



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 341 of 1993

1. MEZA GALANA1ST PLAINTIFF
2. MICHAEL GAFU HIMBAE2ND PLAINTIFF
3. ALI DHADHO SANTOR.....3RD PLAINTIFF
4. ATHMAN HAMZA4TH PLAINTIFF

VERSUS

1. ATTORNEY GENERAL1ST RESPONDENT
2. THE DIRECTOR OF KKENYA WILDLIFE SERVICES...2ND RESPONDENT
3. THE RIVER TANA COUNTY COUNCIL3RD RESPONDENT

J U D G M E N T

This judgment relates to a representative suit filed by Meza M. Galana, Michael Gofa Hiribae, Ali Dhadho Santur, Athmani Hamza and Stephen Muluwa Omar on behalf of themselves and all other residents of Ndera and Gwano Location in Tana River District against The Attorney General, Kenya Wildlife Service and Tana River County Council. The dispute is expressed in a plaint dated 16TH June 1993 which was later amended pursuant tot his court’s order of 17th September 1996. In the amended plaint the plaintiffs are praying for judgment against the defendants as follows:

(a) an order of injunction restraining the defendants their servants and or agents from evicting any person residing on any land in the Ndera and Gwano Locations of Ndera Trust Land as defined in the Trust Land Act Cap.288 of the Laws of Kenya

r from obstructing them from residing and or carrying on their daily routine on the land being occupied by them.

(b) A declaration that the plaintiffs are entitled to the use and or possession or to carry on cultivation of their farms within the said locations without being harassed or obstructed by the defendants.

(c) An order that all the persons evicted from the said locations be allowed to their respective homes/lands.

(d) Damages for trespass and or evictions.

(e) An order restraining the Kenya Wildlife services, its servants and or agents from interfering with the Fauna of Ndera, Gwano Locations and restoring to the said locations any Wildlife it may have removed from there.

The summons and the plaint were served upon the defendants.

On the 10th day of February 1994, the Attorney General filed a joint written statement of defence for all the defendants, denying the plaintiffs' claims. On the 16th day of December 1996, Kenya Wildlife Service filed its separate defence in view of the fact that it is an autonomous entity capable of suing and being sued.

The entire evidence was taken before Mr. Justice (retiree) Hayanga, who unfortunately left the judiciary before completing the matter. On the 21st day of October 2005, this court directed the matter to proceed for hearing from where Justice Hayanga left. Typed proceedings were to be supplied to the court and the parties involved. In this case the plaintiffs tendered the evidence of 4 witnesses to support their case. The 2nd defendant, Kenya Wildlife service was the only defendant who offered evidence otherwise the Attorney General (1st defendant) and Tana County council (3rd Defendant) failed to tender evidence in their defence. The plaintiffs and 2nd defendant each filed their written submissions pursuant to this court's order of 17th October 2006.

Two witnesses each testified from the two locations namely Ndera and Gwano Locations of Tana River District. The first to testify is Meza Mororwa Gaura (P.W.1). He told this court that he was born in 1959 at Makora village of Gwano Location. He has always known that location to be his ancestral home. In that village P.W. 1 cultivates maize, Mangoes and coconut. P.W.1 stated that the location has a population of 5000 people. P.W. said he remembers that in 1975, the Tana River District Commissioner came to tell the villagers that the area would be made a Game Reserve. It is P.W.1's evidence that the District commissioner officials from Kenya Wildlife Service and the Chairman and County Clerk of Tana River County council attended the meeting held in 1974 where the residents of Gwano Location rejected the Government's intention to have the area gazetted as a Game Reserve. P.W. 1 said the area D.C. and officials of Tana River County Council ordered them to vacate their ancestral land to pave way for the establishment of a Game Reserve. P.W. 1 said he came to learn that the Tana River County Council passed a resolution giving out their land without consulting the residents.

P.W. 1 admitted that he knew that Tana River Primate Reserve was established by legal notice No. 4 of 9th January 1976. a near similar story was given by Seta Meshak Abir (P.W.4), a resident of Wenje Village of Gwano Location. P.W. 4 said he saw Game Rangers from Kenya wildlife Service armed with guns forcing people to move out of their ancestral home. P.W.4 said people refused to budge and opted to file this suit. P.W. 4 told this court that he knew that Kenya Wildlife Service had built an office block housing the Headmaster of Wenje Sec. School. He said the residence of Gwano and Ndera Locations had been told by the District Commissioner that the area would be made a game reserve. He further claimed that K.W.S. Personnel directed people to move out of the location to designated places namely Kipini.

