



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
CONSTITUTIONAL PETITION NO. 3 OF 2013

IN THE MATTER OF: CHAPTER FOUR OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: ARTICLES 10, 19, 20, 21, 22, 23, 35, 40, 47, 60, 63 AND
258 OF HTE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 40(1), 40(3) AND
47(1) OF THE CONSTITUTION BY THE 1ST AND 2ND
RESPONDENTS**

AND

**IN THE MATTER OF: ENFORCEMENT OF ARTICLES 10, 35 (1)(a) 60(1)(b),
63(2)(d), AND 63 (3) OF THE CONSTITUTION**

BETWEEN

- 1. MOHAMED AHMED KHALID
(CHAIRMAN)**
- 2. ABDULRAHIM ABDDALLA MOHAMED (SECRETARY)**
- 3. YAHYA MOHAMED IDARUS (TREASURER)**

4. ALI ATHMAN ALI
5. IBRAHIM MOHAMED ISMAIL
6. MOHMED AHMED ALI
7. ALMUBARAK ATHMAN ALI
8. ALMUBARAK ATHMAN ABUBAKAR
9. HAFIDH HAMID BAKARI
10. YUSUF KHALID BAKARI
11. KHADIJA HAMID BAKARI *on behalf of all the members of*

**MWAFKA COMMUNITY BASED
ORGANISATION**

**AND RESIDENTS OF RAS KITAU,
LAMU.....PETITIONERS=VERSUS=**

1. DIRECTOR OF LAND ADJUDICATION
2. DIRECTOR OF PHYSICAL PLANNING
3. THE HON. ATTORNEY GENERAL.....RESPONDENTS

J U D G M E N T

1. The Petition herein was filed by the officials of Mwafaka community based organisation on behalf of the members of that organisation and the residents of Ras Kitau, Lamu. The Petition is dated 19th February 2013 and it seeks for the following reliefs.
 - a. **A declaration that Manda Ras Kitau in Lamu County is land reserved for the petitioners exclusively.**
 - b. **A declaration that the adjudication process for Manda Ras Kitau was unconstitutional and infringed on the Petitioners' rights under 35(1)(a), 40(1), 40(3) and 47(1), of the Constitution.**
 - c. **A declaration that the development plans completed on 30/7/10, 25/5/12, 22/7/2009 and 34/3/2009 are illegal, null and void.**
 - d. **An order of Judicial Review under Article 23(3) (f) by way of an order of certiorari quashing Gazette Notice No.11190.**
 - e. **An order of Judicial Review under Article 23(3) (f) by way of an order of Mandamus compelling the 1st Respondent to carry out a fresh adjudication process and prepare a demarcation map for the adjudication section, showing every parcel of land as occupied by the Petitioners.**
 - f. **A declaration that any title deed and/or lease now issued over a portion or portions of land within Manda Ras Kitau, Lamu to any person other than the Petitioners or residents of Manda Ras Kitau is a product of fraud and is null and void.**
 - g. **An order of Judicial Review in the manner of certiorari quashing any existing Title Deed/or Lease of Manda Ras Kitau, Lamu.**
 - h. **Any other relief that the Court may deem fit to grant.**
 - i. **Costs of the Petition.**
2. According to the Petition, Mwafaka Community Based Organisation is registered under the Ministry of Gender, Children and Social Development. A list of members was attached on the

Petition.

