



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 4 OF 2011

HUSSEIN MOHAMMED KULA

HASSAN NUR ABRAHAM

IBRAHIM ALI HUSSEIN (*Suing as The Office Bearers Of*

WALIKHABANA SELF HELP GROUP).....**PLAINTIFFS**

VERSUS

BARIAS SHINA ERGATA & 197 OTHERS..... **DEFENDANTS**

JUDGEMENT

1. The plaintiff's instituted this Suit on 9th November 2011 claiming that they are the legitimate proprietor of the parcel of land known as Walkhabana Self Help group measuring approximately 74.2 Hectares situated at Saka Location Madogo Division vide allotment reference Number 01500 issued by the County Council of Tana River.

2. They averred that the Defendants had on or about April 2010 invaded on their land and took away with power tools. That on or about 3rd July 2011 they invaded on the farm again and took away water pump and other related tools. That despite numerous dispute resolution meetings, the defendants have continuously interfered with the plaintiff's farming as a result of which they have suffered loss and damage.

3. The plaintiff's urged the court to issue the following Orders;

a) A declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession of the parcel of land known as Walkhabana Self Help Group Farm measuring approximately 74.2 Hectares situated at Saka Location Madogo Division subject of allotment reference Number 01500 and physical Development Plan No. TRD/232/2010/53.

b) Permanent injunction restraining the Defendant whether by themselves, servants or agents and/or any persons howsoever claiming under them from interfering with the plaintiff's possession of Walkhabana Self Help Group farm and/or committing any form of trespass thereon.

c) General damages for trespass.

d) Cost of the suit plus interest thereon at such rates as this Honourable Court may deem fit to grant.

e) Any such other or further relief as this Honourable Court may deem appropriate in the circumstances.

4. The Defendants filed a joint statement of defence on 24TH November 2011. They averred that the County Council of Tana River held the land in issue in trust for the indigenous residents of the area who are the *Waliwana* ethnic community and in particular the *Ergata Family* and it therefore had neither the right nor the authority to deprive the local community of their communal ancestral land without consulting them. They averred that the plaintiffs have never been in possession of the suit premises since they were chased away prior to their occupation. They admitted to taking the water pump but averred that the same was secretly put and they removed it and took it to Madogo Police Station. They denied there being any dispute resolution meeting and stated that any records produced as evidence of ownership are forgeries. It was their further averment that they are entitled to protect and defend their community land and they shall continue to resist all irregular and unconstitutional attempts to be deprived of their land.

5. The matter proceeded for hearing on diverse dates. Both parties testified.

6. **Pw1 Hassan Nur Abraham**, chairman of Walkhabana Self Help group testified that the group was formed in the year 2006 and registered in the year 2007 precipitated by the drought pandemic as an alternative to herding and solely to conduct business and farming. That they approached the county Council and informed them that they want a piece of land. The council referred them to the Sub location committee who showed them a place in *Kherguyo*. At the time, the land was bushy and had no sign of development. They cleared the land and went back to the sub location committee who approved the land.

7. He told the court that the Sub location committee held its meeting on 11/9/2008 chaired by Sub-chief Aden Guche Wacho, Headmen and other members of the committee. That the committee resolved in Agenda 2 that the land to be allotted to the group. A second meeting was held on 17/9/2008 by the Land Development Committee where at Agenda 1, resolved that the land shall be given to the group. That they also went to the Divisional Development Committee which resolved at Agenda 4 that the group should get the land.

8. It was his testimony that by this time, they had cleared 18 Acres. They paid Kshs. 15,000/= as application, land rates and registration fees. The allotment letter refers to 74.2 Acres the same was made as per the Physical Development Plan. PDP No. TRD/232/2010/53. That after this, they applied for registration of the land measuring 74.2 Acres. They were issued a certificate Ref. TRCC/LND/46.5.

9. That in the year 2008, three members of the Ergata Community informed them that they had interfered with the boundary. The elders resolved the Boundary dispute. In 2010 they were issued a pump by Red cross. The same year, 10 youths invaded the land destroyed items and threatened to kill them. The Elders resolved the matter. On 3/7/2011, over 20 people aboard motor vehicle registration Number KAP 809K and armed with bows and arrows invaded the land and took away with the water pump. They reported the matter at Madogo Police station vide OB No. 22/4/7/2011. They later went to the police station and found the pump.

