REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 654 OF 2011

1. CHRISTOPHER NYANGE

2. SIMON NGURARU MWADIME

3. ELISTONE MWANDAWIRO MBELA

4. BENEDICT MWAMBILI

5. MARTIN M. MWAKIO

6. WALEGHWA MWANG'ONDI

7. CRISPUS MGHALU

8. DANSON KORONGE

9. JANE MWERO

(*both suing in their capacity as elected representatives of the Kishushe and Ngolia communities*)

……. PLAINTIFFS

V E R S U S

THE KENYA WILDLIFE SERVICE …….……. DEFENDANT

RULING

This suit is a representative action brought by the nine plaintiffs on their own behalf and on behalf of the Kishushe, Mwaktau and Ngolia communities. In it they seek, inter alia,

that-

(a) A declaration that the act of the Defendant

Defendant in extending the boundary of Tsavo West National Park beyond its limits as contained in the schedule to the National Parks Ordinance, 1945, to the heart of the land occupied by Kishushe, Mwaktau and Ngolia Communities are illegal, unlawful, unprocedural and a violation of their Constitutional entitlement.

(b) An order compelling the Defendant to

pull down and remove at its own expenses posts erected in readiness of an electric fence joining Mwaktau and Ndii and restore the land to its original state as it was before the Defendant entered upon the same, and thereby deliver the land to the Plaintiffs and their Communities.

(c) Injunction do issue restraining the Defendant by itself, its employees, servants, agents and/or hirelings from erecting or continuing to erect and/or constructing or continue to construct the Mwaktau/Ndii electric fence, or in any other manner whatsoever interfere or continue to interfere with the rights or Constitutional entitlement of the Plaintiffs, and the entire Kishushe, Mwaktau and Ngolia Communities over the subject land pending the hearing and determination of this suit.

Alongside the suit the plaintiffs filed an application for injunction dated 28th December 2011framed in the following terms.

"That this Honourable Court be pleased to issue injunction restraining the Defendant by itself, its employees, agents, contractors, servants and/or hirelings from electing and/or constructing, or continuing to erect and/or construct the Mwaktau-Ndii fence (electric or otherwise) or in any manner whatsoever interfering with the rights and/or Constitutional entitlement of the Plaintiffs and the entire Kishushe, Mwaktau and Ngolia Communities over the land falling within Kishushe, Mwaktau and Ngolia Locations pending determination of this suit."

It would seem that this suit and application were prompted by an ongoing exercise of the fencing of the Tsavo National Park by the Defendant. It is said by the plaintiffs that the fence runs in excess of 16 kilometres into the heart of their community land. That by doing so the Defendant has extended the boundary of Tsavo West National Park beyond the limits contained in proclamation No. 17 of 1948 made under the National Parks Ordiance, 1945. That unless restrained the Defendant's action will render a majority of the members of the three communities landless, deprive them of their grazing land and the use and enjoyment of the resources of the Tsavo.

The Defendant responded to the application through an affidavit made by Joycelyn Makena. She gave a short history of how by a subsequent proclamation No. 23 of September 1953 the boundaries of Tsavo National Park were amended. Those amendments were shown in Boundary Plan No. 204/8. That Tsavo West National Park was formally surveyed in 1998 and Survey Plan No. F/R 287/34 produced which concurs with boundary plan No. 204/8 of 1953. That the Government granted unto the Defendant the land contained within the survey plan and described as Land Reference Number 24360. The Defendant denies any encroachment outside the delineated boundaries.

The plaintiff claims entitlement to the disputed land by virtue of Article 63 of The Constitution. This Article prescribes what amounts to community land. Although the plaintiffs do not specify the exact nature of their ownership, it seems to be based on Article 63(2)(d)(i) which provides that community land shall include land-

"lawfully held, managed or used by specific communities as community forests, grazing areas or shrines" (emphasis mine)

It must be observed that the plaintiffs claim is that there is a breach of the boundary delineated in proclamation No. 17 of 1948. The plaintiffs, it would appear, were unaware of proclamation No. 23 of 1953. This, the Defendant claims amended the boundary and is the basis of the fencing that is now ongoing.

Section 6 of the Wildlife (conservation and management) Act deals with declaration of National Parks. Section 6(2) thereof provides as follows-

"All National Parks declared to be such under the National Parks of Kenya Act and existing immediately before the appointed day are declared to be National Parks for all the purposes of this Act, and the names and boundaries of such National Parks, unless and until they are amended under this Act, shall be those existing on the appointed day."

Through that Section the Act recognizes any National Park declared as such under previous legislation. On the material before court, I accept that Tsavo National Park is that area of land described in Proclamation No. 23 of 1953.

Then Article 62(1)(g) of The Constitution 2010 declares National Parks (such as Tsavo National Park) to be Public Land. Public land vests in and is held by the National Government in trust for the people of Kenya (Article 62(3)). For the plaintiffs to establish a prima facie case then they must prove that the disputed land lies outside the boundaries lawfully proclaimed to be part of Tsavo National Park and therefore public land.

Counsel for the plaintiffs attempted to give a survey interpretation of proclamation No. 23 of 1953 and Survey Plan No. F/R 287/34 when prosecuting the application. He argued that the ongoing fencing was still in breach of this latter proclamation. I am not told that counsel possesses expertise in survey. I am reluctant to accept that argument without the opinion of an expert in the field of survey or survey interpretation. In disputes of this nature, it will do well if litigants were to provide the court with ground reports and opinions prepared by experts. It helps the court to make an informed decision. The court will not be involved in conjecture or guesswork.

The conclusion this court reaches is that the plaintiffs have not established on a prima facie basis that the Defendant has stepped outside the land described and delineated in proclamation No. 23 of 1953 and encroached on their land.

The result is that this application fails the first test in **Giella**

-Vs- Cassman Brown and must, as I hereby do, be dismissed with costs. The interim orders of 23rd February 2012 are hereby discharged.

Dated and delivered at Mombasa this 20th day of March, 2012.

F. TUIYOTT

JUDGE

Dated and delivered in open court in the presence of:-

Ondongo for Applicant

Sitonik for Ombonyo for Respondent

Court clerk - Moriasi

F. TUIYOTT

JUDGE