



REPUBLIC OF KENYA

High Court at Kisumu

Civil Miscellaneous Application 55 of 2010

IN THE MATTER OF APPLICTAION BY: USONGA YALA SWAMP COMMUNITY FARMERS

FOR ORDERS OF JUDICIIL REVIEW

IN THE MATTER OF : WILDLIFE CONSERVATION AND MANAGEMENT ACT CAP 376

AND

IN THE MATTER OF TEH CONSTITUTION OF THE REPUBLIC OF KENYA

REPUBLICAPPLICANT

VERSUS

MINISTRER FOR FORESTRY & WILDLIFE.....1ST RESPONDENT

DIRECTOR KENYA WEILD LIFE SERVICES.....2ND RESPONDENT

COUNTY COUNCIL OF SIAYA3RD RESPONDENTS

AND

CHARLES ODUOR OKELO & 5 OTHERSEXPARTE

JUDGMENT

By a Notice of Motion dated 12th January 2011 the applicants prayed for the following reliefs:-

- 1) **Orders of Certiorari to quash the decision dated 1st September 2010 vide legal Notice No. 158 of 2010 by the 1st respondent to arbitrarily award or set aside land parcel measuring 41.42 sq Km situated West of Siaya Town in the boundary plan No. 216 / 68 for Wildlife purposes.**
- 2) **Order of Prohibition to prohibit the Clerk, County Council of Siaya the Interested party, Director Kenya Wildlife Services, 2nd Respondent and the Commission of lands from effecting the changes on the land until further order of this court.**
- 3) **Costs of this application.**

The application is supported by the affidavit of one **Meshack Ochieng Mayi** together with the statement

thereof. The applicants are residents and stake holders of Usonga Yala Swamp.

Sometimes on 25th August 1970 the interested party vide gazette notice No. 2570 set apart Yala Swamp for farming purposes with the consent of the residents. The effect of this therefore was that the interested party became the trustee for all intent and purposes of the trust land that had been set aside.

Evidence was shown by the applicants that the interested party with the consent of the residents did enter into an agreement with the Dominion Farms Ltd wherein it granted consent to undertake some farming activities on some portion of the trust land.

It is the applicants contention that the Minister of Forestry and Wildlife vide gazette notice dated 1st September 2010 gazetted a portion of the land for Wildlife purposes and christened it “**Lake Kanyaboli National Reserve**”.

The gazettelement was without the consent of the applicants and further that if any consent was granted by the interested party then it was null and void for it did not consult the applicants.

In reply one **Philip Otiende Adundo** the interested party's Clerk has sworn an affidavit dated 25th March 2011. The significant part of the affidavit is that as far as he is concerned the interested party “**has not and does not plan to cede its trusteeship to the Kenya Wildlife Services to the best of my knowledge attempted, intimated and expressed desire to take over ownership thereof**”.

He however confirmed that he is aware of the Kenya gazette notice No. 1031 legal Notice No. 158.

The 2nd respondent filed a response vide the replying affidavit of one **Thomas Ogolla** its legal officer. As far as he was concerned the gazette notice was legitimate and under the provision of the Trust Land Act Chapter 288 Laws of Kenya the action by the Minister was within the law.

He further contented that the consent from the Local Community was obtained on 13th September 2009. He said that the state has a constitutional obligation to utilize the environment and natural resources for the benefit of the people of Kenya. He dismissed the applicants as mere busy bodies.

The issues to determine are whether or not the applicants are legitimate residence of the area in question; whether the Minister followed the proper procedure in alienating the suit land for the intended purposes; whether the consent from the interested party was obtained and whether it was also necessary to obtain the consent from the applicants.

The applicants in my mind are the legitimate residents of the area in question and thus they are the bona fide members of Usonga Yala Swamp Farmers Community. Although the 2nd respondent has dismissed them as mere busy bodies there is no contrary evidence to rebutt that proposition.

The next issue is whether the land in question is a trust land. I do not think also this is an issue in dispute. The gazette notice No. 2570 of 25th August 1970 say as much.

Further evidence of this is shown by the agreement between the interested party and the Dominion Farms Ltd.

If this is so how did the 1st respondent who did not apparently file any response, gazette the portion now known as **Lake Kanyaboli National Reserve**?

