



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. CASE NO. 109 OF 2018

B2 YATTA RANCHING CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

COUNTY COUNCIL OF KITUI.....1ST DEFENDANT
CEDRIC SAMMY MWANZIA.....2ND DEFENDANT
MUTHENGI MULAMBAYA.....3RD DEFENDANT
MUSYOKI SYUKI.....4TH DEFENDANT
NGUU NDONGA.....5TH DEFENDANT
BENSON NGUTHU.....6TH DEFENDANT
FESTUS MUSUMBA KAKYA.....7TH DEFENDANT
JOSEPH NDELI MUSYOKA.....8TH DEFENDANT
PIUS KAKONO KAU.....9TH DEFENDANT
GEOFFREY DIDINGA SAMBI.....10TH DEFENDANT
BEATRICE MATHEKA.....11TH DEFENDANT
MUNINI KITHAMI.....12TH DEFENDANT
THE ATTORNEY GENERAL.....INTENDED 13TH DEFENDANT

RULING

INTRODUCTION:

1. This Ruling is in respect to three Applications, that is, the Notice of Motion dated 18th July, 2019; 20th July, 2019 and 22nd August, 2019. In the Notice of Motion dated 18th July, 2019, the Attorney General

has prayed for the following orders:

- a. That leave be granted to enjoin the Honourable Attorney General as 13th Defendant to the suit.***
- b. That parties be granted leave to amend the pleadings and the Intended Defendant be allowed to file Defence and witness statement in this matter.***
- c. That this matter do proceed to hearing as ordered by this Honourable Court on 12th February, 2009.***
- d. That costs of this Application be in the cause.***

2. The Application is supported by the Affidavit of the Commandant, National Police Service Border Police Training Campus, who has deponed that the Police Training Campus sits on the land in dispute and that the portion of land measuring 5,300 acres of L.R. No. 12010 houses the headquarters of the Border Police Unit, the Police Training Campus and is also a field training ground for the two institutions.

3. According to the Commandant, the said land was allocated to the Administration Police Service by the then Kitui County Council; that the whole land measures 30,200 acres which was allocated to Katoteni Ranching Co-operative Society Limited in 1967 on a 20 years Leasehold and that after the expiry of the Lease in 1987, the County Council of Kitui requested for the sub-division of the land into three portions being 20,000 acres for Agricultural purpose; 5,000 acres for Conservation of Wildlife and 5,200 acres for tree planting.

4. According to the Police Commandant, the Administration Police Service, through a letter dated 14th March, 2009, requested for 150 Ha to develop training infrastructure; that the County Council of Kitui jointly with B2 Yatta Ranching Co-operative Society, approved the allocation of 300 acres of land to the Administration Police Service and that on 11th February, 2010, the County Council of Kitui officially allocated 300 acres of the suit land to Administration Police Service on a Lease of 60 years.

5. It is the Attorney General's case that on 8th September, 2011, the Administration Police Commandant requested for additional land adjacent to the land already allocated to it to support critical training like range which requires expensive area for training and that the Council agreed and allocated the Police additional land of 5,000 acres.

6. According to the Police Commandant, the National Police Service has since erected permanent structures on the 5,300 acres for the National Police Service Border Police Unit and the National Police Service Border Police Training Campus headquarters, including the residential quarters for over 700 officers; that the land also houses a Regional Counter-Terrorism Training School and that five permanent camps have since been established at the key corners of the 5,300 acres' piece of land.

7. In the Application dated 22nd August, 2019, the Attorney General prayed for the following orders:

- a. That the Honourable Court be pleased to vacate and set aside this Honourable Court order number 2 issued on 29th July, 2019 directing status quo in terms of further development and or either construction of new structures and or further demolition of 2nd to 12th Defendants structures on the suit land pending hearing and determination of this Application as the same was issued on misrepresentation and non-disclosure of material facts.***
- b. That the Honourable Court restrain the 2nd to 12th Defendants from any intended interference, encroach and or occupation of apportion measuring 5,300 acres currently occupied and in possession of the 13th Defendant.***

c. That the 2nd to 12th Defendants be required to furnish security for costs as a condition for issuance of any order affecting the intended 13th Defendant as the suit land does not belong to them and hence this continued application is causing inconvenience to the intended 13th Defendant.