10. Later in the year 2018 a security team went to the farm together with the D.O. and the Chief. The D.O. resolved that the two farms were existent i.e. Dololo Farm and Walikhabana Farm. That when the police did not give them a solution, they decided to institute these proceedings. He urged the court to find that the defendants entered the land without their permission. They would have planted mangoes and other crops during the six years. He sought damages for cost opportunity to farm and develop the land for six years.

11. In Cross examination, it was his testimony that his family came from Elwak which is in Mandera County (as per his I.D.). He was however born in Tana River, Mlanjo Village Laganjire. That at Mlanjo, there is the Munyoyaya, Ogaden and Garee clans. The Garee are the ones who came from Mandera and Isiolo while Ogaden came from Garissa.

12. He conceded to knowing Gamenane Farm, Ergata Family and Dololo Farm. He however stated that Dololo farm and Kher Guyo farm are separate and distinct farms. That at the time they occupied the land, the same was virgin and unoccupied as the land belonged to the government. They only informed the chief that they were to clear the bushes. That Guyo Chumba was the leader of the Munyoyaya Clan before the colonial period. He was not born at the time but was informed that Guyo Chumba owned the land.

13. In re-examination, he clarified that they approached the locational and Divisional land committee who confirmed that Historically, the land belonged to the *Abadiba Family*. That the Abadiba Family have not complained about the land. That he is not familiar to the workings of the County Council but he is aware that only members of the Sub-committee are invited to attend the meeting. That Ergate family are not member of the sub-locational, locational and divisional committee.

14. **Pw2 Adan Wachu** Assistant Chief Mlanjo Sub-location Saka Location. He testified that he has worked within Madogo Division for 22 years. He confirmed to be familiar to the self-help group and that the plaintiffs resided within Madogo division. That they talked about security and drought and as a team they resolved that people should group together and do farming as a project. That they authorized the Self- help group to farm. They also resolved that the plaintiffs should follow up over Agenda 2. It was also his testimony that the chief decided the boundary between Khar Guyo and Dololo Farm. At the time, they knew that the land had been issued to the plaintiffs. He confirmed that the Plaintiffs were issued a water pump by Red cross. That the group had cleared the land at the time a group from Dololo invaded the farm.

15. In cross examination, he testified that headmen, councilors of the Area and the Chief were members of the Sub-Location Committee. He confirmed being present at both sub-locational and locational committee. He acted in the chief's capacity. That the land in dispute is trust land. He told the court that Gola farm belongs to Abadiba Family. Baretume farm belongs to Kukuyu Kwamamane. The farm is also called Bara Farm. Baretuno farm is also near there. Damunyare farm are between Dololo and Khar Guyo. Every family had a place. Munyoyaya are from Galole, Garsen, and Mbalala. Shown a list by the defence counsel and he confirmed the same to be a list of the member of Ergate family with Dameto Dilo being one of the eldest. Guyo Chimba was the leader of Abadida Family. Abadida was the son of Guyo Chimba.

16. He further testified that he did not consult Ergate family to discuss any dispute and/or during the sub-locational and locational committee. That the two meetings were convened after a short duration due to the drought pandemic and people wanted to cultivate. That they did not get food between the short period but got a way forward. He denied having personal interest in the matter. He conceded that Dololo farm belongs to Ergata.

17. In cross-examination, he denied having a personal interest in the suit premises but concede that he is a member of the self-help group. He restated that the Ergate Family does not reside in the Area. That there is a boundary between the neighboring farms. That they acted fast to allow them prepare the land for farming.

18. **Pw3 Mugalla Maro** was the Divisional Gender Development Officer Madogo Division. When Shown Exh1 the group's certificate, he confirmed that it was a document issued through their office. That the same was issued to Walkhabana group. He confirmed dealing with the group previously.

19. When shown certificate of registration for Dolola Farm Self-help Group, he testified that he did not have such a document in his office and the same could be found in their office at Hola. He however confirmed knowing Benard G.Waweru who was former district Gender officer at Hola.

20. **Pw4 Matanidis Ramadhan** project officer Red-cross confirmed that a water pump was given to Walkhabana Group. He stated that the pump stayed in the station for a long time. they could not return the same to the group due to the ongoing dispute. He produced a letter from the Agricultural Officer recommending issuance of the water pump to the group as **Pexh. 4**.