3. According to the Petitioners, they are and have been at all material times, residents of Manda Ras Kitau in Lamu County, measuring approximately 2,500 acres; that the land is trust/ancestral land and that it has never been adjudicated.
4. The Petitioners averred that sometimes in the year 2009, the Government, through the Lamu District Land Adjudication Officer proposed to adjudicate the suit property; that the Petitioners agreed to have the area adjudicated and that it was agreed that the persons on the ground would be registered as proprietors of the areas they occupied.
5. According to the Petitioners, the demarcation officer, Lamu, without the authority and consent of the Petitioners fraudulently and irregularly alienated some of the Petitioners' land for the construction of the social amenities.
6. It is the Petitioners' contention that the area was proposed for adjudication but the 1st and 2nd Respondents earmarked it as a settlement scheme; that several names appeared on the list of the persons purportedly residing in the area yet they were unknown to the residents; that some residents' names were removed from the list and that some residents got less acreage from what they occupy on the ground and vice versa.
7. On the issue of the gazette of the development plan for Ras Kitau, the Petitioners averred that they were never consulted before the plan was gazetted and that the survey advisory plan and gazette of the development plans was aimed at denying the Petitioners their rights to own their ancestral land.
8. The Petitioners finally averred that their rights to own property has been violated by the Respondents; that some government officials allocated themselves land yet they are not settlers in the area; that there are cases of double allocation and that the Respondents should be compelled to account for the several names that appeared in the list of the people allocated the land yet they were unknown to the Petitioners.
9. The Petition is supported by the Affidavit of Mohamed Ahmed Khalid, the Chairman of Mwafaka Community Based Organisation. The said Affidavit has been sworn on behalf of the deponent and on behalf of the 410 members of the organisation.
10. The Respondents, through the Attorney General's office filed their Grounds of Opposition on 25th April 2013.
11. The Respondents stated in the Grounds of Opposition that the Respondents' Actions were proper and within their mandate and jurisdiction; that no rights have been demonstrated to have been breached; that the Petitioners have a better alternative remedy that will deal with the issues raised and that the Petitioners are guilty of laches.
12. The parties agreed to dispose of the Petition by way of written submissions. The Petitioners' advocate filed her submissions and list of authorities on 2nd July 2013. The Respondents' counsel did not file any submissions.
13. The Petitioners' counsel submitted that the land in question is unregistered community land held by the County Government on behalf of the community; that the adjudication of the area was to be done with the blessings of the community and that the demarcation officer of Lamu, without the authority and consent of the Petitioners, fraudulently and irregularly alienated the Petitioners' land for the construction of the social amenities.
14. Counsel further submitted that despite the irregularities, the 2nd Respondent caused to be gazetted completion development plan for Ras Kitau on 17th September 2010 vide gazette notice number 11190 without the Petitioners input.
15. The Petitioners' counsel quoted at length the provisions of Article 63 which define what community land is.
16. The Petitioners' counsel further submitted that the only way trust land can legally be removed from communal ownership is through adjudication and registration and setting apart, and that when trust land is set apart, the residents must be compensated pursuant to the provisions of section 8 of the Trust Land Act, Cap 288.
17. The Petitioners' counsel relied on the provisions of Article 23, 35 and 258 of the Constitution.
18. I have considered the authorities relied on by the Petitioners' counsel.
19. The Petitioners' case, as I understand it, is that the land measuring 2,500 acres within Manda Ras Kitau is trust land and that the adjudication that was carried out in the year 2009 should have complied with the repealed Constitution and the Trust Land Act.

20. I discussed at length the distinction between Government Land and Trust Land under the repealed Constitution in **Malindi Land Case Number 168 of 2012; Bahola Mkalindi Vs Michael Seth Kaseme & 2 others**. That distinction is blurred under the current Constitution.
21. In the said case, I stated that the distinction is important because the law regulating dealings in Trust Land is different from the legal regime regulating Government Land under the repealed Constitution. In view of the Petitioners claim, I shall reproduce my views in that case in these proceedings.
22. Under the repealed Constitution and the Trust Land Act, trust lands are neither owned by the Government nor by the County Councils within whose area the land falls under. The County Council simply held such land on behalf of the local inhabitants of the area.
23. 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 is transformed into private land. That is what the provisions of Sections 114, 115 and 116 of the repealed Constitution provided.
24. 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.
25. The former 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.
26. 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 Trust land from the dominion of community ownership and placed it under the dominion of public ownership.
27. Trust land could only be allocated legally pursuant to the provisions of the Constitution, the Trust Land Act and the Land Adjudication Act.
28. 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.
29. 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.
30. 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.
31. 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.
32. However, under section 117 (4) of the repealed Constitution, the setting apart of Trust land shall be of no effect unless the 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.
33. Trust land could also be set apart for Government purpose. 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.
34. If Trust land was *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.
35. Other than Trust land which was set apart for government purpose, the Government also had land

