REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CONST. PETITION NO. 2 OF 2015

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 40, 42, 56, 60, 61, 63, 69, 70, 159, 165, 174, 186, 258 AND 259

OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 40, 42, 56, 60, 63, 69, 70, 174, 186

TOGETHER WITH SECTIONS 8(B) & 10(a) OF THE FOURTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF: SECTIONS 5, 87, 102 OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF: PURPORTED ACQUISITION FO LEASEHOLD INTEREST IN LAND BY TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY (TARDA) ON LR NO. 28026

BETWEEN

COUNTY GOVERNMENT OF TANA RIVER.....PETITIONER

AND

1. TANA AND ATHI RIVER DEVELOPMENT AUTHORITY

2. NATIONAL LAND COMMISSION.....RESPONDENTS

J U D G M E N T

Introduction:

1. This suit was commenced by way of a Petition dated 4th March, 2015. The Petition is seeking for a declaration that the actions of the 1st and 2nd Respondents described in the Petition are unconstitutional; that this court revokes the Certificate of Lease issued to the 1st Respondent on LR No. 28026 and vest the same to the Petitioner to hold it in trust for the people of Tana River County and that a permanent injunction do issue restraining the 1st Respondent from dealing with the suit property.

The Petitioner's case:

2. In its Petition, the Petitioner averred that on 17th January, 1995, the Commissioner of Lands, the predecessor of the 2nd Respondent, purported to offer a grant to the 1st Respondent vide a letter of allotment for unsurveyed community land on plan number 106798/33A for a term of 45 years.

3. According to the Petitioner, the 1st Respondent started farming and doing irrigation on the land measuring 28,875 hecters; that the said land harbours the Tana Delta consisting of unique ecological system with rare species of plants and animals and that the land is the only source of water and pasture for the majority of the residents in the County.

4. According to the Petitioner, the 2nd Respondent purported to grant a certificate of lease to the disputed land on 10th November, 2013 contrary to the laid down procedures and laws governing community land and that the Respondents' actions are an affront on the national values being the rule of law, participation of the people, equity, inclusiveness amongst others.

5. It is the Petitioners case that the massive irrigation and large scale sugar production scheme in the Tana Delta has deprived thousands of people of their land and deprived them of their property contrary to the provisions of Article 40 and 42 of the Constitution.

6. The Petitioner has averred that the process of allotment and subsequent issuance of title to the land was not above board; that the process was opaque and that the suit land is community land and was held in trust for the people of Tana River by the defunct County Council of Tana River.

The Respondents' case:

7. In his Affidavit, the 1st Respondents' Legal Services Manager deponed that all the requisite legal, environmental and public processes and mechanisms were followed in the run up to the various projects that the 1st Respondent initiated and that some of the rights the Petitioner is invoking have already been litigated on and are either *res judicata or subjudice.*

8. The 1st Respondent's Legal Manager deponed that the 1st Respondent (TARDA) is a creature of the statute formed to enhance strategic planning and utilisation of water and other resources in the Tana and Athi River Basin and that it has engaged in various projects including irrigation of crops within the Tana Delta and Athi area.

9. According to the 1st Respondent, the Tana Delta Irrigation Project (TDIP) was formulated to open 12000 ha of flood plains to produce 65,000 tons of milled rice a year and that the project area is to be divided into three sub areas surrounded by flood protection dykes and that the 1st Respondent embarked on the construction of dykes in the area from 1987 to 1989.

10. According to the 1st Respondent, an Environmental Impact Assessment was conducted at the project planning stage; that there is also a project environmental monitoring unit in place to monitor adverse environmental effects and that should the rice and maize projects be stopped, there would be very serious regional and national ramifications.

11. The Legal Manager deponed that there is also a proposed Tana Delta Irrigation Sugar Project in respect of 20,000 Ha and that over 2,600 stakeholders were individually consulted.

12. The 1st Respondent's Legal Manager deponed that the land covered by Plan No.106798/33A is public land belonging to the National Government; that the Title Deed Grant No. IR 152049 that was issued to the 1st Respondent is valid and legitimate and that the process of acquisition of the land by the 1st Respondent was above board.

13. It is the 1st Respondent's case that pursuant to Article 62(2)(b) of the Constitution, land held, used or occupied by any state organ cannot be claimed by the County Government and that the Petition has been filed in bad faith.

14. Despite being served with the Petition and the hearing notice, the National Land Commission did not file any pleadings in answer to the Petition.

Submissions:

15. The Petitioner's counsel submitted that this matter is not res judicata because the Petitioner never participated in Nairobi Civil Case No. 14 of 2010 and that Malindi High Court JR. Misc Civil Application No. 20 of 2008 was never heard and determined on its merits.