21. **Pw6 -Rashid Wele** testified that he is a Civil Servant at Madogo. He explained the procedure for land acquisition. It was his testimony that one has to approach each family in occupation of the land. Once the family agrees, it is discussed at the sub-locational level and a consent is issued. The matter is then taken to the locational committee level chaired by the Area Chief. If passed, the same is taken to the sub-district development committee where the matter is discussed and consent is given. It is after this that the party applies to the County Council for allotment letter. He confirmed that the committee discussed and agreed that Walkhabana Group was to be allowed to farm. He confirmed that the committee comprised of the District officer, Department heads, representatives from religious leaders and elders. He also confirmed that there was a boundary dispute between Guyo Jimbo & Ergate Banisa Family. The dispute was also to the effect that Jumbo family had given out land to the Walkhabana Self Help Group.

22. In cross-examination, he testified that at the Sub-locational committee, the family informs the committee of the incomers. That if a family raises a complaint at the locational level, the same is referred back to the sub-locational level for further discussion. He testified that the assistant chief would sit at the locational level as a member of the committee. At the locational level, the chief is the chairman. The chief sits as a member, not assistant chair, at the divisional level. Lastly, he stated that the locational and sub-locational committee meet quarterly but they also meet when a situation arises.

23. **Pw7- Mohammed Mulisho Abadiba** Chief of Saka location testified that he has been chief since the year 1988. That Kher Guyo is within Mulanjo Sub-location and 15 Km from Mulanjo Chief Centre. That the same is named Kher Guyo due to custom. Every family had a farm. That the leader was Guyo Jumbo. Ergate family is different from the Guyo family. That Ergate family have their land at Dololo Farm. Wedo Abadiba Guyo, councilor since 1974 is the leader of Kher Guyo and senior member of the family.

24. He testified being a member of the Guyo family and stated that the family had consented to the issuance of the land to the group. That at the time of the issuance, there was a dispute with the Ergate family. That both families sat on 9/9/2007 (at his offices) they went to the farm and resolved the dispute. that there are trees which mark the boundary.

25. **PW8- Joseph Ogugi** OCS Madogo Police station produced extract of OB. No. 22 of 4/7/2011 at 11:45 a.m. as Pexh6.

26. **Pw9- Hussein Mohammed Kula** testified that on 3/7/2011 at around 3:00 p.m., 24 people came in a vehicle armed with bows and arrows escorted by police reservists. They alighted from the car and took possession of the pump. He identified six persons in court as being amongst those who took part in the raid. He confirmed recording his statement the next day and equally seeing the water pump at the Police station.

27. In cross-examination, he testified that they had been on the land for six months prior to the pump being taken. He reiterated that the Ergate family was claiming that the land was theirs but their land is in Dololo farm. He told the court that they did not go to Guyo family to ask for the land. That the chairman was the one dealing with the land.

28. **Pw10- Galano Funan Banta** Tana river County revenue officer/land allocation Madogo division testified that his duties include collecting revenue, land rates, visit the location of the land and issue receipt of land payment. That he is familiar with Walkhabana Self Help Group. That there are minutes of the Sub-locational and Locational Committee and that is when they process the allotment letters.

29. That his senior issued the allotment letter. That the group paid application fees, registration fees, setting apart fees and land rates. The same was backed by minutes dated 8th and 9th February 2011.

30. He produced the following documents; PDP/TRD 232/210/2010/53 (Exh7), Minute extract (Exh8), Receipt for minutes paid on 22/7/2011 (Exh9), Allotment letter (Exh10) Receipt for allotment dated 15/4/11 (Exh11), Receipt for farm application (Exh 11 a), Rent payment receipts (Exh 11 (b) & (c), Letter from County Council Exh 12.

31. In cross-examination, he told the court that the receipts for the farm application, registration and setting apart fees were issued on 15/4/2011. The same were issued before the farm was registered i.e. on November 2011. He testified that the setting apart process takes almost one year. He however denied that in this case the same was fast tracked. He was taken to task on the measurement of the land he testified that the Town planning and market Committee can allocate such size (74 hectares). He told the court that he visited the land with the Divisional Committee. He however stated that he was not aware that the Chief and the councillor came from the same family for 3 generations.

32. In re-examination, he told the court that the process began in 2010. The PDP was done in 2010. That the farm is in Tana River but initially registered in Garissa County. That at the time the application for setting apart was made in 2011, he went to the site and found the farm was already in existence. That it is not abnormal to pay for the whole process on the same day.

