



**Mwakandana & 6 others (On behalf of themselves and on behalf of the other residents of Kishushe Adjudication Section) v Kishushe Ranching Co-operative Society Ltd & 5 others (Environment & Land Petition 26 of 2019) [2023] KEELC 20471 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20471 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 26 OF 2019  
M SILA, J  
OCTOBER 5, 2023**

**BETWEEN**

**DAVIS NYAMBU MWAKANDANA ..... 1<sup>ST</sup> PETITIONER  
STEPHEN MWAMELA MWANYAMA ..... 2<sup>ND</sup> PETITIONER  
REGINA MKIWA MWANGECHO ..... 3<sup>RD</sup> PETITIONER  
BEATRICE WAMONA MWATELE ..... 4<sup>TH</sup> PETITIONER  
LYTTLETON MAGHANGA MKONU ..... 5<sup>TH</sup> PETITIONER  
PRUDENCE MDULO ..... 6<sup>TH</sup> PETITIONER  
FESTUS MWASI MWAWUGHANGA ..... 7<sup>TH</sup> PETITIONER  
ON BEHALF OF THEMSELVES AND ON BEHALF OF THE OTHER  
RESIDENTS OF KISHUSHE ADJUDICATION SECTION**

**AND**

**KISHUSHE RANCHING CO-OPERATIVE SOCIETY LTD .... 1<sup>ST</sup> RESPONDENT  
THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL  
PLANNING ..... 3<sup>RD</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF MINING ..... 4<sup>TH</sup> RESPONDENT  
COUNTY EXECUTIVE LANDS TAITA TAVETA COUNTY. 5<sup>TH</sup> RESPONDENT  
THE HON ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**



## JUDGMENT

(Petitioner claiming that 18,000 acres out of the 60,000 acres that 1<sup>st</sup> respondent has a leasehold title to was surrendered and placed under adjudication; 1<sup>st</sup> respondent refuting this contention; 1<sup>st</sup> respondent being a Society and asserting that it has never passed any resolution to cede part of the land; title showing it is a leasehold from Government; no resolution shown by petitioners that 1<sup>st</sup> respondent gave out 18,000 acres as claimed; no evidence that the Government, as Lessors, sanctioned or directed any part of the land to be surrendered; petition dismissed).

1. This suit was commenced through a petition filed on 17 July 2019 by seven persons on behalf of themselves and the residents of Kishushe Adjudication Section in Wundanyi District, Taita Taveta County. The 1<sup>st</sup> petitioner, Davis Nyambu, however abandoned the petition and the 7<sup>th</sup> petitioner, one Festus Mwasi Mwawughangha, swore an affidavit that he was wrongly joined as petitioner for he does not subscribe to its cause.
2. The petitioners aver to be owners of land in Kishushe Adjudication Section. They contend that the 1<sup>st</sup> respondent, Kishushe Ranching Cooperative Society Limited (the Society), was issued with title by the 3<sup>rd</sup> respondent (Cabinet Secretary, Ministry of Lands and Physical Planning), for land which includes that of the petitioners. They plead that the Society received a letter of allotment of 60,000 acres of land under a lease of 20 years from 1 January 1974 to 1 January 1994, and that the allotment was subsequently extended for another 99 years. It is claimed that approximately 18,000 acres of this land was set aside to be adjudicated to the community and was held by the County Council of Taita Taveta in trust for the community members. It is averred that on 28 November 2001, the District Land Adjudication Officer, declared Kishushe sub-location to be an adjudication area. It is pleaded that iron ore was discovered in the area and that a dispute arose between the boundaries of the Society land and the adjudicated area and that this led the Society to carry out three surveys. It is alleged that the surveys included part of the land that was declared an adjudication section. The petitioners plead that the title issued to the Society, which is title number CR65748, for LR No. 28984 issued on 24 August 2015, is for 60,000 acres, and that it encroaches on part of the land in the adjudication area. The petitioners averred that they would rely on a Task Force Report on mining within Kishushe area and another report by the Kenya National Commission on Human Rights (KNCHR) to support their case. The petitioners thus allege a violation of their constitutional rights inter alia Article 40 on the right to property.
3. In the petition, the petitioners seek the following orders (paraphrased for brevity):-
  - a. That the petitioners and other residents of Kishushe Adjudication Section own the portion of land known as CR 65748 for LR No. 28984 as delineated in survey plan No. 361167 that falls within Kishushe Adjudication Section.
  - b. A revocation of the title CR 65748.
  - c. An immediate degazettement of the Society as registered owner of the title CR No. 65748, LR No. 28984.
  - d. A permanent injunction restraining the Society from interfering with the petitioner's land in Kishushe Adjudication Section.



