



**Chuka Igamba Ng'ombe Development Association v County Government of Tharaka Nithi
(Environment & Land Case 72 of 2019) [2022] KEELC 2822 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2822 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 72 OF 2019**

LN MBUGUA, J

MAY 18, 2022

BETWEEN

CHUKA IGAMBA NG'OMBE DEVELOPEMENT ASSOCIATION PLAINTIFF

AND

COUNTY GOVERNMENT OF THARAKA NITHI DEFENDANT

JUDGMENT

1. The Plaintiffs are a group of Stakeholders from Chuka Igamba Ng'ombe community who in year 2012 mooted the idea to commemorate 100 years of existence of Chuka Town and they formed an association known as Chuka Centenary Celebration Committee (4C's), later renamed Chuka Igamba Ng'ombe Development Association (CIDA). The association resolved to and proceeded to erect a monument with a plaque in Chuka Town. That sometime in year 2019, the County Government of Chuka embarked on reconstructing/changing the monument hence defacing it. The County Government contends that the monument was erected by an ad-hoc committee which was spearheading celebrations to mark 100 years of Chuka Town. The County however stated that it needed to spruce up the monument through integrated plans.
2. The Plaintiff's on the other hand contend that they are the ones who have been undertaking environmental activities for the purpose of protecting the monument and the grounds thereon. Thus the activities undertaken by the County Government to reconstruct the monument were prejudicial to them and that they stood to suffer irreparable loss and damage.
3. The Plaintiffs therefore sought for the following orders vide their plaint dated 23.7.2019:
 - 1) The Honourable court issues a permanent injunction restraining the Defendant from interfering with the Chuka Town Centenary Celebrations Monument.
 - 2) The Honourable court do issue an order directing the Defendant to restitute the said monument and the grounds thereof to their original state.



- 3) any other relief that the Honourable court may deem fit and justifiable to grant.
 - 4) Costs of this suit.
4. The suit was opposed vide the statement of defence dated 25.11.2019.

Case for the Plaintiffs

5. The case for the plaintiff was advanced by three witnesses. PW1 Japhet Gitari Kea introduced himself as the Chairman of the Igamba Ng'ombe Development Association (CIDA) which had mooted the idea of the monument in year 2012. That their association solicited, sourced and fund raised for the erection of the monument, engaged the services of an Architecture, they were given a site by the then County commissioner and the monument was built.
6. PW1 further stated that the prime and core purpose, essence and spirit embodied in the design of the monument was, and still is, to symbolize and signify the three sub counties of Tharaka Nithi namely; Tharaka, Maara and Chuka represented by the three pillars of the monument and rested on a solid base signifying the stability of our county and Kenya Nation. The sphere/circular opening at the middle of the monument... signifying the universality and endless unity of our County and Kenya Nation. The feature of Mt. Kenya at the top signifying our heritage both as a county and as a nation.
7. PW1 contended that in 2019, they realised that the County Government had gotten a contractor to re-construct the monument which acts were unlawful. He produced the documents in their bundle of 4.11.2020 as exhibits 1-8.
8. In cross-examination, PW1 stated that their organisation is registered by Registrar of Societies. He contends that the monument is in Chuka Town on land which belongs to the County Government.
9. PW2, one Moses Kirimi is the Architecture who was tasked by CIDA to come up with the design of the monument. He adopted his statement 2.11.2016 as his evidence which by and large is similar to that of PW1.
10. In cross-examination, PW2 stated that the monument was erected on a road reserve and that the site was pointed out by the County Commissioner and that the land belongs to the National Government. He added that before erecting the monument, they did not get approvals from the County Government. PW2 is not a member of CIDA but he hails from the community, though in his recorded statement, he had stated that he is a member of CIDA.
11. PW3, one Tabitha Mbungu was a County Executive member of Tharaka Nithi County Government in charge of public service and urban development from 2013-2017. She adopted her statement dated 2.11.2019 as her evidence. She contended that the County Government of Tharaka Nithi was not in any way involved in the erecting of the monument nor its maintenance. That the County Government was not involved because there was no political good will. PW3 was approached by the Plaintiffs concerning the project and she informed the Governor who was not willing to be part of the celebrations. PW3 became involved in the celebrations in her capacity as an opinion leader.
12. In cross-examination PW3 stated that she was in charge of urban developments which included cleaning the town and constructions. If there was any building coming up, she would give her recommendations, so for any construction to take place in the area, the County would be involved, but in this case, the county was not involved. She contends that approvals were sought from the National Government which superseded the County Government.



