REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 925 OF 2006

1. STEPHEN MRING'A

2. JACOB ANAELI NASHERA KODAWA

3. OMARI JUSTIN MOCKOY…...……...….....PETITIONERS

VERSUS

1. COUNTY COUNCIL OF TAITA TAVETA

2. HON. ATTORNEY-GENERAL

3. DAVID MASILA KITISE (for all non-Tavetans in occupation

of Challa/Njukini area Taita Taveta)..….....….RESPONDENTS

AND

1. BANTON FUNDI SARELI

2. JUSTIN L. MENGATI

3. JERRY KIMARO

4. MEDUWA LEWUSHAMA

5. ALPHONSE NDORO

6. NAHASHON MKUNDE

7. CHARLES MASAMO

8. CHARLES MUNDANI…….....…….INTERESTED PARTIES

JUDGMENT

Introduction

The Parties

1. Stephen Mring'a , Jacob Anaeli Nashera Kodawa and Omari Justin Mockoy (originally the Applicants), regard themselves as members of the **Elders** or **"Njama"** of the five clans which constitute the Taveta tribe of Taita Taveta County (formerly District), namely (1) the **Mruttu**, (2) **Mnene**, (3) **Mndighiri**, (4) **Msuya** and (5) **Mzirai**. I will hereafter refer to the Applicants as "the Petitioners" in line with new constitutional provisions, and rules governing constitutional petitions.

The Respondents

2. The Respondents are respectively, the **County Council of Taita Taveta** (as it then was). The Second Respondent is the Attorney-General, and is allegedly sued for and on behalf of the Ministry of Lands and Settlement). The Third Respondent is an individual called **David Masila Kitise** and is sued allegedly on his own behalf and allegedly **"on behalf of all other non-Taveta persons now in occupation of Challa/Njukini Area of Taita Taveta Constituency in Taita Taveta District"**.

The Interested Parties

3. (1) Banton Fundi Sareli (2) Justin L. Mengati (3) Jerry Kimaro (4) Meduwa Lewushama (5) Alphonse Ndoro (6) Nahashon Mkunde (7) Charles Masamo and (8) Charles Mundani (all "Interested Parties"), were introduced into the Petition via a Notice of Motion dated 21st September, 2015 and filed on 28th September, 2015 in which the Interested Parties sought leave to be enjoined in the Petition, **"in order to defend and protect the interest of the Taveta Community"**.

4. Without waiting for that application to be heard, the Interested Parties' counsel filed on 12th November, 2015 a Notice of Motion dated 11th November, 2015, and sought orders to restrain the Respondents from carrying on the exercise of land adjudication in the **Challa-Njukini** area including Sir Ramson Settlement Scheme of Taveta Sub-County in the Taita-Taveta County until the complaints of the Petitioners and Interested Parties have been heard and conclusively addressed and that -

> **"the parties in this case do undertake an open, transparent and involved process in the Challa-Njukini area including Sir Ramson Scheme within Njukini Location."**

5. Pursuant to that application I directed by orders made on 15th December, 2015, that **"the adjudication process in Challa-Njukini Locations in Taita-Taveta County be guided by the principles of national cohesion and integration"** and further directed that the Petition be heard on 23rd February, 2016. In the event, the Petition was not heard until 11th July, 2016 and judgment reserved to 28th August, 2016 (now past).

The Petition

6. The Petitioners' claim for -

> **(a) a declaration that all non-Taveta persons now residing in the area falling within the Administrative locations known as Challa-Njukini of Taveta Constituency in the now Taita-Taveta County is unlawful because such residence is not approved by any Njama declaration;**
>
> **(b) the Respondents should deal with all non-adjudicated land falling within Challa/Njukini area only with the express approval of the "Njama" organ which had been outlawed by the Second Respondent and that the Respondents be ordered to obtain express approval and blessing of the Njama Organ for any further act of administration (adjudication) and disposal of the unadjudicated land within Challa/Njukini area;**
>
> **(c) a declaration that the land falling within the Administrative Locations known as Challa/Njukini of Taveta Constituency in the Taita Taveta District (County), is and has at all**

material time been trust land within the meaning of Sections 114 – 120 of the former Constitution of Kenya (1998) and that the said land is held by the County Council in trust and for the benefit of the persons ordinarily resident on the said land, namely, the Taveta community members;

(d) the Third Respondent be declared a non-Taveta occupant in the said land, and be deemed to be a representative of all non-Taveta people who occupy the said land;

(e) that it be declared that by virtue of the customs and practices of the Taveta Community from time immemorial the disposal of land that is for the benefit of the Taveta Community, as vested in the County Council of Taita/Taveta aforesaid, can only be dealt with, upon express approval of the Taveta "Njama" governing organ and not in any other manner;

(f) costs of the Petition.