8. The Application is premised on the ground that vide the ex-parte orders of 29th July, 2019, the 13th Defendant was restrained from any further demolition and development of any new structures on the suit land; that a portion of land measuring 5,300 acres was allocated to the 13th Defendant for development as an International Training Ground for Administration Police; that the 13th Defendant has been in possession of the said land since the year 2010 and that the Applicants have not shown any development that they have erected on the suit land.

9. In the Notice of Motion dated 26th July, 2019, the 2nd to 6th Defendants sought for the following orders:

a. That an order of injunction be and is hereby issued preserving the character of L.R. No. 12010 “the suit property” by restraining all the parties to these proceedings including, the Commandant, National Police Service Training Campus Kitui, the Intended 13th Defendant by themselves, their officers, agents, servants or otherwise howsoever from evicting, destroying property or homes, carrying out constructions, extending the portions they are occupying in the suit property pending the carrying out of the survey exercise ordered by the Honourable Court on the 18th June, 2019 and the final determination of this suit.

b. That the Honourable Court be pleased to interpret its orders issued on the 19th July, 2019 and determine whether the orders made on 22nd January and 18th June, 2019 were stayed or set aside.

c. That this Application be and is hereby admitted for hearing during the court vacation beginning 1st August, upto 15th September, 2015.

d. Costs of the Application be costs in the cause.

10. The said Application is supported by the Affidavit of the 2nd Defendant who has deponed that sometimes in the year 2010, the National Police Service, Border Training Campus Kitui – the 13th Defendant, was allowed into the suit property whereupon they constructed a training campus for its members; that at that time, the 2nd to 7th Defendants and members of the Society were living on the suit property which is their ancestral home and that during the pendency of the suit, it was agreed that 300 acres of the suit property be set aside and appropriated to the 13th Defendant and a consent in that regard was drawn.

11. According to the 2nd Defendant, the 13th Defendant has since encroached beyond their allocated entitlement in the suit property leading to a conflict between them and the Defendants; that the 13th Defendant has since the year 2017 destroyed property belonging to Katoteni Nguamuka Farmers Environmental Conservation Group and that the 13th Defendant is misusing the orders of the court of 19th July, 2019.

12. The 2nd Defendant deponed that on 24th August, 2010, the 13th Defendant published a Gazette Notice number 10864 informing members of the public that the Director of Physical Planning was alienating the suit property; that the said notice was contrary to the orders of the court dated 12th February, 2009 and that an injunction should issue to restrain all the parties, including the 13th Defendant, from carrying out any activities which will change the character of the suit property.

13. In response to the 2nd -7th Defendants' Application dated 26th July, 2019, the Commandant, National Police Service Border Police Training Campus (*Police Commandant*) reiterated the contents of his Affidavit in support of the Application dated 18th July, 2019; that is, if there is any claim by the 2nd to 12th Defendants, then the same ought to be made as per the provisions of the law and that the Notice of Motion dated 26th July, 2019 is an abuse of the court process.

14. The Police Commandant finally deponed that the suit land is a protected zone; that proper arrangement to access the suit land is highly required due to security reasons and that the Application dated 26th July, 2019 should be dismissed.

15. The 1st Defendant filed Grounds of Opposition in respect to the Application by the 2nd-6th Defendants dated 26th July, 2019. In the said Grounds of Opposition, the 1st Defendant averred that the Applicants have not produced any evidence of demolition of their property, if any, by the 1st Defendant; that the Applicants have not produced any ownership documents; that the whole land belongs to the 1st Defendant and that the aim of the Application is to ensure endless litigation to the detriment of the rest of the parties.

16. The 1st Defendant's Assistant Director of Lands swore a Replying Affidavit in which he deponed that L.R. No. 12010 was Leased to Katoteni Ranching Co-operative Society Limited in 1967 for 20 years; that the said Lease expired in 1987 and reverted back to the then County Council of Kitui and that after the expiry of the Lease, the 1st Defendant sought permission of the then Local Government to have the land sub-divided into three portions measuring 2,000 acres, 5,000 acres and 5,200 acres for agricultural, conservation of wildlife and tree planting respectively.

