



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO.115 OF 2014**

**1. KATANA CHARO FONDOH ALIAS SAMSON**

**2. MTAWALI CHENGO CHOME**

**3. JOSEPHINE DAMA RIZIKI** suing as Chairman, Vice-Secretary & Treasurer of

**MATOLANI RESIDENTS DEVELOPMENT ASSOCIATION.....PLAINTIFFS**

**VERSUS**

**1. GARDER GENERAL TRADING LIMITED**

**2. COUNTY GOVERNMENT OF KILIFI.....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. By a Complaint dated 18<sup>th</sup> June 2014, Katana Charo Fondoh alias Samson, Mtawali Chengo Chome and Josephine Dama Riziki suing as officials of Matolani Residents Development Association pray for Judgment against the two Defendants as follows:

**a. A declaration that:**

**i. The acts of the Defendants were ultra vires; and**

**ii. The lease Agreement is null and void.**

**b. The 2<sup>nd</sup> Defendant by its servants and/or agents be ordered to deliver vacant possession of the leased premises; and**

**c. The Defendants be ordered to pay costs of and incidental to this suit.**

2. It is the Plaintiffs' case that the Association's membership comprises residents of the area known as Matolani Sub-Location in Chakama Location of Kilifi County. They accuse the Defendants of negotiating a lease agreement for the 2<sup>nd</sup> Defendant County to lease the Matolani Trust Land to the 1<sup>st</sup> Defendant Company without involving the Plaintiffs.

3. The Plaintiffs aver that the subject land was from time immemorial utilised by themselves for cultivation and grazing of animals and that any alienation thereof would directly affect their livelihoods. Contrary to their said interests, they aver that on or about 16<sup>th</sup> September 2010, the Defendants herein purported to enter into a Lease Agreement in which the 1<sup>st</sup> Defendant was leased 3,500 Ha of their land for five years at a consideration of Kshs 775,500/- per annum.

4. The Plaintiffs contend that the subject land remains trust land falling under the trusteeship of the 2<sup>nd</sup> Defendant and that as the beneficiaries thereof, the Plaintiffs ought to have benefited directly from the transaction. As a result of the said acts of the Defendants including the clearing of the huge parcel of land in contravention of good environmental practices, the Plaintiffs have suffered loss and damage and hence the orders sought herein.

5. But in their Statements of Defence dated and filed herein on 4<sup>th</sup> September 2014, M.s Garder General Trading Ltd (the 1<sup>st</sup> Defendant)

denies the allegations contained in the Plaint and aver that the Plaintiffs have never utilised the suit property and that the 2<sup>nd</sup> Defendant had capacity to enter into the lease agreement without involving the Plaintiffs.

6. The 1<sup>st</sup> Defendant further asserts that upon entering the lease agreement, it proceeded to clear the bush thereon and the Plaintiffs never cultivated nor grazed their animals on the property as alleged. The 1<sup>st</sup> Defendant further avers that the Plaintiffs' Association ceased to exist way back in 2013 and the suit as filed is a non-starter, fatally defective and the same ought to be struck out and/or dismissed with costs.

7. The County Government of Kilifi (the 2<sup>nd</sup> Defendant) similarly denies the Plaintiffs assertions as contained in the Plaint. In a Statement of Defence dated and filed herein on 26<sup>th</sup> May 2015, the 2<sup>nd</sup> Defendant avers that all acts done by itself were in accordance with the law and the Plaintiffs' claim is vexatious, scandalous and does not disclose any cause of action to warrant the orders sought herein.

### **The Plaintiff's Case**

8. At the trial, the Plaintiffs called one witness who testified in support of their case.

9. PW1-Katana Charo Fondo alias Samson is the 1<sup>st</sup> Plaintiff and the Chair of Matolani Residents Development Association. He testified that the land belongs to the community of Matolani who have always lived thereon and used it for farming and rearing of livestock. They also have their homes on the land.

10. PW1 told the Court that towards the end of 2009, one Hassan Abdalla Yusuf went to their area as an investor accompanied by Ishmael Benjamin Kalume and others. He wanted to plant "mchicha". The investors were representing the then County Council of Malindi and they wanted the residents to donate 3500 acres of land.

11. PW1 testified that he attended one of their meetings where people were asked to accept the proposals as they would get employment opportunities. While the 3<sup>rd</sup> Defendant would get 80% of the proceeds from the venture, the area residents would get 20%. The residents however rejected the proposal.

12. PW1 told the Court that they did not participate when the 3<sup>rd</sup> Defendant eventually agreed with the 1<sup>st</sup> Defendant but they later accessed a copy of the Lease Agreement. More than Kshs 777,500/- was paid to the Chair and Clerk of the Council but the area resident had not benefited from the project.

13. On cross-examination, PW1 told the Court he was not aware that the lease agreement was revoked on 27<sup>th</sup> January 2016. He told the Court their members were more than 6000 people but he did not have the minutes to show those who attended and authorized the case to be filed. He agreed that the Lease Agreement was dated 16<sup>th</sup> September 2010 but told the Court they only came to Court in 2014 as initially they did not know what had transpired.

