



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 31 of 2004

1. SAID ABDALLA BUDZO

2. MASUDI TSUMO KHAMISI

3. SALIM ALI MWAKUKANA

4. RAMADHAN MOHAMED MWAMGUNO

**(suing on their own behalf and on behalf of the below named members
of the Avirizi, Achina-Uchi and Achina Ngala clans)**

5. KASSIM MASUDI NGOCHO

6. MWALIMU ATHUMANI GARIKO

7. ALI HASSAN MBEGA

8. KASSIM SALIM LIKONGO

9. SULEIMAN SHEHE KOCHA

10. MWINYI HAMISI MASUMBA

11. MOHAMED ALI BOKOMO

12. SAIDI MUHAMADI SARAI

13. SHEE MBWANA

14. ALI HASSAN NJAMA

15. OMAR JUMA SELEMANI

16. SAIDI NASORO MWAKAMOLE

17. JUMA ABDALLA

18. KASSIM OMARI MWAMAPEMBA

19. SALIM MBWANA ZOMU

20. ATHUMANI MWAKAM

21. FAKI MBRARUKU

22. MWINYI HAMISI MWAKIWELA

23. JUMA HAMISI DZENGO

24. RASHID BAKARI MWAJOPU

25. SALIM HAMISI BARUA

26. SAID KAMOLE

27. MASUDI SALIM BAMVUA

28. OMAR MBWANA KALI

29. ATHUMANI MBARUKU

30. MOHAMED OMAR ABDALLA

31. MOHAMED OMARI MWAMADI BAKARI

32. ALI ATHUMANI MWANAKA

33. JUMA MOHAMED MWAGONGOLO

34. ALI MUSA

35. RADHANI MASUDI GAMBERE

36. ABDALLA SHABANI ACHILIKO

37. AMZA SALIM MBWANAPLAINTIFFS

- Versus -

TIOMIN (K) LIMITEDDEFENDANT

THE ATTORNEY GENERALTHIRD PARTY

J U D G M E N T

The plaintiffs in this case claim that they live in an area in which the Defendant is carrying out mining activities, and the defendant has refused to compensate them in terms of an agreement reached between the defendant and the Government. The plaintiffs therefore pray for judgment against the defendant for:-

(a) An injunction restraining the defendant, its servants, agents, employees and or any other person acting on the defendant's instructions from trespassing and or carrying on any work and or mining on the unregistered land at Maumba-Msambweni until this matter is heard and determined.

(b) A declaration that the area subject matter of this suit belongs to the plaintiffs.

(c) A declaration that the plaintiffs are entitled to compensation by the defendant as agreed before any activity starts.

(d) An order for the plaintiffs to be compensated by the defendant on the terms and figures agreed between the defendant and the Government.

(e) Damages for breach of contract

(f) Costs and interest of the suit.

(g) Any other relief the court might deem fit to grant.

In its written statement of defence, the defendant denies the plaintiffs' claim as pleaded in the plaint or at all and, in the alternative, states that the plaint does not disclose any valid cause of action against the defendant. It is further the defendant's case that the negotiations for the acquisition of the mining land referred to in the plaint are matters between the plaintiffs and the Government of Kenya

sequently the plaintiffs' claim against the defendant in respect of any issue arising from the said negotiations is misconceived and unsustainable. The defendant also refers to regulation 33 of the Mining Regulations and states that the plaintiffs' claim is time barred. It also refers to section 61(2) (e) of the Mining Act, Cap 306 Laws of Kenya, and pleads that this court has no jurisdiction to hear and determine the claims made in this suit except by way of an appeal from an order or decision made by the Commissioner of Mines and Geology. The defendant further contends that the plaintiffs' claims do not lie and are not sustainable on the additional ground that the property referred to in the plaint falls outside the defendant's area of mining operations. Finally, the defendant maintains that the actions done by the defendant in relation to the acquisition of the land in the mining area were performed by the defendant as an agent of the Government and, therefore, the claim made against the defendant as an agent is misconceived.

Arising out of these pleadings and the submissions of counsel, it seems that the main issues for consideration and determination are – whether this court has jurisdiction to hear and determine the claims made in this suit; whether the plaintiffs' claims are time-barred; whether the claims made against the defendant lie; whether the plaintiffs have established a cause of action; whether they have proved their case on a balance of probability; and what orders should issue.

With regard to the jurisdiction of this court or the lack of it, I wish to observe that the issue was ably addressed and disposed off in an earlier ruling in this matter. In its ruling, the court observed that the High Court was a creature of the Constitution of Kenya, and was established with unlimited original jurisdiction in civil and criminal matters. It also exercises such other jurisdiction as may be conferred on it by the Constitution or any other law. In that context, it would be fallacious to suggest that the High Court lacks jurisdiction to hear any matters arising out of any statutes. Any provision in any statute barring the High Court from exercising jurisdiction thereunder would be inconsistent with the Constitution and, under section 3 of the Constitution, it would be void to the extent of the inconsistency.