33. **Pw11- Mohammed Ali Mwafunza** Director Urban development services testified that if a person wished to be registered as the proprietor of land, he makes an application to the county Council. The application is tabled to the relevant committee. That in this case it was the Town Planning and Markets Committee. He stated that he received the application in January and tabled the same before the committee on 8th & 9th February 2011. The committee approved. That once the committee approves, the County Clerk writes to the applicant informing him of the decision of the committee and the charges he is supposed to pay. The applicant is supposed to pay for the allotment fees and

setting apart fees. Thereafter he is given an allotment letter by the county council. He produced the minutes from the committee as (Exh 13), receipt of Council minutes (Exh 14), allotment letter from County Council of Tana River (Exh 15), letter from County Council of Tana River informing the applicant that his application was successful (Exh 16).

34. In Cross- examination, he told the court that the acreage of the land applied is 74.2 Ha approximately 181.79 acres. He conceded that there was a difference of weeks between the meeting held at the locational and the divisional meeting. He however stated that nothing was detected by the speedy sitting of the committee at the sub-locational, locational and divisional level. It was also his testimony that during the setting apart process, the council is supposed to get comments from the local people. That in this case, the council did not go to the place where the land was situated to confirm the locals had no objection to the allocation of the suit property. The PDP had not been approved by the director of surveys in Nairobi. That the letter of allotment is the first step of starting the process of registration by the Ministry of Lands. The same is yet to be registered by the Ministry of lands in favour of the applicant. That the land belonged to the Walkhabana group on the basis of the allotment registered in the county Council. That he later came to learn that some people were claiming the same land allocated to Walkhabana Self-help Group but they have not come to them.

35. He further testified that the number of the committee members are 15. The Minutes of committees are presented to full Council for either approval or rejection. The recommendation of the committee, town planning and market committee was presented to the full council meeting. He did not have the minutes of the full council approving the same.

36. In re-examination, he told the court that they have no control over the decision of the sub- locational, locational and divisional committee. That when they receive the minutes, they are certain that there are no objections. That they only wanted to ascertain that Walkhabana was a registered group with the government. There is no other group registered other than Walkhabana. The allotment is a form of identification. The plot refers to size and location of the plot.

37. **DW1- Salat Imole Lengarisa** a resident of Malakatikati farm in Saka Location Madogo Area in Tana River County. He testified that he is familiar with the families that live along the banks of River Tana. That the families include Lenkarisa family, Elgata, Kolosho, Kotu, Guyo and Tukuyu. That the owner of Dololo farm is Elgata family. He also testified being familiar to the Wedo Abatiba & Mohammed Mulisho. He however stated that he is not aware of Wlakhabana Self- Help Group.

38. In cross-examination, it was his testimony that for one to acquire land along the Tana River, he has to talk to the owner. There is a leader who speaks on behalf of the clan. Anybody who wants to get land has to speak to the head of the clan and in this case, Mzee Abadiba is the one to be consulted in case of anything. He told the court that he is not familiar to the Sub-locational and locational committees. That there is no problem if the Abadiba family agreed to give land to the Walkhabana Self-Help group. that the Ergata family and Abadiba family are far away from each other.

39. In re-examination, he testified that the farm in Dololo and Abadiba family land are far away.

40. **Dw2 -Mohammed Buro Guyo** a cattle herder testified that he comes from Gotu family which faces Ergata farm to the left, Lengarisa farm to the right is Komomam farm and Abadiba family. That their farm is known as Bartemu farm. That their border with Ergata farm is a thin line. The distance between their farm and that of Ergata and Abadiba is far. He told the court that Wedo Abadiba is his uncle and they have good relations. That Othimbitu farm belonged to his grandfather known as Othimbitu. That there is no dispute in the farm.

41. He further testified that they have a representative in the family. If someone wants a portion of family land, he can approach the family and they may accept. The family has to agree and an agreement is written. There is nowhere written in the county government records that it belongs to the family. He stated that the Abadiba family stay far away from their family land.

42. In re-examination, he stated that he has no relationship with the 2nd, 3rd, 5th and 7th Defendants. They are neighbours. There is a cut line between the different farms. Ergata farm and Abadiba farm are not neighbours.