- e. Revocation of the mining licences issued by the 4<sup>th</sup> respondent (Cabinet Secretary, Ministry of Mining) on the land in question pending review of the benefits supposed to accrue to the community in Kishushe Adjudication Section.
  - f. Costs of the petition.
4. The Society opposed the petition through a replying affidavit of Elliston Mbela, its Chairman. He deposed that the Society holds a leasehold title for land measuring 60,000 acres in the title CR No. 65748. It is averred that at some point in the years 2004-2005, it had been contended that the Society's title can only be for 48,000 acres and that 12,000 acres had been annexed for another purpose (elephant corridor). It is averred that this position, though false, was fronted by the County Council of Taita Taveta and the District Land Adjudication Officer (DLASO) for ulterior purposes. It is pleaded that the ulterior purpose became clear when the area was turned over to Wanjala Mining Limited under a 10 year lease which led to litigation in the suit Mombasa HCCC No. 340 of 2008. The matter was settled by consent after the Society filed a suit of its own, Mombasa ELC No. 141 of 2017, seeking to eject Wanjala Mining Limited, and Sanghani Investments, from the land. It is averred that the land in question was set apart to the Society in 1973 and could not form part of the adjudication section which was declared in 2001. He dismissed the reports of the Task Force and KNCHR.
  5. The 2<sup>nd</sup> respondent, National Land Commission, did not file anything towards the suit.
  6. The 5<sup>th</sup> respondent, the County Executive, Lands, Taita Taveta County, filed a replying affidavit sworn by Edwin Chahilu Ayiro, the legal counsel of the County Government of Taita Taveta. He deposed that the petitioners have never brought the issues in contention to the attention of the 5<sup>th</sup> respondent to enable the 5<sup>th</sup> respondent get to the bottom of the issues raised. He deposed that the 5<sup>th</sup> respondent is ready and willing to have a sitting with all stakeholders to have the matter resolved.
  7. The petition was canvassed by way of oral evidence.
  8. PW-1 was Lyttleton Maghangha. What was material in his evidence was the claim that in 2015, the Society proceeded to get title to their parcels of land already adjudicated. He contended that the Society and the community agreed to what extent the land was to be demarcated in a meeting held on 20 November 2011. He also testified that there was a Kenya Gazette notice that pronounced the boundaries (to be adjudicated). He testified that to resolve the dispute a task force was formed by the Government through Gazette Notice No. 77 of 27 July 2015. He made reference to various reports, being report of the NLC, report of the task force, report of CS, mining and KNHCR report. Cross-examined, he testified that he was born in 1968. He conceded that in 1973, the land of the society was set apart and it was 60,000 acres. He is also a member of the Society; he became member in 2005. He claimed that there was a resolution passed to reduce the land of the society and that it was agreed that 18,000 acres would be ceded to the community. He claimed that this 18,000 acres was the land placed under adjudication. He was asked what land parcels of the adjudication section have been taken by the Society but he could not identify them. He stated that he was among the beneficiaries in the adjudication section but they are yet to get titles. He however testified that the final adjudication list is out and all it awaits is issue of titles. He stated that the land set apart to the Society in 1973 was trust land and he has not seen any gazette notice to that effect. He testified that before 2015, there was no dispute but they were called by the then Governor of Taita Taveta and shown their land which he claimed fell in land occupied by the Society. He however had no document to this effect.
  9. PW-2 was Stephen Mwamera Wanyama, the 2<sup>nd</sup> petitioner. He testified that he was the Chairman of Kishushe Adjudication Section. He stated that the pronouncement for demarcation was done in 2001 and that the boundaries of the Society were identified. The first phase of adjudication (Phase A) had no



issue. He stated that the process stopped in 2015 as the Society had a title (to the land that was subject to adjudication). They raised issue with the NLC. He claimed that the then Chair of NLC, Mr. Swazuri, came to the land and directed adjudication to proceed, but it could not because the Society had title. He also contended that the people of Kishushe area are entitled to 18,000 acres of the Society land. Cross-examined, he stated that he was not a member of the Society. He claimed to have land within the disputed 18,000 acres. He affirmed that the 18,000 acres has never been demarcated. He claimed that the 18,000 acres was to be carved out of the 60,000 acres of the Society. He alleged that the 18,000 acres were ceded in 2001 but he was not present in the meeting that ceded the land. He testified that this 18,000 acres is what constitutes Phase B of adjudication. He was asked what land was to be subject to adjudication but he stated that the acreage was never provided.