I don't think that there is any provision in the Mining Act which seeks to oust or limit the jurisdiction of the High Court in hearing and determining any of the matters arising from this suit. On the contrary, section 67 is explicit in the following language –

“Nothing in this Part contained shall be deemed to prevent any person from instituting in any court any proceedings he may think fit to institute as provided by law:

Provided that subject to the provisions of section 65, where a dispute has been adjudicated upon in accordance with the provisions of section 61, proceedings in respect of the same cause of action shall not thereafter be instituted in any court.”

It is significant that sections 61, 65 and 67 all fall within Part IV of the Act, and even more significant

that that Part deals with disputes. It was suggested that section 61(1) limits the jurisdiction of the High Court by empowering the Commissioner of Mines and Geology to inquire into and decide all disputes concerning any of the matters specified in subsection (2). However, when this section is read together with section 67, it becomes clear beyond peradventure that the jurisdiction of the High Court as enshrined in the Constitution is not in any way compromised. That is even the more so when it is borne in mind that the Commissioner has not exercised his power under section 61(1) to inquire into and decide any of the matters specified in section 61(2). For these reasons, I find that this court has jurisdiction to entertain, hear and determine the matters raised in this suit.

In paragraphs 11, 12 and 13 of its written statement of defence, the defendant pleads as follows –

“11. Further, the Defendant states that in compliance with the provisions of regulation 33 of the Mining Regulations (being part of the subsidiary legislation under the Mining Act), the Commissioner of Mines published a Gazette Notice number 401 on 24th January 2003 giving notice to the whole world that the Defendant’s said principal had applied for a Special Mining Lease for the area referred to therein.

12. In terms of the said regulations, any party aggrieved by the said application for a Special Mining Lease was required by law to file an objection in writing against the application within Ninety (90) days from the date of the publication and in default no such objection would be received or considered for hearing and determination by the Commissioner of Mines and Geology.

13. By reason of the matters aforesaid, the Defendant states that the Plaintiffs’ claim herein is time barred and unsustainable.”

This point was not pursued during the hearing of this suit. This was probably for good measure as well. The plaintiffs’ case is not that they are in any way aggrieved by the defendant’s application for a special mining lease. P.W.1, Masudi Tsumo Khamisi, was very categorical that the plaintiffs were not opposed to the entire mining project as such. Instead, they would prefer that the project proceeds for the development of the affected area and the country as a whole. All they are asking the court is to stay the project until the issue of compensation in respect of the plaintiffs’ trees, kayas, etc within the mining area is sorted out. That being the stand taken by the plaintiffs, the issue of any objection to the special mining lease does not arise, and the further issue of the plaintiffs’ claim being time barred for failure to file an objection within ninety days equally does not arise.

This brings me to the crux of the matter in this case which is whether the plaintiffs have established a cause of action in this matter, and whether they are entitled to the orders sought. In a nutshell, their case against the defendant is that they are entitled to be compensated by the defendant before the latter can commence its mining operations. Before they can qualify for payment of compensation, they have to demonstrate, inter alia, that they are owners or lawful occupiers of land upon which the defendant intends to mount its mining operations. This requirement is spelt out in section 26 of the Mining Act. In order to appreciate fully the position of the plaintiffs, I find it prudent to reproduce some excerpts from paragraphs 1, 3, 4, 6, 7, 11, 12, 13 and 14 of their plaint which was filed in court on 6th February, 2004, **which are to the following effect –**

“1. The plaintiffs are adults male (sic) ... residing and carrying on business at Msambweni Division of Kwale District

3. The plaintiffs avers (sic) that they are members of the Avirizi, Achina-Uchi and Achina Ngala clans, the traditional owners of a portion of the unregistered land known as special No.173 Maumba which land they used for both residential and cultural purposes commonly referred to (sic) as Kaya forest and by virtue of having settled on this area without title deed they are recognized as squatters by the state.

4. ... The plaintiffs shall crave for leave to produce in evidence the map of the area the Defendant intends to mine and prove that the land in question is within the same area they are claiming

ownership.

6. The plaintiffs avers (sic) that although they are the affected party the Defendant has not approached them to obtain their consent to start work on the land ... and they now fear that the Defendant does not intend to compensate them as earlier agreed on.

7. The Plaintiffs states (sic) that they have lived on the questioned land all their lives and if the Defendant is left to go on with the mining activities it has started, it will not be possible to cultivate and use their farms (sic) as before and it is therefore imperative that they are compensated on the terms and the premises made by the defendant as soon as possible

...