43. **Dw3 -Dawala Dilo Elgata** testified that he is a senior member of the Ergata Tribe. He testified that there was nobody introduced by the Area chief who wanted to buy their tribal land. There was no administration officer beside the chief who came saying that they wanted to sell the land belonging to the tribe. That there is no resolution in a meeting by either the chief or the DO saying that they wanted to buy the tribal land. He stated that he is not aware being approached by the County Council or County Government that there are people who wanted to buy their land.

44. In cross-examination, he restated that the land belonging to Ergate family is known as Dololo farm and the land belonging to the Abadiba is known as Gora. He denied being in a meeting dated 9/9/2007 and/or signing on the minutes of the meeting. He stated that he is not familiar to the Walkhabana group. That the Dololo land which is in court was wrongly sold. The boundary between their land and the neighbouring land is separated by a tree and a beacon.

45. In re-examination, he testified that he is not familiar with the size of their land but he knows the boundaries of their land. He stated that the Ergata land and that of Abadiba is separated by two parcels of land belonging to two owners. That if the Abadiba want to sell their land, he has no problem with that.

46. Both parties filed their respective submissions. The plaintiffs submitted on four grounds i.e. *Whether the Walkhabana Self Help Group is a legally registered entity? Whether the Walkhabana Self Help Group followed the laid down procedure in the acquisition of the Walkhabana Self held group farm measuring approximately 74.2 hectares and if so, whether they are the legal and/or beneficial owners of that land? Whether the plaintiff's encroached and/or trespassed onto the Defendants parcel of land? Who should bear the costs of the suit?*

47. On the first ground, the plaintiff's submitted that Walkhabana self-help Group is a legally registered entity. They relied on the certificate of registration dated 16th November 2007 (exh1). He also sought to distinguish Dololo farm which the plaintiffs stated was registered on 7th

March 2008, four months after Walkhabana Self help Group.

48. On the second ground, the plaintiffs submitted that the plaintiffs followed all the steps required in setting apart the suit premises. That the plaintiffs qualified as trustees for the reason that the land in question was clan/family land and that their relationship was not so remote as the project they intended to carry out would benefit the group and the community as a whole. The plaintiff took issue with the defendant's witnesses who they opined could not comprehend the issues before the court. They cited the following cases in support of their submission on this ground i.e. **Isack M'Inanga Kiebia V Isaaya Theuri M'Lintari & Another [2018] Eklr, Justus Maina Mukuru V Jane Waithira Mwangi (2014) Eklr, Martha Thairora V Elizabeth Kananu & Another (2019) Eklr, Peter Gitonga Vs Francis Maingi M' Ikaria Mmeru HCCC No. 146 Of 2000, Njenga Chogera Vs Maria Wanjira Kimani & 2 Others [2005] Eklr, Constitutional Petition No. 2 Of 2018 Henry Wambega & 733 Others V Attorney General & 9 Others [2020] Eklr**. They also cited the provisions of the **Trust Land Act, Section 6 of the County Governments Act, Section 12 Community Land Act and Section 40 of the Constitution**.

49. On the third Ground, the plaintiffs relied on the evidence of Pw8 and Pw9 who identified the persons who trespassed on the land in court and produced the OB extract as evidence. They noted that the defendants never sought to cross-examine Pw9. That the defendants had equally admitted to the same in their witness statements. They submitted that the same was proved.

50. On the fourth ground, they submitted that prior to filing the suit herein, they issued a letter to the defendants and demanded compensation to the tune of Kshs 1,550,000/= for the water pump and the power-saw machine. They submitted that they ought to be compensated for the same and be equally awarded costs of the suit.

51. The defendants restated the facts of the case in their submissions. They questioned the legitimacy of Walkhabana self-help group and wondered whether it had the capacity to hold title to land. On acquisition of the suit premises by the plaintiff, they submitted that the process was opaque, partisan, with a pre-determined outcome with the committee sittings being a mere formality. They submitted that the sitting was riddled with conflict of interest by key members of the committee. That the process of setting apart did not follow the due procedure set out in the Trust Land Act. That in particular, no notice was issued to the people of the area concerned. The Divisional Board was not made aware of the procedure. That the procedure undertaken by the plaintiff only took 39 days which time was pre-planned and pre-determined. The sittings were also attended by Wedo Abadiba Guyo who sat in the committee sittings. It was their submission that Wedo Abadiba Guyo who was at the center of the land acquisition was not called as witness in the case.

52. They further submitted that the PDP was not approved hence there is no justifiable prove of the alleged size of the land. They took issue with the approach by Walkhabana self-help group approaching the land and clearing bushes then proceeding back to the council and the sub-locational committees.