13. PW3 further averred that where the monument is erected, the land belongs to the National Government though she was not sure on that issue.
14. PW3 also stated that she is a member of CIDA which has about 44-45 members.

Defence Case

15. DW1, Faith Kalunda Kyunga is the Chief Officer, Lands, Physical Planning and Urban Development as well as National Resources in Tharaka County and that she was authorised by the County to tender evidence on its behalf. She adopted her statement dated 25.11.2019 as her evidence.
16. She admits that there was indeed a monument which was to commemorate 100 years of the existence of Chuka Town. She averred that the centenary celebration monument is part of Chuka Town improvement works that had been running 2017/2018: 2018/219 budget which plans and budgets were approved and ratified by the Tharaka Nithi County Assembly.
17. DW1 avers that before the sprucing up process, they did what was required, that is incorporation of public participation, having intergrated plans et.c.
18. She avers that before the intervention by the County Government, the place was in bad shape as no repainting had been done and the grounds upon which the monument was erected were damaged, the landscape was destroyed and the place was a holding ground for idlers hence a security threat as there were no lights. The County Government wanted to put up lights and also a water feature as well as a water fountain.
19. DW1 further states that the County Government has a core mandate to undertake measures to preserve monuments which can be re-structural engineering with appropriate auxiliary construction in line with schedule 4 Section 4 of *the Constitution* of Kenya. She added that in line with Section 36 of the *Urban Areas and Cities Act*, every city and municipality should operate within the frame work of integrated development planning which in essence is the provision of Physical and Social infrastructure for purposes of urban planning. DW1 produced the documents in their bundle dated 25.11.2019 as exhibits 1-5.
20. In cross examination, DW1 stated that the monument was part of ongoing works since year 2017 geared towards improving the town. She contended that a liveable town is needed, hence the need for restorations and improvements. They (the County Government) had a budget for what they wanted to undertake for the financial years 2017-2018 and 2018-2019. DW1 averred that the sprucing up of the monument did not in any way interfere with the goals appertaining to the erection of the monument.

Plaintiff's Submissions

21. It was submitted for the Plaintiffs that the monument was erected by private citizens using resources solicited from the public, thus the monument became a public feature. It was designed for a specific purpose that is the commemoration of 100 years of Chuka Town. It was therefore not subject to be tampered with or altered. The Plaintiffs legitimate expectation is that the monument must remain in its original form and stature, and that there was no reasonable justification for its re-construction and or modification. It was submitted that the structure was barely 6(six) years old and it had no defects. They also contend that there was public participation in the activities of the Defendant.
22. The Plaintiffs relied on the authorities of :
 1. *Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudbebia Workers) v Salaries and Remuneration Commission*, [2014]eKLR.



2. [Republic v Ministry of Finance and Another ex-parte Nyong'o](#) [2007]eKLR.
3. [Republic v Independent Electoral and Boundaries Commission ex-parte National Super Alliance \(NASA\) Kenya & 6 Others](#),(2017]eKLR.
4. [Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 others](#), (2015) eKLR.
5. [Council of Civil Service Unions and others b Minister for the Civil Service](#) [1984] All ER 935.
6. [J. P. Bansal v State of Rajasthan & Another](#), Supreme Court of India, Case Number appeal (Civil) 5982 of 2001.