11. The plaintiff avers that the acts of the Defendant is

(sic) pure breach of contract between it and the land owners since the implied terms of the agreement meant that the land owners were to be paid immediately the activity on the ground started and if there be a change, it is the duty of the Defendant to inform the Plaintiffs.

12. The Plaintiffs states (sic) that as a result of the

Defendant's activities, it has become very difficult for the Plaintiffs to access their land and the Plaintiffs hold the Defendant responsible and claims for damages (sic) ...

13. The Plaintiff avers that although they (sic) occupy

land which is not registered in their names, they are entitled to protection under the law more so when there is evidence of the Plaintiffs residing and actually owning the said land in question which has also their sacred Kayas."

On that note, since the plaintiffs contend in paragraph 11 that the defendant's conduct is a breach of contract between it and the landowners, and that the landowners were to be paid immediately, it is imperative to scrutinize the evidence before the court in order to ascertain whether the plaintiffs reside and actually own the land in question as averred in paragraph 13 of the plaint.

In paragraph 3 of the plaint, the plaintiffs describe themselves as members of some three stated clans, the traditional owners of a portion of the unregistered land known as special No. 173 Maumba. This statement is ambiguous. It could mean either that the land in question is owned traditionally by the three clans, or that the plaintiffs themselves are the traditional owners. If the land is owned by the clans, then the plaintiffs cannot own it at the same time. In any event, whoever the owners may be, they should be able to establish ownership by producing any documents of title. The plaintiffs have not produced any such documents. Indeed, in paragraph 13 of the plaint, they concede that "they occupy land which is not registered in their names ...". Since they are not registered owners of that land, it follows that they are not and cannot be in a position to produce any documentary evidence of title to the land. In the absence of such evidence, indeed, they can't prove ownership. For the plaintiffs to aver in paragraph 13 of the plaint that they occupy land which is not registered in their names, and then state in the same breath that they reside and actually own the land in question is to engage in self contradiction.

This self contradiction gathers some extra mileage from paragraph 3 of the plaint in which they aver that by reason of having settled in the suit area without title deeds, they are recognized as squatters by the State. There is a world of difference between the lot of an owner of land and that of a squatter. Since the plaintiffs acknowledge that the State recognizes them under the tag of squatters, then that is all they are and they cannot be squatters and at the same time purport to be the owners of the land on which they squat. In his evidence in chief, P.W.1 conceded that the plaintiffs have no titles to that land. And in cross-examination, he confirmed that none of them has a title deed or homestead on the suit property. In these circumstances, I find that the plaintiffs have not established ownership of the land in question,

despite stating expressly in the plaint that they actually own that land.

Even if the plaintiffs are not the owners of the land in issue, however, they may yet qualify for compensation under section 26 of the Mining Act if they are lawful occupiers of the land. In a bid to establish that they occupy that land, they have stated in paragraph 7 of the plaint that they have lived on the land in question all their lives. In contrast, the defendant states in paragraph 16 of its defence as follows:-

“Further and/or in the alternative, the Defendant states that the claims made herein do not lie and are also unsustainable on the additional ground that the property referred to in the plaint falls outside the Defendant’s ... area of mining operations.”

In the face of this plea by the defendant, it became more imperative for the plaintiffs to establish not only their abode, but also that the same lies within the area of the intended mining operations. Unfortunately for them, the plaintiffs have not demonstrated with sufficient clarity where they actually reside. More specifically, they have not shown by evidence that the land which they occupy falls within the area delineated for the defendant’s mining operations. The closest they came to doing that was the undertaking they gave in paragraph 4 of the plaint in which they promised to crave for leave to produce in evidence the map of the area in which the defendant intends to mine and prove that the land in question is within the area over which they claim ownership. During the hearing of the case, the plaintiffs did not even attempt to make good that promise. They neither produced in evidence a map of the area in which the defendant intends to mine, nor did they crave for leave to do so. This leads credence to the defendant’s assertion that the plaintiffs do not live within the area of the defendant’s intended mining operations.

Two factors further led credence to this view. The first one is the evidence of the Plaintiffs own witness, P.W.2, one Mr. Samuel Odari Okenyi. Mr. Okenyi is the District Land Adjudication & Settlement Officer in Kwale District, and he also doubles up as a member and secretary of the Resettlement Committee. He testified that on the ground, one committee verified the land and people, and another committee was involved in verifying trees. In his evidence in chief, he said that the mining area was occupied by the people and households whose names appear on a list dated 31st October, 2005. That list was filed in court on 27th January, 2006, and was produced and admitted in evidence by consent of the parties. The list is in two parts. Part I comprises 130 mine site farmers with freehold titles, and Part II embraces 254 mine site farmers who are leasehold occupiers. According to Mr. Okenyi, those are the only people who occupy the mining area. In his words in cross-examination, he said –

“No one from the mining zone has been excluded ...”