The residents of Ndera Location tendered their evidence through two witnesses. One of those witnesses is Athmani Hamza Ali (P.W.2) who said he was born in Ndera Location in 1932 and has since lived there. He confirmed that the residents of his location resisted the government's move to have them evicted from their ancestral home. P.W. 2 said there were several attempts to have people evicted out of the location but people resisted these moves. The other witnesses who testified from Ndera Location is Said Mlua Komora P.W.3 who said that people were being harassed on account of living in a game reserve. He said he did not know the existence of the Game Reserve. This witness produced documents indicating that his wife was one of the victims of these acts of harassment. For these reasons the plaintiffs asked this court to grant the orders sought.

I have already said that the 2nd defendant K.W.S, is the only defendant who tendered evidence. Philip

Okuba Wandera (P.W.1) told this court that K.W.S. (2nd Defendant) was not involved in evicting people from the two locations. He however told this court that the two locations were in a gazetted National Reserve owned by Tana River County Council (3rd defendant) who had requested K.W.S. to manage the same on its behalf. He said that the people of the area practice Shifting cultivation which is compatible with reserve management. D.W. 1 said that in 1997 the World Bank funded the project and made recommendations to the effect that people living in the designated areas be evicted and be compensated. D.W. 1 said K.W.S. had to dialogue and sensitize the people over the proposal.

It is the evidence of D.W. 1 that people from the two locations were given options to chose whether to vacate or not. The agreed issues were as follows:

- (i) Is the land delineated in boundary plan no. 216/28 part of the Ndera Trust Land?
- (ii) Are the plaintiffs ordinary residing in portion of the aforesaid land?
- (iii) Is the legal notice no. 4 of 1976 given by the Minister for Tourism and Wildlife declaring the said land as Game Reserve a valid notice.
- (iv) Are the plaintiffs entitled to the orders and declarations sought in the plaint?

In the first issue it is the submission of the 2nd defendant that the area in contention became a Game Reserve known as Tana River Primate Reserve by legal Notice No. 4 of 18th November 1975 hence the same ceased to be Trust Land. I have carefully considered the evidence tendered and submissions made by learned counsels on both sides. What emerges is that the land comprising of Ndera and Gwano Locations were Trust Land bestowed upon Tana River County Council under Section 115 of the constitution as trustee for the inhabitants of the aforesaid land before the same was purportedly Gazetted as a National Reserve. This fact is admitted by the 2nd defendant through the evidence of Philip Okuba Wandera (D.W.1) who referred to the parcels of land as Gazetted National Reserves owned by Tana River County Council.

On the second issue as to whether the plaintiffs are residence of Gwano and Ndera Locations it is quite clear from the evidence of P.W.1, P.W.2, P.W.3 and P.W.4 that they actually reside in these locations. In fact the evidence of D.W. 1 admits that the plaintiff indeed reside on the disputed piece of land. The evidence of land. The evidence of P.W. 4 indicates that some of the residents have even been charged in court for being illegally in occupation. D.W. 1 says on cross-examination:

“There are inhabitants living in the reserve They cultivate their shamba there even now”

D.W. 1 further says:

“The plaintiffs are using the land. We have never harassed them. We cannot interfere with the environment.”

The above evidence settles second issue.

The third issue is in respect of whether or not legal notice No. 4 of 1976 given by the Minister for Tourism and Wildlife declaring the said land as Game Reserve is a valid notice. The evidence tendered by the plaintiffs indicate that in 1974 the area District Commissioner, councilors from Tana River County Council and personnel from Kenya Wildlife Service visited the area to inform the people of that area of the government’s intention of the creation of a game reserve. There was evidence that there was a serious objection to such a project being established in the area. There was a lull moment until 1991 when the plaintiffs notices that some armed game wardens and rangers were roaming around as they harassed people and demanding that they vacate the area as it was a game reserve. This occurrence prompted them to file this case. It emerged from the affidavit of Tana River County Clerk, Enos Kidai sworn on 1st July 1993, that part of Ndera and Gwano locations by legal notice No. 4 of 1976 had been gazetted to form