14. PW1 further told the Court that the investors did not honour what they had agreed with them. They were to build a public primary school, a dispensary and an agricultural college. They were also supposed to build an Assistant Chief's Office and a Police Station but they did not do so.

### **The Defence Case**

15. The 1<sup>st</sup> Defendant did not call any witness at the trial but the 2<sup>nd</sup> Defendant called one.

16. DW1-Erick Kombe Randu is an Assistant Director in the 2<sup>nd</sup> Defendant's Department of Lands, Energy, Physical Planning and Urban Development. He told the Court that the 2<sup>nd</sup> Defendant organized for a meeting of the residents of Matolani at the 1<sup>st</sup> Defendant's request. The 1<sup>st</sup> Defendant wanted to lease their land for development and it was imperative that they get the community's consent.

17. DW1 told the Court that following the consultations, the Community gave its consent but the 1<sup>st</sup> Defendant failed to honour part of its bargain. The 1<sup>st</sup> Defendant had promised to improve schools, build a dispensary and a Police Post but they did not. The 2<sup>nd</sup> Defendant cancelled the agreement after the community members protested. The 1<sup>st</sup> Defendant then sued the 2<sup>nd</sup> Defendant and there is a pending matter in Court over the cancellation.

18. On cross-examination, DW1 told the Court he could not tell if the names on the minutes of the meeting dated 3<sup>rd</sup> December 2009 were for the Matolani area residents.

### **Analysis and Determination**

19. I have perused the pleadings filed herein by the Plaintiff and the 2<sup>nd</sup> Defendant, the oral testimonies of their witnesses and the evidence adduced at the trial. I have equally perused and considered the written submissions placed before me by the Learned Advocates for the two parties. The 1<sup>st</sup> Defendant entered an appearance and filed a defence but did not take part in the trial herein.

20. Katana Charo Fondoh, Mtawali Chengo Chome and Josephine Dama Riziki bring this suit in their capacity as the Chair, Vice-Secretary and Treasurer respectively of an entity known as Matolani Residents Development Association. From the material placed before me, the said Association was on 9<sup>th</sup> August 2012 registered as a Self-help Group/Project under the Ministry of Gender, Children and Social

Development.

21. From a copy of their Constitution as registered with the Ministry, the Association's objectives include the improvement of the livelihoods of its members through small scale business and sustainable use of resources. The Association further aims to promote the basic rights of its members and to empower them financially. In their Complaint filed herein on 19<sup>th</sup> June 2014, the Plaintiffs point out that the Association's membership comprises of residents of Matolani Sub-Location, Chakama Location, Langobaya Division within Malindi Constituency.

22. The Plaintiffs told the Court that the land within their said Sub-Location comprises of trust land which is held as such in trust for and on their behalf by the Kilifi County Government (the 2<sup>nd</sup> Defendant herein). They told the Court that they have been settled on the subject land from time immemorial and that they have beneficial interest on the land which they have utilized without interruption under customary tenure for both cultivation and grazing of their livestock.

23. The Plaintiffs are aggrieved that without any consultation and or involvement of themselves, the 2<sup>nd</sup> Defendant's predecessor the County Council of Malindi, on or about 16<sup>th</sup> September 2010 entered into a Lease Agreement with the 1<sup>st</sup> Defendant company wherein 3,500 Ha of the subject land was leased to the 1<sup>st</sup> Defendant for a period of five (5) years.

24. The Plaintiffs maintained that the Lease Agreement was executed without the participation of the Plaintiffs and told the Court that the 2<sup>nd</sup> Defendant in particular has through its servants and agents received funds under the said lease but has neither accounted for the same nor released them to the Plaintiffs or utilised them for acts beneficial to the Plaintiffs.

25. In the circumstances, the Plaintiffs have urged this Court to declare the acts of the Defendants ultra vires and to declare the Lease Agreement null and void. They further want the 2<sup>nd</sup> Defendant to be ordered to deliver vacant possession of the leased premises.

26. In response to the Plaintiffs claim, the 2<sup>nd</sup> Defendant did not deny entering into the Lease Agreement. It was however their case that prior to the execution thereof and contrary to the Plaintiffs assertions, they held various meetings with the area residents and that it is the residents themselves who approved the project before it proceeded to set apart the subject land for use by the 1<sup>st</sup> Defendant.

27. The 2<sup>nd</sup> Defendant asserted that the area residents and the National Environment Management Authority were fully involved both in the preliminary and final stages leading to the leasing of the suit property and deny that the 2<sup>nd</sup> Defendant was involved in any procedural impropriety in so far as the subject land and the project relating thereto were concerned.

28. The 2<sup>nd</sup> Defendant further told the Court that prior to the commencement of the trial herein, they had terminated the Lease Agreement on 27<sup>th</sup> January 2016 after the 1<sup>st</sup> Defendant failed to comply with the terms of the Agreement.