- which was not Trust land. This was land which was not within the “Special areas” as specified in the Trust Land Act and which was on 31st May 1963 vested in the Trust Land Boards.
36. Government land was the land that was vested in the Government of Kenya by dint of sections 204 and 205 of the Constitution that was contained in Schedule 2 of the Kenya Independence Order in Council, 1963 and Sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act 1964.
 37. The enactment of the Government Lands Act, Cap 280 replaced the 1915 Crown Lands Ordinance.
 38. The Government Lands Act was enacted to make further and better provisions for regulating the leasing and other depositions of Government Land. Under this Act, it is only the President who could sign documents granting title although he would delegate these powers to the Commissioner of Lands.
 39. Unalienated Government land was not Trust land in that it was not vested in local communities and it was not held in trust for them by a County Council.
 40. Unlike Trust land, the County Councils had no role to play at all in the allocation of unalienated Government land. They could not even purport to administer such land on behalf of the Government.
 41. According to the provisions of section 53 of the Trust Land Act, cap 288, the Commissioner of Lands was allowed to administer Trust land of each Council as an agent for the Council and for that purpose he could execute on behalf of the Council such grants, leases, licences and other documents relating to Trust land.
 42. It is not clear from the Petition and the Supporting Affidavit whether the suit land is Trust Land as defined by the repealed Constitution and the Trust Land Act or it is Government land before the adjudication process commenced in the year 2009.
 43. If the suit property was indeed Trust Land as claimed by the Petitioners, then the same could not be set apart for any other purpose without compensating the local residents who were in occupation, including setting it apart for a settlement scheme.
 44. As I held in the case of **Chengo Katana Koi vs Protus Evans Masinde (2013) e KLR** , settlement schemes could either be created by purchase of private land or by utilising unalienated Government Land.
 45. The creation of settlement schemes was, and still is, meant to settle the landless people and to regularise situations where people have been staying on either government land or private land without the requisite legal documents.
 46. The ascertainment of the rights of squatters over land which has been declared to be a settlement scheme should not be confused with the ascertainment of land rights and interests of individuals on customary and land trusts.
 47. The law that was applicable for the ascertainment of land rights and interest over Trust land is the Land Adjudication Act, Cap 284. The said Act has an elaborate mechanism of appeal in the event an individual is aggrieved by the decisions of the Land Adjudication and Settlement Officer, the Land Adjudication Committee, the Land Arbitration Board and the Minister's Appeal Committee.
 48. However, with the promulgation of the Constitution in 2010 and the establishment of the National Land Commission vide the constitutional provisions, the National Land Act, 2012 and the Land Act, 2012, all the functions of the Land Adjudication and Settlement department which was within the Ministry of Lands have been transferred to the National Land Commission.
 49. The Management and implementation of settlement programmes have also been transferred from the Ministry of Lands to the National Land Commission.
 50. The law which previously governed the setting up of settlement schemes was the Agriculture Act, cap 318. Under section 168 (3) of the said Act, the Director of Land Adjudication and Settlement was appointed as the administrator of Agricultural Settlement Fund by the Settlement Fund Trustees.
 51. The Director of Land Adjudication and Settlement therefore wore two hats; he was in charge of the adjudication and consolidation of land rights and interests for Trust land pursuant to the provisions of the Land Adjudication Act and was also authorised to establish settlement schemes pursuant to the provisions of the Agriculture Act.
 52. The Director of Land Adjudication and Settlement was the head of the land adjudication and settlement. He is the one who oversaw (before the creation of the National Land Commission in