I must note however that the duty of this court in this cause is not to determine the legitimacy or otherwise or the benefit accruing from setting aside the national Reserve. This court is only interested in the process and procedure and whether or not the rules of natural justice were pursued in such acquisition. The issues of compensation, national interest or otherwise are not the province of Judicial Review proceedings.

The provisions of Section 2 of the Trust Land Act Chapter 288 Laws of Kenya states **“Council”, in relation to Trust Land, means the local authority in which the trust land is vested “.**

Section 7 (1) of the said Act states this on setting aside of the land:-

“7(1) Where written notice is given to a council, under subsection (1) of Section 118 of the Constitution, that an area of Trust Land is required to be set apart for use and occupation for any of the purposes specified in subsection (2) of that Section, the council shall give notice of the requirement and cause the notice to be published in the gazette”.

Section 3 further states **“A notice under subsection (1) of this Section shall specify the boundaries of the land required to be set apart and the purpose for what the land is required to be set apart and shall also specify a date before which applications for compensation are to be made to the District Commissioner”.**

My understanding of the above quoted portion of the law is that the council ought to be notified that a certain portion of the Trust Land is supposed to be set aside for a special purposes.

This notice to the council shall open room for the council to demand that the government does demarcate the boundaries of the designated area and thereafter the issues of compensation ought to follow.

From the response by the council earlier own alluded above it appears that the council was not notified of the intention by the government to set aside the Trust land in in question for Wildlife Reserve. The Minister simply went ahead with the gazettment without consulting the council who are holding the land in trust for the local community who include the applicants.

This seem to run contrary to the proviso's of Section 18(1) and (2) of the Wildlife Conservation and Management Act Chapter 376 laws of Kenya which states:-

“18(1) With the agreement of the competent authority the Minister may by notice in the gazette declare any area of land to be a National Reserve.

(2) An agreement between the Minister and a competent authority under

subsection (1) may include agreement as to restrictions or conditions relating to the provisions of this part which shall apply to the area concerned and any such restrictions or condition shall be specified by the Minister in the notice declaring the area to be a National Reserve”.

It is conceded that the land in question is a Trust land. The upshot of this therefore meant that the Minister ought before gazetting to have entered into some agreement with the interested party. The interested party has however denied that there was such an agreement and that it has never desired to cede any portion of land to the 1st and 2nd respondent.

The affidavit of **Thomas Ogola** talks of a consent between the local community and the county council dated 13th September 2009. The same has not been attached.

It is my observation further that the land in question falls under what is termed as **“Community Land”** under Article 62 and 63 of the current Constitution. The same ought to be taken care by the National land Commission as and when it shall be established.

My finding therefore is that to the extent that the land in question was being held by the interested party, the Minister ought to have first obtained its consent or agreement before proceeding to gazette.

The interested party on the other hand would have proceeded to prepare an appropriate compensation before granting the 1st respondent such consent.

In the premises the Minister acted ultra vires. He ought to have exhausted the legal channels provided by the relevant Acts of parliament.

Setting aside an area for a National Wildlife Reserve is good for the country as well as the local community but they ought to be heard. The land in question was not a vacuum. The interested party had already alienated it in 1970 and set aside for community purpose. Although the interested party is distancing itself the affidavit of its clerk veinly supports the action of the respondent.

The purpose of Judicial Review proceeding is to address such unprocedural failures by statutory bodies. The procedure set out by the Trust Land Act Chapter 288 Laws of Kenya and the Wildlife Conservation and Management Act Chapter 376 are not ornamental.

I find that the applicants have established a case against the respondents as well as the interested party. The notice of motion dated 12th January 2011 is hereby allowed as follows:-

- 1) **An Order of Certiorari to quash the decision dated 1st September 2010 vide legal note No. 158 of 2010 by the 1st respondent to arbitrarily award or set aside land parcel measuring 41.42 sq Km situated West of Siaya for Wildlife purposes.**
- 2) **An Order of Prohibition to prohibit the Clerk, County Council of Siaya, the interested party, Director of Kenya Wildlife Serves 2nd respondent from effecting the changes on the land.**
- 3) **Until they follow the lawful procedures.**
- 4) **Costs to the applicants.**

Dated, signed and delivered at Kisumu this 14th day of November 2012.

**H.K. CHEMITEI
JUDGE**

In the presence of:

Ouko for Mwamu for the applicants

P. J. Otieno for the respondents

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