Submissions of Defendant

23. It was submitted that the monument is erected on Public land and that Plaintiff's have not demonstrated any proprietary rights to the land. The case of [Veronica Njeri Waweru & 4 Others v City Council of Nairobi & 2 Others](#) [2012] eKLR was cited to support this point.
24. It was submitted that the reconstruction of the monument was in public interest hence the interest of the county residents overrides the private interests of the Plaintiffs and on this point reference was made to the case of [National Environmental Management Authority & Another v Gerick Kenya Limited](#) (2016) eKLR.
25. It was further submitted that vide the principle of legitimate expectation, the Defendants were obliged to improve the monument on behalf of the residents of the County, of which the budget to that effect was approved. Reference was made to the case of [Keroche Breweries Limited & 6 Others v Attorney General & 10 Others](#) (2016) eKLR and the case of [Solomon M. Nchebers & 22 Others v Meru County Government](#) [2018] eKLR.
26. To this end, the Defendant contends that it had the mandate to reserve and maintain all the land planned for open spaces, parts and urban areas in line with Section 29 & 30(1) of the Physical Planning Act.
27. On public participation, it was submitted that the same did not mean that every person must be involved. That integrated plans were formulated and a budget was drawn for the annual development Plan and that Public participation took place, conducted by the Executive Arm and Assembly Arm of the County Government. On this point, reference was made to the cases of [Robert N. GaKuru & others vs. Governor Kiambu County & 2 Others](#) (2014) eKLR and [Diani Business Welfare Association & Others V County Government of Kwale](#) (2015) eKLR.
28. Finally, it was submitted that the Plaintiffs have no capacity to institute legal action in its name because it is not a person or body corporate and the case of [Living Waters Church International v City Council of Nairobi](#) (2008) eKLR was cited where it was held that registered societies were not Legal personalities capable of being sued or suing. Reference has also been made to the case of [Housing Finance Co. of Kenya v Embakasi Youth Development](#) (2004) eKLR.

Determination

29. I have considered the pleadings, the evidence, the rival submissions the legal framework and prevailing jurisprudence. There is no controversy that a monument was erected within Chuka Town for celebrations of 100 years of existence of Chuka Town. The question of locus standi had been raised earlier on through a Preliminary Objection dated 29.7.2019 where in a ruling delivered on 22.10.2019



the Preliminary Objection was dismissed with the court stating that the issues therein can only be satisfactorily canvassed during the full hearing of the suit. However, I did not see this issue being raised during the trial. The Defendant has only brought it up during submissions. The Defendants never anchored the issue of locus in their pleadings.

30. In *Attorney General & 6 Others v Mahomed Balala & 11 Others* (2014) eKLR, the court made reference to *Galaxy Paints Co. Ltd vs. Falcon Guards Ltd* (2000) EA 885 where it was held that:

“The issues of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings on such issues as the parties framed for the court’s determination unless pleadings were amended, parties were confined to their pleadings”

31. In light of the foregoing analysis, the court shall not determine the question of locus.

32. I discern that all the protagonists want the monument. The question as to who is in charge of the said monument appears to be the elephant in the room. Each side has given its own version as to why they should be the ones in charge. I find that the monument is not sitting on empty space, hence the latin maxim “Quicquid Plantatur Solo Solo Cedit” which means that “what is attached to the soil belongs to the soil” must be invoked. The question I therefore pose is “what is the nature of rights and interests of the Plaintiffs in relation to the land upon which the monument is erected?” Article 61(2) of *the Constitution* stipulates that “land in Kenya is classified as public, community or private land.”

33. The Plaintiffs aver that they are the ones who mooted the idea of the monument, solicited for funds and built the same. Nevertheless, it was incumbent upon the Plaintiffs to give a nexus of the monument and the land upon which the structure was erected in order to give them a mandate to take charge.

34. The Plaintiffs are not sure about this nexus. PW1 stated that:

“The land where the monument is erected belongs to the County Government of Chuka...”

35. For PW2, he stated that:

“The land where the monument is, was identified by the County Commissioner. I know the place is a road reserve so the land belongs to National Government...”