10. PW-3 was Prudence Mdule. Her evidence was that the Society land overlaps their land covering 8 villages of Kwafiti, Ngongodini, Mashashavu, Mwakilemba, Mariva Rapunda, Itange, Kanyaga, and Wanjala, and a small portion in Bura. She stated that the boundary between the land of the residents and that of the Society was agreed in 2001 and that the Society took over 18,000 acres of their land. Cross-examined, she testified that her late father and late husband were founder members of the Society and the first Chairman was Habel Mwandoto. She claimed that the Society land is 60,000 acres and it should be reduced by 18,000 acres following the alleged 2001 resolution to cede 18,000 acres. She did not have a survey report to demonstrate the contended overlap of land or the extent of the land being claimed; they have never engaged a surveyor. She did not attend the alleged meeting where 18,000 acres was ceded by the Society. She did not have any resolution by the Society ceding 18,000 acres. She did not have any list of the beneficiaries of this 18,000 acres. She did not have any document that the 8 villages she mentioned actually fall within land of the Society. She claimed that the mining done at Wanjala was within the 18,000 acres. She however did not have any mining licence. She could not name the Adjudication Section that overlaps with land of the Society.
11. PW-4 was Brenda Dosio, the Coordinator, KNCHR Mombasa office. She testified that the Commission undertook a public inquiry on issues relating to land and mining rights in Taita Taveta in 2015 and 2016. The result was a report which she produced. Cross-examined she affirmed that she did not participate in the preparation of the report. She was employed in 2017 after the report had already been prepared. She admitted not being competent to delve into the content of the report.
12. With the above evidence, the petitioners closed their case.
13. The 1<sup>st</sup> respondent (the Society) called Danson Kidai Mwandoto as her first witness. He is the Secretary of the Society and son of the founding Chairman, Habel Mwandoto, who passed on in 1999. He testified that it is only members, through an Annual General Meeting (AGM), who can resolve to give out their land to the public. He testified that there has never been an AGM held where members resolved to allocate 18,000 acres of the public. He asserted that the Society's land is 60,000 acres which is a leasehold from the Government and the Society cannot give out land without consent of the Government. He testified that there had been a separate 18,000 acres set aside to the public which was not part of the 60,000 acres of the Society. Among the documents he produced was the letter setting apart 60,000 acres to the Society, allotment letters, rent and rates demands and payments for the same. Cross-examined, he testified that the core activity of the Society is ranching, and not mining, and that the prayers in the petition do not set out the mining permit numbers sought to be revoked. He was cross-examined on the allotment letters he produced and he testified that the one that gave rise to their title is that issued on 13 June 1983 which they paid for. He elaborated that originally, there was a grazing scheme during the colonial period measuring 78,000 acres. Subsequently, 60,000 acres was set apart for the ranch and 18,000 acres for the community.
14. With the above evidence, the Society closed her case.