Analysis and Determination

53. I have considered the evidence of the parties and the submissions filed. The issues for determination emanating from the pleadings can be framed as follows; (i) Whether Kher Guyo farm was excised from Dololo farm which belongs to the Ergate family.

54. (ii) Whether due procedure was followed in excising/ setting apart the suit premises.

55. (iii) Whether the plaintiffs are the legal/bonafide proprietors of the suit premises.

56. (iv) Whether the plaintiff warrants the orders sought.

57. Before analyzing the four issues, I shall first deal with a preliminary issue raised by the defence as to **whether Walikhabana Self-help group was a duly registered group and whether it had capacity to acquire the property as a group?** The plaintiffs herein have christened themselves as members of the group which consists of 152 members. They did not produce the constitution and minutes of the group. PW3 however produced a certificate issued to the group on 16/11/2007 under the ministry of gender and social development as EXH.1. The same shows renewals from the year 2008 to 2012. Pw3 stated that the same is legally registered.

58. The issue of Self-help groups having legal capacity was dealt with in the case of **Daniel K. Yego & 3 others v Paulina Nekesa Kode [2016] eKLR where the court held as follows;**

“ The above is the law as it currently exists. The Societies Act, it will be seen, does not contemplate Self Help Groups and does not mention them anywhere. Persons have however continued to mobilize themselves into Self Help Groups and a Ministry of the Government has been issuing registration certificates to them. Their purpose may be well intended, mostly to assist persons to come together for the purposes of community development. The intentions are no doubt noble, but it is apparent that there is a lacuna regarding their registration and legal status which has never been filled.

33. It follows that any group, and that includes the so-called Self Help Groups, which are of ten or more persons, and which are not registered under the Societies Act, or registered as other recognized units under any other statute, are unlawful groups. You cannot give legal personality to an unlawful group and one cannot be allowed to represent and agitate for rights on behalf of an unlawful group. It is in fact an offence under the Societies Act to do so, as I have pointed out above. It is time to call a spade a spade; I am afraid that these groups, which are of ten or more persons, are unlawful, and unless and until an appropriate law for their legal recognition, outside the framework of the Societies Act is provided, they will remain unlawful associations.

34. My holding above is not new. That was the position taken in the two authorities presented to me by Mr. Okeke. In the case of *Dennis Oloigo & 2 Others vs The Art of Ventures Ltd & 2 Others, Nairobi High Court Civil Case No. 1358 of 2005*, by Aluoch J, and by Omondi J, in the case of *Nakuru County Masaai Elders & Others vs Maenga Kisotu & Others*, Nakuru

High Court, Civil Case No. 106 of 2013. I concur with the findings in the two cases”

I agree with the finding of the court in the above decisions. A self- help group is not a legal entity known in law capable of suing or being sued and even owning property. It is an amorphous entity which is an unlawful incapable of being recognized in law. In that regard, the plaintiff was not a body which could obtain title in its name. The letter of Allotment and all documents produced by the plaintiffs as evidence that the suit property was allocated to them are mere documents with no evidentiary value.

59. The Second issue is **(ii) Whether Kher Guyo farm was excised from Dololo farm which belongs to the Ergate family.** There is no clear distinction from the evidence adduced where Kher Guyo is located. None of the parties requested the court for a site visit. The plaintiff’s witnesses did not provide evidence to support this claim. The physical development plan is also not dated and/or signed. There is no indication the same was approved.

60. I have also considered the earlier deliberations made by the Area chief with regard to the alleged boundary dispute. The issues raised earlier are not the same as those raised in these proceedings. The Plaintiff therefore did not distinguish the suit premises herein from the Dololo Farm claimed by the Defendants who ostensibly are members of the Ergate Community.

61. **(iii) Whether due procedure was followed in excising/ setting apart the suit premises. Under Section 13 of the Trust land Act(repealed),** the Law provides for the procedure of Setting apart land. The same provides as follows;

13. Setting apart by council

(1) In pursuance of section 117(1) of the Constitution, a council may set apart an area of Trust land vested in it for use and occupation—

(a) by any public body or authority for public purposes; or

(b) for the purpose of the extraction of minerals or mineral oils; or

(c) by any person or persons for purposes which in the opinion of the council are likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in the council, either by reason of the use to which the area set apart is to be put or by reason of the revenue to be derived from rent therefrom.