part of Tana River Game Reserve for purposes of protecting Wildlife Conservation and Management Services. In the same affidavit, the plaintiffs also learned that before the gazettment, the Tana River County Council met and resolved to establish a game reserve and that for political dispensation the area residents could not be evicted at the time. The County Clerk further admits in his affidavit that the 2nd defendant came to the scene to help manage the National reserve in liaison with Tana River County council. In short it is admitted that by legal notice No. 4 of 1976, the part of Gwano and Ndera Locations became part of Tana River Primate Reserve. These facts are also admitted in the 2nd Defendant's defence and by the oral evidence of D.W.1. It is the submission of the 2nd defendant that the plaintiffs were consulted by the 3rd defendant before the land was taken away hence the gazette notice was valid. The plaintiffs on their part are of the view that they were not consulted by their trustee as required hence the gazette notice did not confer any right. I have considered the evidence and the submissions over this issue. I have already said that it appears from the evidence it is not disputed that the land comprising of Gwano and Ndera Locations is trust land vested in Tana River County council to hold it for the benefit of the persons ordinarily resident on that land. Under Section 117 of the constitution, the County Council is empowered through an Act of Parliament to set apart an area of Trust Land rested in that County Council for used and occupation.

- (a) By a public body or authority for public purposes
- (b) For the purposes of the prospecting for or the extraction of Minerals or mineral oils.
- (c) By any person or persons for purposes which in the opinion of the County Council is likely to benefit persons ordinarily resident in that area or any other area of trust land vested in that county council either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from in respect thereof.

It is clear from the evidence that the County Council started the process of setting aside the trust land for purposes of creating a game reserve to be managed on its behalf by the Kenya Wildlife Service (2nd Defendant). It is clear from the provisions of S.117(2) of the constitution that where a county council has set apart like in this case any area of land, any rights interest or other benefits in respect of that land that were previously vested in any tribe, group family, or individual under African Customary Law shall stand extinguished.

However, before a County council sets trust land aside, it must follow the procedures laid down under the Trust Land Act (Cap 288 Laws of Kenya) which Act came into being pursuant to Section 117 (1) of the constitution. Section 13 of the aforesaid Act provides as follows:

“13. (1) In pursuance of S.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) Or**

(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 and not more than 3 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 meetings.

(b) The council shall bring the proposal to set apart the card 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 recommendations concerning the proposal to set apart the land together with a record of the representations made at the meeting.

(d) The recommendations 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.

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.”

The law is so detailed and elaborate when it comes to the appropriation of trust land by county councils. In this case the land held in trust for the residents of Gwano and Ndera has been gazetted to be a game reserve. The question which must be answered is whether or not the Tana River County Council complied with the provisions laid out under Section 13(2) of the Trust Land Act (Cap.288 Laws of Kenya)? Unfortunately the aforesaid council (3rd defendant) did not present any evidence. The only evidence available to assist this court is the affidavit of Enos Kidai its then clerk sworn on 1st July 1993.

Assuming for a moment that, that was the only evidence the council could in its defence, then in my estimation the council did not meet the requirements of the law as set out in Section 117 of the Constitution and under Section 13 of the Trust Land Act. There was no cogent evidence that the council ever consulted the residents of Gwano and Ndera Locations under Section 13(2)(b) of Trust Land Act. There is also no evidence that the council passed the resolution with the required quorum under Section 13(2)(d) of the Trust Land Act. It is clear from the minutes attached to the aforesaid of Enos Kidai that the resolution passed was that of a committee and not that of a full council. In the end and for the above reasons I find the gazette notice No. 4 of 1976 issued by the Minister of Tourism and Wildlife invalid. This means that the plaintiffs rights have not been extinguished. Judgment is entered for the plaintiffs and against the defendants as prayed in the plaint save that prayer (a) cannot issue against the Government (1st defendant). The prayer for damages for trespass was not strictly proved nor the kind of damages submitted. On this head I will not make any award. Costs is awarded to the plaintiffs.

Dated and delivered at Mombasa this 19th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Anjarwalla for the plaintiffs and Mr. Mutungi for the Attorney General and Mr. Gitonga, Kipsang

No Appearance for 2nd and 3rd Defendants.