And in re-examination, he said –

“If anyone was excluded from the list, we would know.”

Falling out from the lips of the plaintiffs own witness, these are strong words. Their plain import is that since no one from the mining zone was excluded, and the plaintiffs' names were not included, then the plaintiffs were not from the mining zone. Moreover, if they were from the mining zone and were excluded, the witness would know. But that was not the case. Therefore, the plaintiffs did not occupy land within the mining zone.

Secondly, the evidence of P.W.1 himself is pretty damning to the plaintiffs’ own case. It has been observed that the plaintiffs allege in paragraph 7 of the plaint that they have lived on the land in question all their lives. In cross-examination, however, P.W.1 said –

“we have lived there all our lives and if Tiomin mines there we shall have nowhere to live. We have lived there for a long time but we stopped living there in the 1960’s because the area was prone to smallpox. I am 56 years old. I lived there between 10 – 15 years ...”

If the age of this witness is taken as the average age of the plaintiffs, it would mean they lived on the suit land from around 1950 and possibly earlier. But since they stopped living in that area in the 1960's, it follows that they are not living there today as alleged in paragraph 7 of the plaint. P.W.1 was quite clear in cross-examination that none of the plaintiffs has a title deed or homestead on the suit property. Since the plaintiffs do not have any title deeds, if they cannot establish lawful occupation of the land, as they have failed to do, then they fail to establish entitlement to compensation under the second limb of section 26 of the Mining Act.

The above observations notwithstanding, it is arguable that a person who is farming on land is also in occupation of that land. Indeed, P.W.1 was clear that whereas all the plaintiffs have land in the suit property, none of them has a title deed or a homestead thereon, and that only some of them farm on the land. Even though a person who uses a piece of land may as well be labelled an occupier, the circumstances of this case are not quite conducive. This is because all the farmers within the mining area have been identified, and these are either freehold title holders, or leasehold occupiers. But the plaintiffs do not seem to have any respect for the sanctity of title to land, not even a freehold title. While acknowledging that there are people with title deeds on the suit property, P.W.1 said –

“I am aware that there are some people there who have title deeds. Even though there are people there with title deeds, I still insist that that is our ancestral land. There are trees there that we planted a long time ago – mango trees, cashew nut trees, and coconut trees. Even though title deeds were issued, the trees are still ours ...”

If this is the philosophy upon which the plaintiffs' claim is founded, then the claim is totally misconceived. Barring some express agreement between a title holder and a third party to the effect that the latter would acquire an interest in anything on the land, the basic principle of law is summed in the latin maxim **“quicquid plantatur solo, solo cedit.”** Translated into English, this simply means that whatever is affixed to the soil belongs to the soil. In my view, the trees on the land in issue belong to that land and by extension to the holders of the freehold titles. Any dispute regarding anyone's interest in those trees should be sorted out with the title holders, who are not parties to this suit, but not with the defendant.

In these circumstances, I find that the plaintiffs have failed to establish ownership of the land in question, or lawful occupation thereof, or any prima facie interest which would sustain this suit against the defendant herein.

The plaintiffs also claim damages for breach of contract. In paragraph 11 of the plaint, they state that the defendant's acts are pure breach of contract between it and the landowners. It is not clear who is meant by “the landowners” in this context since the plaintiffs have not demonstrated that they own the land in question. Even if it was meant and intended to refer to the plaintiffs, their principal witness, Masudi Tsumo Khamisi, who testified as P.W.1, admitted frankly, and rightly so, that there was no agreement between the plaintiffs and the defendant. The plaintiffs cannot seek damages in respect of a contract that never was; nor can they enforce a contract between the defendant and a third party since they were not privy to that contract. A copy of the contract signed between the defendant and the Government was not availed to the court, and it would therefore be presumptuous for the court to refer to any terms, express or implied, from that contract. For the above reasons, I find that, as pleaded, the plaint does not disclose a valid cause of action against the defendant.

It is on record and admitted by defendants that the plaintiffs raised complaints with the District Resettlement and Compensation Committee, but that these complaints were not adjudicated upon on the ground that this matter was subjudice. The defendant's only witness, Mr. Ted Majaliwa Kombo, conceded that the plaintiffs should have been given a hearing, and that they could still be accommodated. This is the only window left open to them, but only in respect of those trees they may have, and which do not fall within land in respect of which freehold titles have been issued. They are therefore at liberty to pursue that option through the District Resettlement and Compensation Committee.

Otherwise as the suit does not disclose a valid cause of action against the defendant, it is dismissed

with costs.

Dated and delivered at Mombasa this 9th day of February, 2007.

L. NJAGI

JUDGE