Grounds in support of the Petition

7. The Petition was supported **firstly** by the grounds on the face of it, **secondly**, the Supporting Affidavit of Stephen Mring'a the First Petitioner sworn and filed on the 19th September, 2006, **thirdly** the Further Affidavit of the said Stephen Mring'a sworn and filed on 18th November, 2006 and **fourthly** the Further Affidavit of the said Stephen Mring'a sworn on 11th September, 2012, and filed on 12th September, 2012 in support of a Notice of Motion seeking directions on hearing of the Petition.

8. The gist of the grounds of the Petition may be summarized as –

(a) that the **"Njama"** which according to the Petitioners is the governing council of the Taveta people and in line with the Taveta customary law that the "Njama" has to approve any land dealings within the Challa/Njukini area;

(b) that individuals represented or purportedly represented by the Third Respondent who are non-members of the Taveta tribe clans, had overtime infiltrated and settled in Challa/Njukini area with the aim of being allocated land to the detriment of the indigenous residents of **Challa/Njukini**, like the Petitioners.

9. In light of the joinder of the Interested Parties, the Petition was likewise supported by the Interested Parties, on the same grounds, as per the Supporting Affidavit of **Banton Fundi Sareli** sworn on 21st September, 2015, in support of the Notice of Motion dated the said 21st September, 2015, and filed on 28th September, 2015, and the grounds on the face of the said Notice of Motion. It was likewise supported by the Affidavit of the said Banton Fundi Sareli dated 11th November, 2015, but filed on 12th November, 2015 in support of the Notice of Motion dated 11th November, 2015, and filed on the said 12th November, 2015. These Interested Parties claimed through the grounds of the said Notice of Motion that the exercise of adjudication was not participatory, contrary to the Constitution.

10.The Affidavit of one Laban Lesabulu Mshighali sworn and filed on 7th February, 2007 by the Petitioners' Counsel's firm was to the same effect, and was particularly offended by the process of appointment by the District Commissioner of an equal number of men, women and youth to the adjudication committees, whereas the indigenous people preferred an adjudication process led by the Njama – the Council of Elders.

Opposition to the Petition

11.The Petition was opposed by both the First and Second Respondents. In the Replying Affidavit of Jonathan Kerio the First Respondent's County Clerk sworn on 26th September, 2006, and filed on 27th September, 2006, the First Respondent, admits in paragraph 7 thereof that it holds the land in question in

trust under Sections 114 and115 of the former Constitution for the benefit of the person ordinarily resident on the land and is required to give effect to such rights, interests or other benefits in respect of the land as may under African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual.

12. This deponent also deposed that **"all in all the alienation of Challa/Njukini trust land is proceeding on course and relevant resolutions are being put in place and the process is yet to be communicated to the Commissioner of Lands, and that consequently the current proceedings in court are at best based on speculation".**

13. The First Respondent also filed on 7th September, 2006 a Notice of Preliminary Objection dated 26th September, 2006 and sought orders to have the Petition struck out for disclosing no cause of action against the First Respondent, and being fatally defective.

14. The Petition was also opposed by the Second Respondent through the Replying Affidavit of Kennedy Njuguna, the District Land Adjudication and Settlement Officer in Taita Taveta District in the Ministry of Lands on whose behalf the Second Respondent was sued. In his Replying Affidavit sworn and filed on 16th November, 2006, the said deponent, apart from reiterating his counsel's advice that the Petition is **"not only fatally and incurably defective but is also a blatant and grave abuse of the court's process"**, proceeds to aver that Sections 114 and 115 of the repealed Constitution vest trust land in the County Council within whose jurisdiction the land is situate, and holds the land in trust for the benefit of the inhabitants or persons ordinarily resident on that land and not for any particular tribe or ethnic group.

15. This deponent also avers in paragraph 14 his attendance of a meeting held on 5th July, 2006, at which it was **inter alia** decided that –

(a) a sub-committee be formed to go on the ground and meet with councilors of the Taveta Town Council for consultations;

(b) the sub-committee was also to visit the site;

(c) the sub-committee was to prepare a report which was submitted to the First Defendant to enable it to pass a resolution either for or against the enabling of the setting apart of the said unadjudicated lands, and that the sub-committee was not the "Njama".