16. The Petitioner's advocate submitted that the Petitioner's complaint is the breach of Article 42 of the Constitution on the right to a clean and healthy environment and that the activities of the 1st Respondent have displaced thousands of people and their livestock from the suit land.

17. Counsel submitted that the Respondents have not placed any sufficient material before the court to prove that they have compensated the displaced residents; that the 1st Respondent was irregularly allocated the suit property and that this court should make a finding that the rights of the Petitioner and the displaced residents of Tana River have been violated.

18. The 1st Respondent's counsel's submissions rehashed the deposition of the Legal Manager which I have already summarised above.

Analysis and findings:

19. The issues for determination in the Petition are:-

(a) Whether this Petition is res judicata or sub judice

(b) Whether the Respondents have violated the Petitioner's constitutional rights to a clean and health environment and

(c) Whether the Respondents have violated the Petitioner's constitutional right to own property.

(d) Whether the Respondents have violated the rights of the residents of Tana River County to own land.

20. It is the 1st Respondent's case that the suit is res judicata because the issues that have been raised in the current Petition were raised in Nairobi HCCC No. 14of 2010 and in Malindi JR Miscellaneous Civil Application No. 20 of 2008.

21. I have perused the Judgment in Nairobi HCCC No. 14 of 2010 and noted that although most of the issues in the current Petition were raised in the said case, the Petitioner herein was not a party to that suit.

22. It is trite that for one to successfully raise the defence of res judicata, he has to show that the parties in the subsequent suit are the same parties in the previous suit or the parties were litigating under the same title.

23. The 1st Respondent did not inform the court how the Petitioner herein can be said to be the same as the Plaintiffs in HCCC No. 14 of 2010 or that it is litigating under the same title.

24. Although the Ruling in Malindi JR Miscellaneous Civil Application No. 20 of 2008 does not indicate the parties, the same was struck out before it could be heard and determined on its merits. Consequently, this matter cannot be said to be res judicata because the matter, was not heard and determined on merit.

25. It is common knowledge that where a suit is struck out, a similar suit involving the same parties can be filed. In the circumstances, the Petition before me is neither res judicata nor sub judice.

26. The Petitioner has deponed that the massive irrigation and large scale sugar production schemes in Tana Delta, the impact of ferterlizers and pesticides offends Articles 42 of the Constitution on the right to a clean and healthy environment, a violation which the 1st Respondent has persisted on committing.

27. It is the Petitioner's case that the alienation of the Tana Delta by the 1st Respondent has denied the minority communities an environment in which to practice their culture and develop their values contrary to Article 56 of the Constitution; that the agricultural and irrigation activities of the 1st Respondent have adversely affected the flora and fauna in the area and that due to the 1st Respondent's activities the Tana River has changed its course and rare species now face extinction contrary to Article 69 of the Constitution.

28. The 1st Respondent has countered the allegation that they are degrading the environment within the Tana Delta by deposing that it commissioned experts approved by the National Environmental Management Authority (NEMA) to undertake and carry out an Environment/Impact Assessment (EIA); that NEMA was satisfied as to the adequacy of the EIA study, evaluation and review report and that NEMA issued to the 1st Respondent a licence on 19th June, 2008.

29. It is true that under Article 20, a state organ like the 1st Respondent can be held to have violated the constitutional rights of another or another organ like the Petitioner herein.

30. Indeed, Article 42 of the Constitution guarantees everyone the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of the present and future generation.

31. Article 69 of the Constitution on the other hand imposes a duty on the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources by: encouraging public participation in the management, protection and conservation of he environment and establishing systems of environmental impact assessments, environmental audit and monitoring of the environment, amongst other measures.

32. Where a person, like the Petitioner herein, alleges that a right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, he/it may apply for redress and the court may make appropriate orders, which include an order to prevent, stop or discontinue any act or omission that is harmful to the environment, to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment or to provide compensation for any victim of a violation of the right to a clean and healthy environment (See Article 70 of the Constitution).

33. Although Mr. Omar Buketa, a member of the County Executive Committee in Charge of Lands, Agriculture and Fisheries Tana River County, has deponed that the 1st Respondent is engaged in activities that are harmful to the environment, including massive use of fertilizers and pesticides, he has not offered any tangible evidence or a report by an environmental expert to show that indeed the 1st Respondent is degrading the environment.

34. Indeed, even after being served with the Environmental Impact Assessment report in respect to the

Tana Delta Integrated Sugar and the EIA licence that was issued to the 1st Respondent by NEMA on 19th June, 2008, the Petitioner did not counter the said report and the licence in any form.

35. I have read the conditions that are contained in the EIA licence dated 19th June 2008. Condition number 13 provides that the proponent (the 1st Respondent) shall ensure that environmental protection facilities or measures to prevent pollution and ecological deterioration such as conservation of biodiversity, protection of the river bank and water quality monitoring are designed, constructed and employed simultaneously with the proposed project.