36. PW3 on her part stated that:

“where the monument is it is in the Government of Kenya Land...I know that the land belongs to the Government but I am not sure if it is for National Government or County Government”

37. What resonates from the sentiments of the Plaintiffs is that the land was public land. The Plaintiffs are however a private entity and they have not advanced tangible evidence to show that they are the ones who had the sole mandate to manage the monument to the exclusion of everyone else including the County Government.

38. The Defendant on the other hand has given a plausible explanation that the land where the monument was erected was public land in an urban area and was for the people of Tharaka Nithi but held in trust by the County Government. To this end, the Defendant has advanced a tangible explanation as to where they derived their mandate in the management of the monument.



39. PW3 Tabitha Mbungu has stated that she was a County Executive Committee for urban development. Thus she was expected to know the process of management of such a structure as the monument. She states that Plaintiffs approached her with their information, which she passed on to the Governor who was not willing to participate in the celebrations. She admits that:

“I was in charge of Public Service and urban development in 2013 in all areas. It entailed cleanliness in the town and construction. i.e if there is a building coming up, I would give recommendation, so for construction to take place in an area, the County would be involved.”

40. Thus PW3 was well aware that the county was in charge of such buildings. However, as a County Government, they did not get a formal application for approval but they got a verbal one! How is it that in her position as the CEC for urban development, PW3 doesn't have any paper trail of CIDA's formal engagement with the County Government that she was working for in so far as the management of the monument was concerned?

41. What resonates from the analysis herein is that a private entity was attempting to assert its interests and activities on public land. After all CIDA is but an outfit of 44-45 members (see evidence of PW3). They cannot purport to wrench off the reins of the County Government. If such practices were left to flourish, it would be a recipe for anarchy. After all, other outfits can always come up, perhaps demand their own monument with specific designs goals, etal.

42. The provisions of the 4th Schedule, Section 4 of *the Constitution* places cultural activities under the County Government. I discern that the erection of the monument had a cultural flavour to celebrate the 100 existence of the Chuka Town.

43. The provisions of Section 36 of the *Urban Areas and Cities Act* stipulates that cities and municipalities shall operate within the framework of integrated development planning which shall inter-alia strive to achieve the objects of devolved government as set out in Article 174 of *the Constitution*. The Defendants contend that they were carrying out their mandate in tandem with the aforementioned provisions of law in conjunction with the provisions of *Physical and Land use planning Act*. The definition of Physical Planning under the Physical and Land Use Act of 2019 means;

“the active process organizing the physical infrastructure and its functions to ensure orderly and effective sitting or location of land uses, and it encompasses deliberate determination of spatial plans with an aim of achieving the optimum level of land utilization in a suitable manner”

44. It is quite apparent that the Defendants actions are anchored on a legal/statutory and constitutional framework geared towards intergrated development planning for provision of physical and social infrastructure in an urban setting. The Plaintiffs on the other hand do not have any legal framework which mandates them to manage such infractures as the monument.

45. This is a matter where the Court, (Judge P. Njoroge who handled the matter at the initial stage) tried to guide the parties in resolving their dispute through Alternative Dispute Resolution Mechanisms, but somehow this failed. Precious time has now been lost in litigation yet the parties still do not have the perfect monument as the reconstruction stalled.

46. My conclusion is that any private entity desiring to invest their resources (intelligence, financial etal) in public land, must have a defined legal framework in which their activities & undertakings, would be anchored upon.



47. As at now, I find that Plaintiffs have not proved their case in tandem with the provisions of Sections 107-109 of the Evidence Act. The suit is hereby dismissed with costs to the Defendant.

DATED, AND SIGNED AT NAIROBI THIS 5TH DAY OF MAY, 2022.

LUCY N. MBUGUA

JUDGE

DELIVERED AT MERU THIS 18TH DAY OF MAY, 2022.

HON. C. K. NZILI

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JUDGE

In the presence of:-

Salvy for the Defendant

Court Assistant: Kananu

