



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 5106 OF 1993

MWAKINI RANCHING (D.A) CO. LTD..... PLAINTIFF

VERSUS

COUNTY COUNCIL OF KITUI.....DEFENDANT

RULING

1. This an extremely old matter which has a long and involved history before the courts. It was part heard before Hon. Mr. Justice P.K. Kariuki (as he then was) in 2008. It then came before Hon. Mr. Justice J.B. Havelock on several occasions and since March 2015 it has been before me.
2. The issue that requires resolution before the matter can proceed any further is; Who is the correct Legal Officer to be served with notices, Applications etc to ensure the Defendant's attendance and/or participation in the suit. The question of the Defendant being resolved by Hon Havelock J.
3. The underlying suit concerns land in the County of Kitui and the existence and terms of a lease that may or may not exist on that land, Both now and when the lease was entered into.
4. In 2010, i.e after the matter had been part-heard, the Constitution of Kenya 2010 was promulgated and took effect from 22nd August 2010.
5. As a consequence of the new constitution and in particular Articles 61(2) and 62 the Defendant needed to be substituted by its successor in title. Havelock J made the Order for substitution is around June 2013. That substitution became necessary because upon devolution, the title to the Land in question became vested in a new party, probably the County Government instead of the National Government.
6. **Article 62** defines Public Land **Article 63** Defines Public Land **Article 63** Defines Community Land and **Article 64** deals with private land.
7. By a process of elimination, and without determining the underlying dispute, the land, subject of the dispute is either community land or public land. By **Article 63**, Community Land vests in the community and is held in trust by the County Government (**Article 63(2) constitution of Kenya 2010**).
8. Public land includes "any land not classified as private or Community Land under the constitution (**Article 62(1)(m)**). " *Public land shall vest in and be held by a County Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission*".
9. By reasons of the aforesaid, I concur in part with the decision of Havelock J that the County

Government should be a defendant within these proceedings. However, on further consideration, it is clear that the Lands Commission must also be a party pending any declaration upon the classification of the land in question, and indeed beyond that for the purposes of argument and enforcement and /or recommendations and/or resolution under *Article 67*.

10. The second and principal issue that arises is, who is the correct person and/or office to be served with the notices etc. Havelock J resolved that it should be the Attorney General. On closer consideration of the Constitution, and with respect to Havelock J that cannot be the complete answer. Each County Government is a separate entity from the National Government . The Attorney General’s role is defined by Article 156. In relation to these proceedings Article 156(4) (b) applies, namely that

“The Attorney General...shall represent the national government in court or in any other legal proceedings to which the national government is a party...”

That responsibility is not extended to County Governments without more. It may be that in the correct circumstances the County Government could instruct the Attorney – General to represent it in court. However, in these circumstances he would have to come on the record as such.

11. In this case the Attorney General has been served and not attended. By reason of the aforesaid there can be no criticism of that approach perse, but It has led to an impasse and the plaintiffs are entitled to be heard and the Defendants to be represented.

12. In the circumstances, as the route out of the impasse I order that the Lands Commission be added as a party to the suit. I further Order that the plaintiff should serve the notice of hearing etc upon the appropriate legal officer of the County Government of Kitui, the Lands and the Attorney General’s Office.

13. The parties have voiced some concern over the time it has taken to have this Ruling delivered. Although they are entitled in raising their concerns, they should be aware that the reasons are matters which were beyond my control. They should also be reassured that in the intervening period their tribunal has had the benefit of further training, in particular on the subject of devolution and they are the beneficiaries of that, so the delay has been purposeful in part nevertheless. I regret that it has taken as long as it did. Order accordingly,

FARAH S. M. AMIN

JUDGE

DATED 30 October 2015

SIGNED AND DELIVERED AT NAIROBI this 2nd DAY OF November, 2015.

Coram:

Clerk: Joseph Kabugi

..... for Applicant

..... for Respondent