(2) The following procedure shall be followed before land is set apart under subsection (1) of this section—

(a) the council shall notify the chairman of the relative Divisional Board of the proposal to set apart the land, and the chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall meet to consider the proposals, and the chairman shall forthwith inform the council of the day and time of the meeting;

(b) the council shall bring the proposal to set apart the land to the notice

of the people of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered;

(c) the Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting;

(d) the recommendation of the Divisional Board shall be considered by the council, and the proposal to set apart the land shall not be taken to have been approved by the council except by a resolution passed by a majority of all the members of the council:

Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three-quarters of all the members of the council.

(3) Where the council approves a proposal to set apart land in accordance with subsection (2)(d) of this section, the council shall cause a notice of the setting apart to be published in the *Gazette*.

(4) Subject to this section, sections 7(3) and (4), 8(1), 9, 10 and 11 of this Act shall apply in respect of land set apart under this section, *mutatis mutandis*, and subject to the modification that the compensation shall be paid by the council (without prejudice to the council obtaining reimbursement thereof from any other person). {Emphasis mine}

62. In **Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others [2014] Eklr,** the Court of Appeal held as follows;

“...The council held the Trust land for the benefit of the residents. Statutory procedural safeguards which are imposed for

the benefit of the persons affected by the exercise of administrative powers by a statutory body are normally regarded as mandatory. Further, where the statute imposes a duty to notify the persons affected and to hear their representations, the statutory body should genuinely comply and a full and sufficient opportunity accorded to the persons affected to make their representations (Grunwick Processing Laboratories Ltd v. Advisory, Conciliation and Arbitration Services [1978] AC 655; In re The Union of the Beneficiaries of Whippingham Church Commissioners for England [1954] AC 245. The procedural safeguards in section 13(2) of the Trust Land Act which are described as mandatory particularly the requirement for issuing a notice, hearing and recording the residents' representations and ultimately, and more importantly, approval by council by resolution passed by a majority of the members of the council went to the jurisdiction to set apart Trust land.....”

63. I have considered the steps taken by the plaintiff in their effort to set apart the suit premises and the procedure they have outlined. In both the sub-locational Development Committee, Locational Development and the Divisional Development committee, there is no indication given that the council engaged the member of the community and gave notice to the people of the area concerned as required in Section 13 (2) (c) of the Trust Land Act. The only indication given is that they engaged Wedo Abadiba, a sole person, a member of the council and who sat in all the committees including the Town Planning and Market Committee. It is curious that the Locational Development Committee approved the setting apart based on a letter from the Abadiba family which was not produced. Pw2 who was the area chief at the time and who sat a committee's confirmed being a member of the Plaintiff's Group.

64. Another, striking and relevant concern is the size of the land purported to have been set apart by the Town Planning and Market Committee. At the time the plaintiffs sought to set apart the land, they had excised 18 acres only. The Town planning Committee set apart 74.2 hectares and issued the same to the plaintiff's. there is no clear explanation for the huge difference from 18 acres to 74.2 hectares.

65. Whereas there is no clear distinction of time that the council should move through the committee stages, the time within which the committees sat in this case serves to add to the cloud of doubts concerning the procedure used by the committees to set apart the land.

66. It would have been imperative for the Council to have engaged the community and presented a record of such engagement. It was also their mandate to consider the size of land sought to be set apart, the reasons afforded and if such process was agreed upon by the people residing in the Area. In order to conduct this function, the council ought to have issued notices to persons who resided in the area, given them an opportunity to air their views before sitting as a committee. This procedure clearly was not adhered to. For the better part, it seems, from the sub locational level, and what may spurn out to be a grand scheme, their reliance was on the word and bond of one person who not only gave the authority to set apart the land but sat in all the committees during the process of approval.

67. In the case of **Daudi Kiptugen v Commissioner of Lands & 4 Others** [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

68. Having determined that due procedure was not adhered to, it then follows that the plaintiffs are not the legal/bonafide proprietors of the suit premises and are therefore not deserving the orders sought.

69. The plaintiff's suit is hereby dismissed with costs to the Defendants.

READ, DELIVERED and SIGNED in the open court at Kerugoya this 28th Day of January, 2022

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HON. E.C.CHERONO

ELC JUDGE

In the presence of:

1. M/S Roble holding brief Onono for the Defendant
2. Okumu holding brief Nyamu for the Plaintiff
3. Ijabo; Court Assistant.