36. Condition number 15 provides that the proponent shall submit an Environmental Audit Report annually after the first year of occupation to confirm the efficacy and adequacy of the Environmental Management Plan.

37. The Petitioner, who is endowed financially, has not provided to this court evidence to show that the 1st Respondent has not complied with the conditions that are in the licence that was issued by NEMA to enable the court to determine whether the 1st Respondent 's actions are harmful to the environment.

38. Indeed, the Petitioner has not lodged any complain with NEMA viz-aviz the licence that was issued to the 1st Respondent in respect to the allegations that the 1st Respondent is degrading the environment.

39. In the circumstances I find that the Petitioner has not placed before me any material to enable me to stop the 1st Respondent from conducting its activities on the suit property on the promise that the said activities infringes on its rights to a clean and healthy environement.

40. The last issue that I am supposed to deal with is whether the grant in respect to LR No. 28026 measuring 25,875 Ha that was issued to the 1st Respondent should be cancelled.

41. It is the Petitioner's case that the allotment and subsequent issue of the title to the land was not above board; that the process was opaque and with no participation from the people and that the suit property being community land, it was held in trust for the people of Tana River by the defunct County Council of Tana River.

42. The Petitioner's representative deponed that the process of allocation of the land to the 1st Respondent was flawed and that the issuance of the grant to the 1st Respondent was in total disregard of the constitutional provisions on management of community land.

43. In response, the 1st Respondent's Legal Manager stated that the suit land is land belonging to the National Government; that the process of acquisition of land by the 1st Respondent was above board and that pursuant to Article 62(1)(b) of the Constitution, any state organ can lawfully hold, use, or occupy land.

44. It is true, as submitted by the 1st Respondent's advocate, that pursuant to the provisions of Article 62(1)(b) of the Constitution, public land includes the land that is <u>lawfully</u> held, used or occupied by any state organ.

45. The question that arises is whether the 1st Respondent, being a state organ, <u>lawfully</u> holds the suit property.

46.The grant exhibited by the 1st Respondent shows that it was registered in favour of the 1st Respondent on 20th November, 2013.

47. According to the said grant, the 1st Respondent was allocated L.R. No.28026 measuring 25,875 Ha (approximately 65,000 acres) for a period of 45 years with effect from 1st January, 1995.

48. According to the letter dated 29th November, 1988 by the Commissioner of Lands addressed to the then clerk of the County Council of Tana and received by the 1st Respondent on 13th December, 1988, a decision was made to set apart an area of trust land under the jurisdiction of the County Council " for the purpose of irrigation by the Tana and Athi River Development Authority" as indicated in the maps.

49. In the said letter, the Commissioner of Lands sought for the views of the County Council.

50. From the annexed topographical map, the land that the Government wished set apart is the same that is captured in the grant that was eventually issued to the 1st Respondent.

51. Other than the grant and the letters of 29th November, 1988, the 1st Respondent has annexed the letter of allotment that was issued to it dated 5th May, 2010 for land measuring 25,876 Ha was Trust land.

52. In the letter of 28th November, 1988, the Commissioner of Lands acknowledged that land measuring 25,876 Ha.

53. This court discussed at length the law relating to setting apart of Trust land under the repealed Constitution and the Trust Land Act in the case of **Bahola Mkalindi Rhingo -Vs Michael Seth Kaseme & Others, Malindi ELC no. 168 of 2012** which I shall rehash in this Judgment.

54. Under the repealed Constitution and the Trust Land Act, Trust land was neither owned by the Government nor by the County Councils within whose area the land fell under. The County Council simply held such land on behalf of the local inhabitants of the area.

55. For as long as Trust land remained unadjudicated and unregistered, it belonged to the local tribes, groups, families and individuals of the area. Once adjudicated and registered, Trust land was transformed into private land. That is what the provisions of Sections 114, 115 and 116 of the repealed Constitution provided.

56. Indeed, Section 115(2) of the repealed Constitution provided that Trust land could only be dealt with in accordance with the African Customary Law vested in any tribe, group, family or individual.

57. The Constitution also provided that the only way Trust land could be legally removed from the purview of communal ownership of the people was through adjudication and registration or setting apart.

58. Adjudication and registration of Trust land removed the particular land from the purview of community ownership and placed it under individual ownership while *setting apart* removed the Trust land from the dominion of community ownership and placed it under the dominion of public ownership.

59. Trust land could only be allocated legally pursuant to the provisions of the Constitution, the Trust Land Act and the Land Adjudication Act.

60. The repealed Constitution, at section 115(4) mandated Parliament to make provisions under an Act of Parliament with respect to the administration of Trust land by a County Council.