15. The other respondents did not avail evidence.
16. Counsel were invited to file submissions, and on record are the submissions of counsel for the petitioners, and the 1<sup>st</sup> and the 5<sup>th</sup> respondents. I have considered these submissions before arriving at my final decision.
17. In a nutshell, the case of the petitioners is that they are entitled to 18,000 acres out of the 60,000 acres of land titled to the 1<sup>st</sup> respondent. They contend that this 18,000 acres was declared an adjudication section but the process could not be completed because of the title issued to the 1<sup>st</sup> respondent. They thus claim that this 18,000 acres is overlapped by the 60,000 leasehold title issued to the 1<sup>st</sup> respondent. They allege that a meeting was held on 20 November 2001 where the 18,000 acres was set aside for the community. The petitioners have relied heavily on the report of the KNHCR which appears to support the allegation that 18,000 acres was to be carved out of the 60,000 acres of the ranch. The position of the 1<sup>st</sup> respondent is that the Society's land is 60,000 acres and there has never been a donation of 18,000 acres to the community as contended.
18. There was claim that there was a meeting held in 2001 which set aside 18,000 acres to the community and an attempt to produce some minutes where the alleged resolution was passed. However, there was objection to their production, as they were not originals and not certified, and none of the persons mentioned in those minutes was called as a witness. The said purported minutes were then abandoned. It follows that I have no evidence of any such meeting having been held as claimed. No resolution was produced by the petitioners to show that there was ever such donation of 18,000 acres by the Society. None of the witnesses of the petitioners were present in any meeting of the Society where 18,000 acres was ceded to the community. Whereas there was a contention that the Society's land overlaps land that was to be adjudicated, no survey map was ever produced to show the extent of the land to be adjudicated vis-à-vis the land of the Society, or show where that overlap is. This so claimed adjudication section that overlaps the land of the Society could not even be named by PW-3. There was also never produced any evidence of the persons who were to benefit from the land to be adjudicated, despite there being an allegation by PW-1 during cross-examination, that the final adjudication list was published. You would have expected PW-2, who described himself as the Chairman of the Adjudication Section of Kishushe, to avail these documents but he had none.
19. The only documentary evidence produced by the petitioners was a gazette notice dated 27 July 2015 setting up a taskforce on mining and a report of the KNCHR. I do not see any probative value in the Gazette Notice. A mere gazette notice that sets up a taskforce on mining cannot help in resolving whether or not there is 18,000 acres donated to the Community by the 1<sup>st</sup> respondent. The report of KNCHR is a 2016 report titled '[\*Public Inquiry Report on Mining and Impact on Human Right.\*](#)' A report such as this, constitutes an opinion and nothing more. An opinion must be based on facts and it cannot count where a person proceeds to give an opinion which is not based on any facts. Such 'opinion' would be nothing more than mere speculation. In our case, the authors of the report were never called to testify, so that their opinion that there is an overlap of adjudication land and the Society's land, or that 18,000 acres of land was donated by the Society, is put to test. The report itself has no factual basis that there was donation of 18,000 acres. In fact this is what it says:-

“It is generally claimed that approximately 18,000 acres out of the 60,000 acres set apart was subsequently hived off for the use by the community, leaving the areas under the Ranch to be 42,000 acres. The community in question as reported to comprise 13 villages, each with its own head. Mr. Stephen Mwamela Mwanyama, the head of Daku village, was elected chairman of the Adjudication section by the community. This area later became part of the Kishushe Adjudication Section declared in 2001 by the Taita Taveta Land Adjudication



Officer *vide* Notice LAS.31/19 Vol. V/44 of 28<sup>th</sup> December 2001 (before the establishment of the County Government.)

On 2<sup>nd</sup> December 2013, the Director of Surveys signed a Deed Plan which was later used to issue Kishushe Ranching Co-operative Society Ltd with Title Deed No. Cr. 65748 on 24<sup>th</sup> August 2015 for a term of 99 years with effect from 1<sup>st</sup> August 2015 over an area measuring 23, 629.800 hectares (or 60,00 acres) and being Land Reference No. 28984 as delineated in Land Survey Plan No. 331167. With the area of land under this title being the original 60,000 acres set apart for the whole Ranch, it means the 18,000 acres returned to the Ranch without the knowledge of the community, the majority of whom are not members of the Ranch. The Ranch is reported to have 710 members while the community is made up of about 1,500 residents (Mwamela Mwanyama); some community members are also Ranch members.

Demarcation of the Adjudication Section into individual parcels/farms commenced immediately after the period allowed for objection to the declaration lapsed on 28<sup>th</sup> April 2002 until it was interrupted in March 2015. According to the Chairman of the Community Adjudication Section, the interruption was precipitated by fresh information brought up by the Taita Taveta County Government's Chief Lands and Mining Officer. The information was in the form of a map containing so much detail that it caused confusion among the community in the adjudication section.