16. It was also this deponent's view that in light fundamental rights to protection of the laws, freedom of movement and association provided for in Sections 70, 80 and 81 of the repealed Constitution, it is impossible and indeed illegal to hold the view that the Taveta Community or Clans are the only **"persons who have been or are ordinarily resident in all the said Challa/Njukini Locations"**.

17. Finally in opposition to the application dated 11th November, 2015, by the Interested Parties, is the Replying Affidavit of Ngugi S. Maina, the Land Adjudication and Settlement Officer, Taveta Sub-County, sworn on 2nd December, 2015, and filed on 10th December, 2015 in which the deponent avers categorically, that **neither** the Petitioners **nor** the Interested Parties are residents of Challa/Njukini Adjudication Section or Sir Ramson area and that they therefore lack any claim to the land or said Adjudication Section. The deponents gives in paragraphs 4 and 5 of his Replying Affidavit the location and the residence of each of the Petitioners and the Interested Parties.

18. It was this deponent's averment that Challa/Njukini area was declared an adjudication Section on 24th March, 2015, pursuant to the provisions of Section 5 of the Land Adjudication Act, (Cap 284, Laws of Kenya). It was also this deponent's case that following the said declaration, a committee of sixteen (16) members constituted and comprised of two members from each of the six sub-locations, and four (4) from one of the sub-locations, and that none of the said committee members was said to be a member of the Taveta Tribe Council of Elders or "Njama".

19. In addition to the opposition by the First and Second Respondents, the Petition was also opposed by the Third Respondent through –

(a) Grounds of Opposition dated 30th September, 2006;

(b) A Preliminary Objection on a point of law that the Petitioner contravenes Chapter V of the former Constitution since it seeks orders which if, granted will discriminate the Third Respondent on the basis of tribe.

The Submissions For and Against the Petition

20. In addition to the basic pleadings represented by the Notice of Originating Motion (the Petition), the Affidavit in Support and Further Affidavit in Support, the Interested Parties' Affidavit in Support, the various Grounds of Opposition and the Preliminary Objections on point of law on behalf of the First and Third Respondents, counsel for both the Petitioners, the Respondents and the Interested Parties, all filed written submissions.

21. Submissions by counsel for the Petitioners dated 18th April, 2016, were filed on the same date. The First Respondent's counsel's submissions dated 30th May, 2016, were filed on the same date together with attached authorities, relied upon by counsel. The submissions by the Attorney-General, the Second Respondent dated 24th July, 2016 were filed on 1st July, 2016. The submissions of counsel for the Interested Parties are dated 27th May, 2016, and were filed on 30th May, 2016 along with the Supplementary Affidavit of Banton Fundi Sareli sworn on 27th May, 2016, in reply to the Affidavit of Ngugi S. Maina sworn on 2nd December, 2015 in opposition to the Interested Parties own Notice of Motion to be enjoined in these proceedings and the entire Petition by the Petitioners.

Analysis and Issues

22. Though the subject matter raised in this Petition is emotive because it concerns land, the issues are I think simple and straight forward. The subject matter is particularly emotive to the Petitioners who though not residents of the Challa/Njukini Locations of Taveta Sub-county, claim to be not only members of the clans constituting the Taveta tribe, but also to be the **"Njama"** or Council of Elders of the Taveta tribe. In that regard therefore they feel they have a sacred duty to protect the lands of their ancestors in Challa/Njukini Locations from intruders such as the Third Respondent and persons he allegedly represents, and the First and Second Respondents from aiding and abetting such intrusion by the process of Land Adjudication Act first referred to at the beginning of this Judgment.

23. I have searched most carefully, the Originating Notice of Motion, the grounds and the Affidavits of the First Petitioner, the Affidavit of the First Interested Party (on behalf of the Interested Parties), the submissions by counsel for the Petitioners and counsel for the Interested Parties and did not find any material under which the Taveta clans appointed a **"Njama"** or **Council of Elders** to govern their affairs, private or public.

24. Likewise, no law, statutory or customary or constitutional provision was cited to the court granting the court power or jurisdiction to declare the three Applicants to be representatives of the Taveta Tribe made of the five (5) clans – **Mruttu**, **Mnene, Mndighiri**, **Msuya** and **Mzirai** (the Clans).

25. The lack of such material supports the Respondents view that the Originating Notice of Motion raises no issue of a constitutional nature capable of enforcement in terms of either Sections 75 (the right to property) or the Trust Land provisions under Chapter IX of the repealed Constitution of Kenya (Revised 1998 Edition).