- the year 2012) the effective implementation of the land adjudication and settlement before the promulgation of the Constitution in August 2010.
53. Pursuant to the provisions of section 29(3) of the Land Adjudication Act, Cap 284, the Director is mandated to sign certificates of finality upon the completion of the adjudication process and forward the adjudication register to the Chief Land Registrar for registration.
54. Indeed, before the Director signs certificates of finality, the Land Adjudication Act provides that the adjudication register must be published which shall be followed with the hearing, determination and implementation of objections in respect to the adjudication register. The manner in which such publication should be done is provided for at section 31 of the Act.
55. The Act, at sections 6 and 9 mandates the Land Adjudication Committee to determine claims in land in accordance with African Customary Law. The Land Arbitration Board hears appeals from the Land Adjudication Committee.
56. The procedure I have enumerated above is the one that the Petitioners' should have complied with if indeed the suit land was Trust/Community land and more so if undeserving people and institutions had been allocated their ancestral land.
57. The Petitioners have not shown by way of evidence that the adjudication register in respect of the suit property was ever published and that they raised objections in respect to the manner in which the adjudication process was carried out.
58. Considering that the Land Adjudication Act, Cap 283 has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of Trust land are supposed to be dealt with, it is my view that this court cannot substitute the established bodies which are supposed to deal with those complaints. The Petitioners can only move this court for declaratory orders and judicial review orders, or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place. In view of the provisions of the Land Adjudication Act, cap 284, I find that the Petition was prematurely filed.
59. The Petitioners averred that they were never consulted before the development plans for Ras Kitau were gazetted and that the survey advisory plan and the gazette of the development plans was aimed at denying the Petitioners their rights to own their land which is their ancestral land.
60. The Director of Physical Planning is mandated under the Physical Planning Act, 1996 to prepare regional physical development plans in respect to Government land, Trust land and Private land for the proper physical development of such land.
61. Section 16 of the Physical Planning Act, 1996 states as follows;

“A regional physical development plan may be prepared by the Director with reference to any government land, trust land or private land within the area of authority of a County Council for the purpose of improving the land and providing for the proper physical development of such land, and securing suitable provisions for transportation, public purpose, utilities and services, commercial, industrial, residential and recreational areas, including parks, open spaces and reserves and also the making of suitable provision for the use of land for building or other purpose.”

62. The regional physical development plan must be published in the Gazette and in such other manner as he deems expedient to the effect that the plan is open for inspection at the place or places and the time specified in the notice.
63. Section 59 of the Trust Land Act provides that Trust land shall be subject in all respects to the general law from time to time, and in this case the Physical Planning Act of 1996.
64. The Petitioners have shown by their own documents that the Part Development Plans for the public utilities within the area was published in the gazette notice of 17th September, 2010. The said notice stated that the copies of the PDPs were available for inspection free of charge at the offices of the District Physical Planning Officer, Lamu .
65. That is the mode of notification that the Physical Planning Act allows and it does not matter that the Petitioners “hail from a rural constituency where English is not understood or spoken and where Kenya Gazette Publications never reach.”
66. If indeed the survey advisory plan and gazette of the development plans was aimed at denying the Petitioners their rights to own their ancestral land, then the Petitioners would be entitled to compensation as provided for at Section 8 of the Trust Land Act after complying with

- the provisions of section 9 of the same Act.
67. Section 9 of the Trust Land Act provides that a person who claims to be entitled to compensation under section 8 shall apply therefor to the District Commissioner. Section 10 provides for the appeals as to compensation. The Petitioners have not made such a claim.
68. In the circumstances, and for the reasons I have given above, I find that the Petitioners have not proved on a balance of probability that the Respondents have infringed or are likely to infringe their constitutional rights so as to invite this court to issue the declaratory and judicial review orders sought in the Petition.
69. I therefore dismiss the Petition dated 19th February 2013 with no order as to costs.

Dated and Delivered in Malindi this **4th** day of **October**, 2013

O. A. Angote

Judge