The 18,000 acres is not without its own controversy. The current Chairman of Kishushe Ranch, Mr. Elistone Mbela (aka Alui Mbela), alleges in his written testimony to the KNCHR of 19<sup>th</sup> May 2016 that the Ranch officials gave 18,000 acres of its land to be used by the community (and also be adjudicated) but did not enter any agreement with the community over it but instead retained the management of the 18,000 acres. This allegation could have been made to explain why the 18,000 acres ended up back in the Title Deed of Kishushe Ranch, contrary to earlier arrangement with the community.

20. From the foregoing, it will be noted that the report itself is not backed up by any tangible evidence. The first paragraph, that I have copied above, states that "it is generally claimed that approximately 18,000 acres out of the 60,000 acres was subsequently hived off for use by the community, leaving the area under the Ranch to be 42,000 acres." Land is not given or taken away by "general claims." There must be tangible evidence of donation of land. There is also reliance in the report to statements made by one Stephen Mwamela Mwanyama, the elected Chairman of the Adjudication Section by the community. I would assume that he is the same person who testified as PW-2 in this suit. As I pointed out when assessing his evidence, he never provided any documentary proof of what area was proclaimed to be the area under adjudication and did not present what he thought was the overlap covering 18,000 acres. A mere verbal statement from him, that the disputed area of 18,000 is what comprised the Kishushe Adjudication Section in the notice declaring an adjudication area of 28 December 2001, cannot therefore be verified. The report itself has no statement of the DLASO who was in charge of the alleged adjudication section and neither did the petitioners call the DLASO to testify on their behalf.
21. There is also in the report that I have copied above, a statement that the Chairman did state that the Society gave out 18,000 acres to the community. This, yet again, is a general statement not backed up by any documentary evidence in form of minutes. As stated by the Society's witness, a Chairman of the Society cannot purport to give away Society land and this has to be done by the Society members themselves through a resolution passed in an AGM. The Report does not mention any such resolution.



22. In essence, my analysis of the report is that it is not factual, but comes to conclusions based on general verbal statements and speculation. It has very little, if any, probative value in my opinion. Indeed I do not see how it dispels the cogent evidence provided by the Society's witness, that the land owned by the Society comprises of 60,000 acres under a leasehold. Mr. Mwandoto produced the Certificate of Registration of the Society, showing that it became registered on 4 May 1966. He produced the setting apart instrument, indicating that on 19 November 1973, 60,000 acres was set apart for the Society. This was vide Gazette Notice No. 3566 of 30 October 1973. The bearings of the land set apart is indicated in the Gazette Notice and therefore the land is identifiable by GPS location. An allotment letter was issued on 15 December 1973 for this land to be held under a leasehold tenure of 20 years. They thereafter were invoiced for land rents and land rates. The term of 20 years certainly ended on 15 December 1993. There appears to have been an application for extension of use and renewal of lease, for I have seen a letter dated 2 April 2002 from the County Council of Taita Taveta, addressed to the District Land Officer, Taita Taveta District, giving consent to both renewal of lease and extend the use to include a lodge and a sanctuary. Through a letter dated 27 April 2004, the District Physical Planning Officer, Taita Taveta District, advised the Society to process their title for 60,000 acres since they only held a letter of allotment. The Society was eventually issued with title in 2015 which is a leasehold title of 99 years from 1 August 2015.
23. I see absolutely nothing wrong with the title issued. This is a leasehold title meaning that it is a grant from the Government. I do not see how the Society could give out land which it only holds under a leasehold title without the explicit consent of the Government. In fact, if that was the case, it is the Government itself, as owner of the land, which would be the entity to grant the land to the Community of Kishushe, not for the 1<sup>st</sup> respondent to donate it, for a lessee cannot give away land belonging to a lessor without the lessor's consent. In such instance, the Government would proceed to seek a surrender of the lease so that a fresh lease can be drawn for the land less 18,000 acres. It would then issue a grant for the 18,000 acres or place it under a settlement scheme. Nothing of the sort has been demonstrated in this case.
24. All that the petitioners have presented are nothing but innuendos, speculations, gossips, unsupported verbal statements and a report that is devoid of facts.
25. The long and short of it is that there is no substance in this petition and it is hereby dismissed with costs. The costs will be paid personally by the 5 petitioners who thought of fighting this losing battle to the end.

Judgment accordingly.

**DATED AND DELIVERED THIS 5 DAY OF OCTOBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