26. Counsel for the Applicants cited to me an Article entitled **Land Reform and Agrarian Change in Southern Africa, (The African Commons: A Century of Expropriation, Suppression and Subversion)** by Professor H. W. O. Okoth-Ogendo, (of happy memory), then of the School of

Government University of the Western Cape, where the erudite Professor sets out the defining nature of the "African Commons" –

> **"2.1 We use the term 'commons' to identify ontologically organised land and associated resources available exclusively to specific communities, lineages or families operating as corporate entities. The commons are thus not constituted merely by territoriality, or by the temporal aggregation of members of any given entity, but are, in addition, characterised by important ontological factors among which is their permanent availability across generations past, present, and future. For those societies which recognise and depend on them, the commons are the creative force in social production and reproduction. As a general rule, this is the manner in which agrarian resources in Africa were, and largely continue to be, organised.**
>
> **Internal mechanisms for the management of and determination of access to resources comprised in any distinct body of commons was and remains a complex issue. That complexity is the result of a number of structural and normative parameters. At the structural level, the commons are managed and protected by a social hierarchy organised in the form of an inverted pyramid with the tip representing the family, the middle the clan and lineage, and the base the community. These are decision-making levels designed to respond to issues regarding allocation, use and management of resources comprised within the commons on the basis of scale, need, function and process. Decisions made at each level are not necessarily taken collectively. Rather, they are made by reference to common values and principles internalised at any such level. Decision-making at the base of the pyramid, however, further entails responsibility for the protection of the territory of the group as a whole; a function which does not entail appropriation of the radical title to the commons. The location of radical title always was, and remains, in all members of the group past, present and future, constituted as corporate entities.**
>
> **At the normative level, access to the resources of the commons is open to individuals and groups who qualify on the basis of socially-defined membership criteria reinforced, internally, by obligations which are assumed on the basis of reciprocity by and to each member of the social hierarchy. The quantum of access rights depends, in the first instance, on the category of membership each individual or collective holds, and secondly on the specific function for which access rights automatically vest, once membership is established, and are permanent within and across generations, their quality and quantum will vary from one membership category to another. The fact that access rights vest in terms of specific functions also means that the use of the resources of the commons is available to individuals as well as collectives whether exclusively, concurrently or sequentially.**
>
> **In short, the defining characteristics of the commons are that land is:**
>
> - **Held as a transgenerational asset**
> - **Managed at different levels of social organisation**
> - **Used in function-specific ways, including cultivation, grazing, hunting, transit, recreation, fishing and biodiversity conservation."**

27. I entirely agree with Professor Okoth-Ogendo's thesis that -

> **"The African Commons were the primary economic and social asset individuals and communities drew on, and the fountain from which their spiritual life and political ideology sprung. It is primarily for this reason that the commons were not susceptible to inter vivos transfers outside each level of social organisation even though latitudinal exchange of function-specific rights was and remains common. It is also for this reason that the transmission of access rights to land and associated resources in <u>mortis causa,</u> always were exclusively by way of intestacy, and only to a predetermined class of heirs in accordance with common rules, internalised at each level of social organisation."**

28. To a large extent the thesis of Processor Okoth-Ogendo as paraphrased above has been captured and enshrined in Chapter Five, **Land and Environment** of the Constitution of Kenya, 2010, as principles of land policy and which in Article 60(1) provide that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accord with the principles set out in the said Article 61(1).

29. Again, and to a large extent giving effect to Processor Okoth-Ogendo's thesis, Article 69(1) declares that community land shall vest in and be held by communities on the basis of ethnicity, culture, or similar community of interest and consists of –

> **(a) land lawfully registered in the name of a group representatives under the provisions of any law;**
>
> **(b) land lawfully transferred to a specific community by any process of law;**
>
> **(c) any other land declared to be community land by an Act of Parliament, and**
>
> **(d) land that is –**
>
> **(i) lawfully held, managed, or used by specific communities as community forest, grazing areas or shrines;**
>
> **(ii) ancestral lands and lands traditionally occupied by hunter-gatherers communities, or**
>
> **(iii) lawfully held as trust land by the County Governments, but not including any public land held in trust by the County Governments under Article 62(2)**
>
> **(e) any unregistered community land shall be held in trust by the County Governments on behalf of the communities for which it is held;**
>
> **(f) community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively;**
>
> **(g) Parliament shall enact legislation to give effect to this Article.**

30. For the purpose of this Judgment, the most pertinent provisions of this Article are sub-articles (3) and (4), unregistered community land is held in trust by the County Governments (sub-article 3), and any disposition of community land shall be in terms of legislation specifying the nature and extent or rights of members of each community, individually and collectively (sub-article 4).