17. The 1st Defendant's Assistant Director of Lands deponed that the Ministry of Local Government granted to the 1st Defendant the approval for change of use of the land from Ranching to Agricultural, Wildlife Conservation and Tree Planting; that the Administration Police through a letter dated 4th March, 2009 requested for 150 Ha for training purpose and that the Council acceded to the allocation of 300 acres to the Administration Police.

18. The 1st Defendant's case is that vide a special meeting held on 3rd February, 2012, it was resolved that the Administration Police should be awarded a further 5,000 acres; that the Plaintiff acceded to this request and that the Administration Police has been allocated 5,300 acres which is the base for several key government installations, among them the Regional Counter-Terrorism Training School.

19. The 1st Defendant's Director of Lands finally deponed that the suit land has never been allocated to an individual; that the Administration Police did not encroach on the 5,300 acres as alleged and that the 2nd to 6th Defendants have no claim to the suit land.

20. In a Further Affidavit, the 2nd Defendant deponed that Katoteni Nguamuka Farmers Environmental Conservation Group (*the Society*) was registered as a Self -Help Group on 16th July, 2007; that the Defendants together with their members have prior to 1941 and during their lives lived in the area forming part of the suit property and that the Defendants were born and raised on the suit property.

21. According to the 2nd Defendant, in recognition of the Defendants' interests over the suit property, the 1st Defendant issued to the Society a Letter of Allotment and that the Defendants' Application dated 18th June, 2019 seeking to be enjoined and plead on behalf of the Society and also amend their Defence should be allowed.

Submissions:

22. The 13th Defendant's advocate submitted that the 13th Defendant is the *bona fide* owner of land known as 12010 measuring 30,200 acres; that the 2nd to 5th Defendants have from time to time been

obtaining various orders which have an adverse effect on the Administration Police Training School and that it is against the rules of justice for the 2nd Defendant to obtain orders against a party without joining the party to the proceedings.

23. The 13th Defendant's advocate submitted that L.R. No. 12010 is public land under the 1st Defendant's ownership; that the 2nd to 6th Defendants do not have any registered interests in the suit land and that the dispute as to the allocation of the suit land vests with the 1st Defendant and not the courts.

24. Counsel submitted that the Plaintiffs have jumped the gun and failed to follow procedure in seeking to be allocated the suit land under the relevant procedure. Counsel submitted that the 13th Defendant is the Government Chief Legal Advisor and seeks to be enjoined in this suit for and on behalf of the Administration Police who have been allocated 5,300 acres, being a portion of the suit land.

25. Counsel submitted that Order 1 Rule 15 of the Civil Procedure Rules does not envisage a situation where a Defendant seeks to enjoin a suit, name other Defendants and then seek to plead on their behalf; that the 2nd - 7th Defendants can only take out third party proceedings and that the 2nd to 7th Defendants have not demonstrated any right that is accruing to the intended Katoteni Nguamuka Farmers Environmental Conservation Group to warrant enjoinder.

26. The 13th Defendant finally submitted that the 2nd to 7th Defendants have not demonstrated that through the court, they will achieve their target of being allocated the suit land. Counsel relied on numerous authorities which I have considered.

27. The 1st Defendant's advocate submitted that the 1st Defendant is the Successor of Kitui County Council, the registered owners of L.R. No. 12010 measuring 30,200 acres; that the 2nd to 7th Defendants have not provided any proof to show that the 1st Defendant's predecessor initiated a process to have the said land cease being public land and that the 2nd - 7th Defendants have not met the threshold required for the court to issue injunctive reliefs.

28. Counsel submitted that the 2nd to 7th Defendants have failed to show a clear and unmistakable right directly threatened by an act sought to be restrained; that the 1st Defendant is the trustee of the suit land and that the 2nd - 7th Defendants have not made out a case of having customary rights on the suit land.

29. The 1st Defendant's counsel submitted that the 1st Defendant stands to suffer irreparable harm as a result of the extensive developments and international security co-operation it is undertaking on the suit property and that pursuant to the provisions of Section 16 of the Government Proceedings Act, an injunction cannot issue as against the 1st Defendant.

30. On his part, counsel for the 2nd to 7th Defendants submitted that the 2nd to 12th Defendants have already been enjoined to the suit on the basis of their occupation; that the National Government has recognized the interests of the Defendants and members of the Society on the suit property and that the issue of joinder of parties is governed by the provisions of Order 1 Rules 1 and Order 10 (2) and (4) of the Civil Procedure Rules.

