the pleadings filed, evidence and submissions made, the issues that emerge for determination are;
  - a. Whether or not the court has jurisdiction to entertain this matter.
  - b. Whether or not the suit is *res judicata*.
  - c. Whether or not the Plaintiff is entitled to the relief sought in the plaint.
  - d. What orders to make on costs.

### Analysis and determination

34. It is not in dispute that the dispute herein was the subject of proceedings before the National Land Commission lodged thereat by the Plaintiff pursuant to the provisions of article 67 of the [Constitution of Kenya 2010](#) and Section 5 of the [National Land Commission Act](#). The claim and accompanying documents that were lodged before the Commission were filed with the plaint and marked PEXB-4(a), (b), (c), (d), (e), (f), (g), (h) and (i).
35. The Plaintiff's complaint in the Plaint is, inter alia, that the Commission did not address all the issues placed before it. That the Commission only dealt with lands measuring 16,645.1 acres, that the Commission ignored to address the remaining 39,460.12475 acres whose leases have expired and that the decision failed to specifically outline the size of the land to be set aside.
36. The [Constitution](#) in article 67 establishes the National Land Commission and empowered it to, *inter alia*, manage public land on behalf of the National and County Governments, to initiate investigations on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress. The [National Land Commission \(Investigation of Historical Land Injustices\) Regulations](#) 2017 provide for the procedure for a party to follow once dissatisfied with the decision of the Commission.
37. Hence the matter could have come before court as an appeal as provided for by the Regulations. Secondly, this court's jurisdiction is ousted by reason of the dispute having been handled and determined by the commission. As held in The [Owners of the Motor Vessel "Lillian S" vs Caltex Oil \(Kenya\) Ltd](#) (1989) KLR 1, jurisdiction is everything and without it the court cannot proceed with the matter.
38. The second issue is that the suit is *res judicata*. It is clear that the dispute has been heard and decided by the Commission. The same is *res judicata*.
39. On the basis of the foregoing findings there will be no basis to hold that the Plaintiff is entitled to the relief sought. The suit is therefore hereby struck out. Each party to bear own costs.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 14<sup>TH</sup> DAY OF DECEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:



Nyambeki for the Plaintiff.

No appearance for the Defendants.

Onsongo for the Interested Party.