31. Though community Land Bill (Acts) are at various stages of enactment (implementation), the primary legislation (in terms of sub-article 4 of Article 60), is the Land Adjudication Act, (Cap 284 of the Laws of Kenya), (the Land Adjudication Law). It is the **law for the ascertainment and recording of rights and interests in trust land, and for purposes connected therewith and purposes incidental thereto**.

32. The Act establishes the processes for ascertainment and recording of rights and interests in trust land, and these processes include the appointment of land adjudication officers, the establishment of adjudication sections in respect of trust land, the appointment of committees, settlement of disputes through arbitration boards, stay of court suits in the process of adjudication, and process of appeals to the Minister, and to the High Court (Land & Environment Court) for judicial review.

33. In light of the elaborate provisions of the current Constitution and the adjudication law, it is clear to me that the Application by the Applicants is not only misconceived and without basis, but it is also speculative that the adjudication process would somewhat be biased in favour of persons such as the

Third Respondent and other immigrants to the Challa/Njukini areas of Taveta Sub-County. The duty of the court is to determine actual controversies arising between adverse litigants, duly instituted in court of proper jurisdiction. In **LEGAL BRAINS TRUST (LTB) LIMITED VS. ATTORNEY-GENERAL OF THE REPUBLIC OF UGANDA**, the Ugandan Constitutional Court adopted the reasoning of the US Supreme Court where the court considered at length the question of speculative cases, and said –

> **"The following cases will suffice: In RE PACIFIC R. COMMISSION, 32, Fed. 241 225 the USA Supreme Court asserted that the US Constitution confers jurisdiction only in "cases and controversies", a position underlined again in Muskrat vs. United States, 219, U.S. 346 (1911), where the Supreme Court stated "that judicial power, as they have seen it, is the right to determine actual, controversies arising between adverse litigants, duly instituted in court of proper jurisdiction."**
>
> **In summary, the question raised in the instant case before this court was hypothetical, academic, abstract conjectural and speculative. It should not have been entertained by the courts below."**

34. Quite clearly, the application herein is purely speculative. There was no adjudication going on at the time the application was filed. There is no dispute at all. If there was one, it is wholly imaginary, in the Applicants' fertile minds.

35. The alleged dispute was based upon perceived grievances which were likely to arise should the adjudication process commence on the community lands (held by the County Government of Taita-Taveta) for the benefit of the persons ordinarily resident in Challa/Njukini area may be allocated to squatters who had settled on the said land to the detriment of the indigenous Challa/Njukini residents. This is not a basis for bringing a Petition, as it is purely hypothetical conjectural and speculative. In the absence of a dispute, the Applicants lack **status**, and can at best be described as busy bodies. The Originating Notice of Motion fails on these grounds as well.

36. The situation would not be different if the Originating Notice of Motion was filed today as a Petition. The Applicants or Petitioners would not only be caught, but would also be bound by the elaborate provisions of the Land Adjudication Act governing disputes relating to land under adjudication. The Applicants/Petitioners would be bound to exhaust the dispute resolution remedies provided for under the Act. The courts have held consistently that –

> **"Where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the court, the court ought to ensure that the dispute is resolved in accordance with the relevant statute… for where the law provides for a procedure to be followed, the parties are bound to follow the procedures provided by the law before the parties can resort to a court of law as the court would have no jurisdiction to entertain the dispute."**

37. Now that the area in question has been declared an adjudicated section and an adjudication committee established under the provisions of the Land Adjudication Act, the Applicants whether they regard themselves a **"Njama"** or a **Council of Elders**, have a clear opportunity to channel their grievances before the adjudication committees and other dispute resolution bodies under the said Act. Neither this court, nor, I dare say, the Environment and Land Court has jurisdiction to grant the Applicants, either the status they claim to be, or the orders they seek. It would be contrary to the Constitution of Kenya and clear unambiguous provisions of the Land Adjudication Act.

<u>Determination</u>

38. In light of the foregoing, I am satisfied that the application (Petition) herein was filed prematurely, it was speculative, and discloses no cause of action. It is an abuse of the process of court. And even if it raised concerns of ownership of land, it is, in light of the progressive Constitution of Kenya 2010, retrogressive, as Kenya must develop a cohesive society devoid of the gene of **"indigene"** and

“foreigners”.

39. The Notice of Originating Motion dated and filed on 19th September, 2006 is therefore dismissed with costs to the Respondents to be paid by the Applicants and the Interested Parties.

39. It is so ordered.

Dated, Signed and Delivered in Mombasa this 14th day of October, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Ondengo holding brief for Petitioners

Mr. Ngari for AG Respondent

No Appearance for Interested Parties

Mr. Silas Kaunda Court Assistant