31. Counsel submitted that the addition of the 13th Intended Defendant and the members of the Society in these proceedings will enable the court to effectively and completely adjudicate and settle the questions of ownership of the suit property.

32. The 2nd to 7th Defendants' counsel submitted that the National Government has started the adjudication exercise of the suit property; that the Defendants have shown that they live on the suit property and that their Applications should be allowed.

Analysis and findings:

33. This suit was commenced by way of a Plaint dated 14th February, 2008 in which the 1st Defendant was the only Defendant. In the original Plaint, the Plaintiff averred that it is in the business of Ranching and that prior to 1974, the Plaintiff existed as two separate Societies, namely B2 Yatta Kanyonyooni Ranching Co-operative Society and B2 Katoteni Ranching Co-operative Society Limited.

34. The Plaintiff averred in the Plaint that B2 Yatta Kanyonyooni Ranching Co-operative Society Limited and Katoteni Ranching Co-operative Society Limited were registered under the Co-operative Societies Act.

35. The Plaintiff further averred that on 10th January, 1967, vide Gazette Notice Numbers 183 and 184, the 1st Defendant set apart the blocks of Trust Land and Leased it to Katoteni Ranching Co-operative Society Limited and B2 Yatta Kanyonyooni Ranching Co-operative Society Limited respectively; that the blocks that were set apart were L.R. No. 11802, leased to B2 Yatta Kanyonyooni, and L.R. No. 12010 to Katoteni Ranching Co-operative Society Limited.

36. According to the Plaintiff, the land that was leased to B2 Yatta was for a term of 99 years with effect from 1st March, 1965 and the land leased to Katoteni was for a term of 20 years effective from 1st September, 1967.

37. The Plaintiff further averred that on 12th September, 1974, the two Co-operative Societies were amalgamated under Certificate of Registration number 2253 and that the amalgamated Society became B2 Yatta Ranching Co-operative Society Limited, the Plaintiff herein. According to the Plaintiff the separate Leases held by the amalgamated Societies vested in the Plaintiff, upon amalgamation, and became a single Lease for 99 years.

38. The Plaintiff finally averred that it is the proprietor of the parcels of land L.R. No. 12010 and L.R. No. 11802 and that the single Lease of the two properties upon amalgamation became a single title for a period of 99 years with effect from 12th September, 1974. The Plaintiff has sought for a declaration that it is the sole proprietor of L.R. No. 12010 and 1180 within Kitui County.

39. The then County Council of Kitui, the predecessor of the current 1st Defendant, filed a Defence in which it averred that the Lease in respect of L.R. No.12010 Katoteni Co-operative Ranching Society was for 20 years with effect from 10th January, 1967, that the Lease expired after the lapse of the 20 years and that the same was never renewed.

40. The 1st Defendant averred that the Lease in respect of L.R. No. 12010 was never formally transferred to the Plaintiff by the 1st Defendant and that the Lease expired upon the lapse of 20 years.

41. The record shows that on 6th March, 2008, the 2nd -7th Defendants filed an Application seeking to be enjoined in the suit on the ground that they are residents on L.R. No. 12010 measuring approximately 30,200 acres. In his Affidavit, the 2nd Defendant deponed that he is the Secretary of “*Katoteni Nguamuka Farmers Environmental Conservation*” and that it was just and necessary for the Intended Defendants to be enjoined in these proceedings to enable the court effectively and completely adjudicate upon and settle all the questions involved in the suit.

42. In his Ruling dated 14th April, 2008, Lenaola J. (*as he was then*) allowed the 2nd- 7th Defendants to be enjoined in the suit and observed as follows:

“6. ... one of the parties with a claim to the land is noted as Katoteni Nguamuka Farmers Environmental Conservation which all the Applicants claim is their flagship.

7. Clearly, with such a scenario obtaining the issues of law and fact that would arise during the hearing would invariably affect the Applicants....”

43. After the said order for joinder, the 2nd to 7th Defendants filed their Defence dated 10th December, 2008 on 16th December, 2008. The 8th -12th Defendants filed an Application dated 16th June, 2008 in which they claimed that they are also residents on the suit land. The Application was allowed by the court on 16th October, 2008. The 8th to 12th Defendants filed their Defence on 9th January, 2009.