61. Consequently, Parliament enacted the Trust Land Act, the Local Government Act (repealed) and the Town Planning Act which was repealed and replaced with the Physical Planning Act in 1996. These statutes, amongst others, allowed County Councils to deal and administer Trust land on behalf of the residents of their respective areas.

62. Section 117(1) of the repealed Constitution allowed, through an Act of Parliament, County Councils to *set apart* any area of Trust land vested in a County Council for use and occupation by a public body; or for purpose of the prospecting for or for the extraction of minerals or by any person for a purpose which in the opinion of the County Council is likely to benefit the person 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 rent in respect thereof.

63. Where an area of Trust land has been set apart by the County Council for the purposes that I have enumerated above, section 117(2) of the repealed Constitution provided that any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.

64. However, under section 117 (4) of the repealed Constitution, the setting apart of Trust land was of no effect unless prompt payment of full compensation of any resident of the land set apart who under the African customary law had a right to occupy any part or was in some other way prejudicially affected by the setting apart.

65. Trust land could also be set apart for Government purposes. Under Section 118(1) of the repealed Constitution, if the president was satisfied that the use and occupation of an area of Trust land was required for the purpose of the Government of Kenya or for a body corporate or for the purpose of the prospecting for or the extraction of minerals, such land would be *set apart* accordingly and was vested in the Government of Kenya or such other person or authority.

66. If Trust land is *set apart* for the purpose of the Government, the Government was required to make prompt payment of full compensation if the setting apart extinguished any estate, interest or right in or over the land that would have been vested in any person or authority.

67. The Respondents have not annexed any minutes to show that indeed the then Tana River County Council approved the setting apart of the suit property and how the residents of the area were compensated by the 1st Respondent, if at all.

68. Indeed, the Petitioner has annexed letters that were addressed to the Ministry of Lands by the members of the communities living in Salama location, New Tana Delta District of 10th June, 2008 and 13th February, 2008.

69. In the letter dated 13th February, 2008, the officials of the communities living in Salama Location informed the 1st Respondent's advocate as follows:-

> **"TARDA has two maps they are using. One that they used to apply for the Letter of Allotment which map did not include our farms and settlements. And secondly a map which they are using to grab our land purporting to have allocated to them and which is where the current protective Bend and Dykes run through making us and our villages, settlements, graves etc their squatters. TARDA does not have a Title Deed and the survey was a calculated move for them to apply and be issued with a Title Deed for which they have already applied to the Commissioner."**

70. In their letter dated 18th February, 2008, the residents of Salama Location, through their officials wrote as follows:-

> **"On behalf of the indigenous residents of Salama Location, whose land has been irregularly allocated to TARDA in January, 1995 vide Letter of Allotment No. 106796 of 17/1/1995, we wish to request your good office not to issue any Title Deed to them until the above case is determined by the High Court."**

71. In another letter of 10th June, 2008, the residents of Salama Location informed the Minister of Lands about the allocation of land belonging to the indigenous residents of Salama Location "where ancestral land and villages were irregularly allocated to TARDA"

72. The then Minister of Lands responded to the letter of 10th June, 2008 as follows:-

"I am studying the matter and will revert to you."

73. It will appear that the Ministry of Lands and the Respondents herein never addressed the concerns of the local residents of Salama Location but went ahead and issued the 1st Respondent with a letter of allotment for LR NO. 28026 and a grant on 5th May, 2010 and 20th November, 2013 respectively.

74. It therefore follows that the participation of the people of Salama Location and due process in the setting apart of the suit property, as provided for under the repealed Constitution, the current Constitution and the Trust Land Act, which I have summarised above, was never followed by the Respondents.

75. In the circumstances, and considering that it is the Petitioner who is mandated under the Constitution to hold community land/Trust land in trust for the people resident in the County of Tana River, I find and hold that the right of the Petitioner to hold such land in trust for its people has been infringed on by the Respondents and the grant in respect of L.R. No.28026 for land measuring 25,875 hectars cannot stand.

76. For those reasons, I allow the Petition dated 4th March, 2015 in the following terms:-

(a) A declaration be and is hereby issued that the actions of the 1st and 2nd Respondents described in the Petition are in contravention of Articles 10, 40 and 56 of the Constitution.

(b) The grant in respect to land registered as I.R. 152049 being L.R.No.28026 and issued to the 1st Respondent be and is hereby revoked.

(c) A permanent injunction be and is hereby issued restraining the 1st Respondent, its servants, employees, agents or contractors from dealing with the suit land in any manner whatsoever.

(d) The Respondents to pay the costs of the Petition.

Dated, signed and delivered in Malindi this **14th** day of **September,** 2016.

O. A. Angote

Judge