29. As I understood the issues before me, there was no dispute therefore that the 2<sup>nd</sup> Defendant's predecessor had leased some 3500 Ha of land to the 1<sup>st</sup> Defendant. A perusal of a copy of the Agreement executed on 16<sup>th</sup> September 2010 reveals that the 1<sup>st</sup> Defendant was to hold the subject land described therein as Matolani Ranch for a term of Thirty Three (33) years with effect from 1<sup>st</sup> October 2010 paying therefor a yearly rent of Kshs 775,500/- which amount would increase by 10% after every five years.

30. Even though the Plaintiffs hold that there was no public consultations and or participation in the process leading to the execution of the Agreement, there was evidence from the bundle of documents submitted by the 2<sup>nd</sup> Defendant herein that there was a meeting of the residents of Matolani Sub-Location held on 3<sup>rd</sup> December 2009 which from the minutes was attended by some 147 residents including the Area Assistant Chief Samuel Kadzitu Kahindi who took the minutes, as well as representatives of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein. The agenda of the said meeting clearly included the then Proposed Lease Agreement captured therein as "Uwekezaji wa Garder General Trading Company Ltd."

31. Following the conclusion of the meeting, the said Area Assistant Chief wrote to the 2<sup>nd</sup> Defendant's Predecessor in regard thereto as follows:-

**"Re: Minutes of Leaders and Residents of Matolani Sub-Location on Land Request by Garda Trading Company Ltd.**

**Attached herewith, please find minutes of the above, meant to set aside land for agricultural development by above mentioned investors.**

**Please note that the agreements as appearing in the minutes were comprehensively made willingly and voluntarily by majority votes and show of hands to prove that they all support the above project without any doubt.**

**I do hereby wish that the Council would go ahead to process their request in order that the project might kick off the soonest possible."**

32. In his evidence-in-chief herein, the Plaintiffs' Chair (PW1) conceded that he attended one such meeting where the residents were asked to agree to the proposal for investment by the 2<sup>nd</sup> Defendant's predecessor on account that the area residents would get employment plus 20% of the proceeds of the investment. Looking at the Resolutions as contained in the minutes of the meeting held on 3<sup>rd</sup> December 2009 aforesaid, it was clear to me that those were some of the issues that were discussed at the said meeting. While the Plaintiffs contend that the meeting rejected the proposals, they did not place any resolutions before me showing that the residents rejected the proposals.

33. As Lenaola J., (as he then was) stated in *Nairobi Metropolitan PSC Sacco Union Ltd & 25 Others –vs- County Government of Nairobi & 3 Others (2013)eKLR*:

“...it does not matter how the public participation was effected. What is needed, in my view, is reasonable level of participation and I must therefore agree with the sentiments of Sachs J in *Minister of Health –vs- New Chicks South Africa (PRY) Ltd (Supra)* where he expressed himself as follows:-

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

I am also in agreement with the sentiments expressed by Chaskalson, Chief Justice of South Africa, in the Constitutional Court of South Africa Case of *Minister of Health –vs- New Chicks South Africa (PRY) Ltd (Supra)* where he stated that:-

“(155) it cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations.

34. Accordingly and in the matter before me, I did not think public participation meant that all the members of the Plaintiffs’ Association had to give their views and/or that the Defendants were under any obligation to accept the same. The rule of thumb is that a reasonable opportunity is given to the public and all interested parties, with timely access to information that is relevant to the project to be initiated and an opportunity to make a contribution or response thereto.

35. In the circumstances herein, I am persuaded that the Plaintiffs and other residents of Matolani were granted an opportunity to participate in the process leading to the execution of the Lease Agreement on 16<sup>th</sup> September 2010.

36. From the material placed before me, there is evidence that the residents were involved even further in the process when the 2<sup>nd</sup> Defendant’s predecessor voted on 8<sup>th</sup> April 2010 to set apart the subject land for use for the project. The 2<sup>nd</sup> Defendant further produced herein an Environmental Impact Assessment Report dated April 2010 indicating not only that an assessment of the impact of the project was done but also that the Plaintiffs concern for their environment had been taken care of.

37. And while the Plaintiffs claimed that the project was not beneficial to the area residents and that their members stood to gain nothing, it was clear from a reading of Clause 4 of the Lease Agreement that the 1<sup>st</sup> Defendant was required pursuant to its corporate social responsibility to the community of Matolani to rehabilitate the existing Assistant Chief’s office and Police Post, erect classrooms at Matolani Primary School, construct an Agricultural Demonstration Centre/School in the Area and to construct an extended room for the Matolani Dispensary.

38. When the 1<sup>st</sup> Defendant failed to carry out those covenants as agreed, the 2<sup>nd</sup> Defendant moved and terminated the Agreement thereby in a sense granting the wishes of the plaintiffs.

39. In the premises, I was not persuaded that the Plaintiffs suit had any basis in law and in fact. The same is accordingly dismissed.

40. Each party shall bear their own costs.

**Dated, signed and delivered at Malindi this 10<sup>th</sup> day of July, 2020.**

**J.O. OLOLA**

**JUDGE**