44. The record shows that on 14th June, 2010, the Plaintiffs, the 1st Defendant, the 2nd - 8th Defendants and the 8th - 12th Defendants recorded a consent to this effect:

“By consent, a portion of Land Parcel Number L.R. No. 12010 measuring in area 300 acres be and is hereby set apart and surrendered to the government department in charge of the affairs of the Administration Police.”

45. The above consent was adopted as an order of the court on 14th June, 2010 by the Deputy Registrar.

46. This matter remained in abeyance until 14th December, 2018 when the 2nd-7th Defendants filed an Application of even date. In the said Application, the Defendants sought for an injunction restraining the Administration Police, Kanyonyooni Camp, from evicting them and for an order directing the District Surveyor, Kitui, to survey and erect beacons on 300 acres of land belonging to the Administration Police.

47. When the Application came up for hearing on 22nd January, 2019, the Defendants’ advocate informed the court that the Application dated 14th December, 2018 was not opposed. Counsel informed the court that the Application is premised on the consent order of 14th June, 2010. The court allowed the Application. It is that order that caused the Attorney General to file the Application dated 18th July, 2019, which is currently before the court.

48. Firstly, the Attorney General is seeking to be enjoined in this suit on behalf of the Administration Police and for setting aside the orders of the court of 22nd January, 2019 and the related order of 18th June, 2019.

49. The case by the Attorney General is that the land that the Administration Police is entitled to is 5,300 acres and not 300 acres and that in any case, the orders of 22nd January, 2019 and 18th June, 2019 were granted without hearing the Attorney General.

50. The prayer for joinder of the Attorney General in these proceedings is not opposed. In any event, having admitted that the Administration Police is entitled to 300 acres of the suit land, the Defendants and the Plaintiffs could not have successfully opposed the Attorney General’s prayer for joinder.

51. The Attorney General has further prayed for the setting aside of the orders of 22nd January, 2019 and 18th June, 2019. The 2nd -7th Defendants on the other hand are seeking to enjoin and include members of Katoteni Nguamuka Farmers Environmental Conservation Group in this suit; amend their Defence and plead a Counter-claim and for injunctive orders.

52. As I stated earlier, when the 2nd-7th Defendants filed the Application dated 5th March, 2008 to be enjoined in the suit, the 2nd Defendant deponed as follows:

“3. That I am also the Secretary of Katoteni Nguamuka Farmers Environmental Conservation registered under the Ministry of Gender, Sports Culture and Social Services;

4. That the other officials of the said group are:

i. Muthengi Mulambaya - Chairman

ii. Musyoki Syuki - Vice Chairman

iii. Nguu Ndonga - Organizing Secretary,

iv. Benson. K. Nguthu -Treasurer/Managing Trustee

v. Festus Musumba Kakya - Treasurer

5. That I have instructions from the aforesaid 3rd, 4th, 5th, 6th and 7th Intended Defendants respectively to swear this Affidavit on their behalf.”

53. According to the said Affidavit, the 2nd-7th Defendants are the officials of the Katoteni Group, which is an unincorporated entity.

54. That being the case, the 2nd -7th Defendants should be granted leave to prosecute these proceedings on their own behalf and on behalf of their members. Prayer number 2 of the Notice of Motion dated 18th July, 2019 is therefore allowed.

55. In the same Application, the 2nd-7th Defendants have sought for leave to amend their Defence dated 10th December, 2008 and file a Counter-claim. According to the 2nd -7th Defendants, they need to amend their Defence in order to fully plead their case and also to clearly demonstrate their Defence against the Plaintiff's claim.

56. Order 8 Rule 5(1) of the Civil Procedure Rules provides as follows:

“5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

57. In the case of *Central Bank of Kenya Limited vs. Trust Bank Limited (2000) 2 E.A 365*, the court held as follows:

“... Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend, that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendments or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs...”

58. I have perused the proposed Amended Defence and Counter-claim. The 2nd-7th Defendants have sought for a declaration that their interest has accrued over L.R. No. 12010; that L.R. No. 12010 is held in trust by the 1st Defendant herein and that an order should be directed at the National Lands Commission directing the National Lands Commission to declare L.R. No. 12010 an adjudication section and the area be surveyed, adjudicated and registered in favour of the Plaintiffs in the Counter-claim.

59. The Plaintiff, the 1st Defendant and the 13th Intended Defendant have not shown the prejudice they will suffer that cannot be compensated with costs if the proposed amendments are allowed. Indeed, all the parties will have an opportunity to respond to the proposed amendments to the Defence and the Counter-claim. Consequently, I allow the prayer for the Amendment of the Defence and Counter-claim.

60. In the Notice of Motion dated 26th July, 2019, the 1st Defendant is seeking for an order of injunction. The Application is opposed by the 1st Defendant and the 13th Defendant. Indeed, the 13th Defendant filed the Application dated 22nd August, 2019 in which he sought for the following orders:

“3. That the Honourable Court restrain the 2nd- 12th Defendants from any intended interference of land measuring 5,300 acres and occupied by the 13th Defendant.”

61. I will first deal with the consent order of 14th June, 2010 and the orders of this court of 22nd January, 2019 and 18th June, 2019. As I have already stated in the preceding paragraphs, on 14th June, 2010, the Plaintiff, the 1st Defendant and the 2nd-12th Defendants entered into a consent in which they agreed that a portion of land measuring 300 acres within the suit property be set aside and be surrendered to the “Government Department in Charge of the affairs of the Administrative Police.”

62. It is this order that the said parties used to convince the court to allow the Application dated 8th April, 2019 in which the County Surveyor was directed by the court to excise 300 acres of the suit land for the Administration Police. Although the Administration Police was said to be the beneficiary of the 300 acres, the parties that entered into the consent of 14th June, 2010 did not enjoin the Attorney General in this matter.

63. Indeed, it has now emerged that the Administration Police is saying that it is entitled to 5,300 acres of the suit land and not 300 acres. Having not involved the Attorney General while recording the consent order of 14th June, 2010, it is my finding that the said consent order is a nullity. Indeed, the orders of 18th June, 2019 allowing the Surveyor to excise 300 acres for the purpose of allocating the same to the Administration Police is null and void. The orders of 14th June, 2010, 22nd January, 2019 and 18th June, 2019 are therefore set aside *ex debito justitiae*.

64. The next issue I will deal with is whether the 2nd - 7th Defendants are entitled to an injunctive order. The 2nd-7th Defendants’ case is that they have inhabited the suit land prior to 1941; that they were born and raised on the suit land and that they have at all material times petitioned the National Government and the 1st Defendant to regularize the issue of ownership of the suit land by “*declaring the area covered by the suit property an adjudication area.*” The Defendants further pleaded in their Affidavit as follows:

***“9. That the National Government through the Ministry of Lands and the 1st Defendant acknowledged the Defendants’ Petition and engaged various Government Departments including the Director of Land Adjudication, the 1st Defendant District Surveyor, District Land Adjudication Officer with a view to having the area adjudicated, surveyed, demarcated and appropriated accordingly to the Defendants.*”**

***10. That in recognition of the Defendants’ interests over the property, 1st Defendant issued a Letter of Allotment to the Society.*”**

65. Indeed, in their Draft Counter-claim, the 2nd - 7th Defendants have averred as follows:

“22. The Plaintiffs in the Counter-claim state that sometime in the year 2007 after several petitions and in recognition of their interests as beneficial owners of the suit property, the Ministry of Lands moved the Land Adjudication Department to have the area covered by the property declared an adjudication area with a view of having the various distinct portions of the property occupied by the Plaintiffs in the Counter-claim surveyed, demarcated and appropriated to them.”

66. In one of the prayers, the 2nd- 7th Defendants have asked for the following orders:

“B. A declaration be and is hereby made that L.R. No. 12010 is held in Trust by the second Defendant in the Counter-claim to the benefit of the Plaintiffs in the Counter-claim.

C. An order directed at the National Lands Commission directing it to declare L.R. No. 12010 as an adjudication area and the area be surveyed, adjudicated and registered in favour of the Plaintiffs in the Counter-claim in their respective distinct and identifiable areas of occupation.”

67. The 2nd-7th Defendants have admitted in their pleadings that the suit land is Trust Land, and that the

same is being held by the 1st Defendant in trust. The Defendants have also further deposed that the land should be declared an adjudication area, be surveyed, adjudicated and registered in their favour.

68. The question that arises then is this: does the court declare land an adjudicated area? What is the process of declaring an area an adjudication area? Which bodies are mandated to ascertain the interests of the parties in this suit, if at all? The answers to those questions are found in the Constitution (*both repealed and the current one*) and the Land Adjudication Act, amongst other statutes.

69. Indeed, having admitted that the suit land is Trust Land, and that the same is being held by the 1st Defendant in trust, then an order for injunction will stop the very act that the Defendants are seeking in their pleadings. If the 2nd- 7th Defendants' claim is that the suit land should be declared an adjudication area so that their rights are ascertained, then this court has no business injuncting the 1st Defendant from commencing that process, in conjunction with the National Land Commission.

70. As correctly submitted by the 13th Defendant's counsel, the court is not the entity mandated to allocate the suit land. If the suit land is Trust Land, or Community Land, then it is the County Government and the National Land Commission that is mandated under the Law to commence the process of ascertaining the rights of parties herein, including the 2nd -7th Defendants.

71. The 2nd- 7th Defendants have averred that unless the injunctive order is issued, they are likely to be evicted from what they claim to be their ancestral home. According to the 2nd-7th Defendants, they have been on the suit land since 1941.

72. The assertion by the 2nd-7th Defendants that they have been living on the suit land is not supported by any document. Indeed, considering that the list of the members of Katoteni Nguamuka Farmers Conservation Group shows the names of 335 adult people, I would have expected to see at least 50 houses by way of photographs. Instead, the 2nd - 7th Defendants have annexed six (6) photographs of buildings which were allegedly demolished.

73. The photographs annexed on the Applicants' Affidavit are not dated. It is not clear to this court when those photographs were taken, by who, and on which portion of the suit land. Is it on the 5,300 acres' land that the 13th Defendant is claiming or on the reaming portion of land measuring more than 25,000 acres?

74. The 2nd - 7th Defendants have alleged that they were allocated land measuring 19,700 acres of the suit land by the 1st Defendant. To support that assertion, the Defendants have annexed a letter dated 16th November, 2011, which is not a Letter of Allotment, but a letter by the then 1st Defendant's County Clerk. The said letter is not accompanied with a copy of the Minutes of the then County Council of Kitui authorizing the allocation. The letter also alludes to land measuring 19,700 acres and not the entire suit land. In the absence of a formal Letter of Allotment and copies of the Minutes, this court cannot at this stage confirm if the 2nd -7th Defendants' rights have crystallized, or if indeed they were allocated 19,700 acres by the 1st Defendant.

75. In any event, if it is true that the 2nd - 7th Defendants have lived on the suit land since 1941, or even before, then why is that the 2nd - 7th Defendants never objected when the land was Leased to the Plaintiff in 1967 for 20 years vide Gazette Notice Number 184? Why did they wait until after the expiry of the Lease to lodge the claim that they are entitled to the entire parcel of land, to the exclusion of everyone else?

76. The long and short of the above analysis leads me to only one conclusion, that is, the 2nd - 7th Defendants have not established a prima facie case with chances of success to warrant them an injunctive over. If the 2nd - 7th Defendants' claim is that the National Government is appropriating their land measuring 5,300 acres, then they can seek for compensation but not an injunction.

77. Considering that this Ruling is in respect of four (4) Applications, I make the following orders:

- a. The consent order of 14th June, 2010; the orders of 22nd January, 2019 and 18th June, 2019 are hereby set aside.*
- b. The 2nd - 7th Defendants' Notice of Motion dated 18th July, 2019 (for joinder and Amendment) is allowed in terms of prayer numbers 2 and 3.*
- c. The 2nd - 7th Defendants' Notice of Motion dated 26th July, 2019 is dismissed.*
- d. The Notice of Motion by the Attorney General dated 18th July, 2019 is allowed in terms of prayer numbers 3 and 4.*
- e. The Notice of Motion dated 22nd August, 2019 by the Attorney General is dismissed.*
- f. The Attorney General and the 2nd - 7th Defendants to file their Defence and Amended Defence respectively within thirty (30) days of this Ruling.*
- g. Each party to bear his/its own costs.*

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF APRIL, 2020.

O.A. ANGOTE

JUDGE