REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 475 OF 1995

MIKULULO RANCHING *(Directed Agricultural)*

CO. LIMITED...PLAINTIFF

VERSUS

THE DISTRICT COMMISSIONER,

MAKUENI DISTRICT.......................................1ST DEFENDANT

THE HON. ATTORNEY GENERAL...............2ND DEFENDANT

KENYA WILDLIFE SERVICE.........................3RD DEFENDANT

GOVERNMENT OF MAKUENI COUNTY....4TH DEFENDANT

JUDGMENT

Introduction:

1. This suit was commenced by way of a Plaint in 1995 by Mikululo Ranching *(Directed Agricultural)* Co. Limited. The Plaint was then amended on 29th June, 2000. In the Amended Plaint, the Plaintiff averred that in or about 1975, several people started grazing and farming in what is now known as Mikululo Area; that in 1982, the said people incorporated the Plaintiff's company and that the Plaintiff's members have been in occupation of an area of land in Mikululo measuring 42,000 acres.

2. The Plaintiff averred in the Plaint that the area that its members have occupied was Trust Land which was initially under the Masaku County Council and later Makueni County Council; that the 1st Defendant allowed them to occupy 42,000 acres of the area that they were already utilizing and that by a Gazette Notice dated 2nd May, 1995, the 3rd Defendant extended its area of jurisdiction by 76.0 square kilometers, which includes the 42,000 acres that the Plaintiff's members were in occupation

3. According to the Plaintiff, after the 3rd Defendant illegally extended its area of jurisdiction, it started demolishing their homes and burnt their farm produce on the assumption that the said area belonged to the 3rd Defendant.

4. The Plaintiff has sought for an order of permanent injunction restraining the Defendants from evicting its members from the land they occupy in Mikululo area of Makueni County.

5. In his Defence, the 1st and 2nd Defendants averred that the Makueni Development Committee allowed the Plaintiff to settle on a piece of land measuring approximately 3,845 Ha and that same squatters encroached on Chyulu National Park and were given notices to vacate.

6. In its Amended Defence, the 3rd Defendant averred that the 3rd Defendant has always had full legal jurisdiction over the area comprising the additional Chyulu Hills National Park, which was duly declared as such vide Legal Notice No. 180 of 2nd May, 1995 and defined in Boundary Plan Number 204/76.

7. On its part, the County Government of Makueni, the 4th Defendant, averred that its the successor of the County Council of Makueni; that the Plaintiff's members were authorized and allowed to graze and develop part of the disputed land by its predecessor in its capacity as the trustee of the land and that the County Council of Makueni supported the allocation of part of the Trust Land to the 3rd Defendant for conservation purposes.

8. The 4th Defendant averred in its Defence that its intent was to support the allocation of the disputed land which was already occupied and developed by the Plaintiff for ranching purposes; that the issuance of the title document to the 3rd Defendant for land known as L.R. No. 24362 measuring 73,427 Ha was unlawful and that the said title should be cancelled by this court.

9. The 4th Defendant's case is that the allocation of the disputed land to the 3rd Defendant was unlawful because as the trustee of the land, it was never consulted; that the said allocation resulted in overlapping claims over the same land by the Plaintiff and that the title that was issued to the 3rd Defendant covers a larger area than the area that the 3rd Defendant was entitled to. The 4th Defendant has averred that the title that was issued to the 3rd Defendant should be cancelled and a fresh survey to be undertaken to demarcate the proper boundaries of the conservation area.

The Plaintiff's case:

10. The Plaintiff called two witnesses. PW1 informed the court that he was 87 years old; that he has lived in Mikululo area, Makueni County since 1942 and that he was one of the founder members of the Plaintiff. It was the evidence of PW1 that the members of the Plaintiff were allowed by the then Machakos District Commissioner to settle on the disputed land in 1975.

11. PW1 informed the court that in 1982, it was decided that the land that the Plaintiff's members had been allowed to occupy should be divided into two: one portion to be used for livestock keeping while the other portion was to be used for farming; that in 1983, and with the help of the County Council's Surveyor, a survey was done in which the boundary delineating the land belonging to the 3rd Defendant and the Plaintiff's land was fixed.

12. While sub-dividing the land to its members, PW1 stated that he was arrested and charged in Criminal Case No. 4560 of 1991; that the said matter was decided in his favour and that in 1993, he learnt that the 3rd Defendant was planning to extend its land to include the disputed portion.

13. PW1 produced a typographical map showing the villages that were established by the Plaintiff's members in 1975 on the disputed land. It was his evidence that when the 3rd Defendant purported to expand the boundary of its land in 1995, they were already in occupation of the land and that they have been living on the land since 1942.

14. In cross-examination, PW1 stated that he has been the Chairman of the Plaintiff since 1982 when the Plaintiff was established; that the Plaintiff comprises 2,000 members and that every member of the Plaintiff has been allocated 20 acres of land in the disputed area. PW1 stated that the land was not a gazetted as a Game Park and that it is the National Government and the then County Council of Machakos that allowed them to settle on the land.

15. PW2 informed the court that he was a Land Surveyor by profession. PW2 produced a survey report that was conducted jointly by the 3rd Defendant and the County Government of Makueni's Surveyors.

16. The evidence of PW2 was that in 1979, a survey was conducted in respect of land meant for the Chyulu National Park vide F/R No. 143/4; that in 1995, Legal Notice number 180 was published giving additional land to Chyulu Hills National Park measuring 76 Km^2 and that the said Gazette Notice brought the total acreage of land under the 3rd Defendant to 73,265 Ha.

17. PW2 stated that after the extension of the boundary of Chyulu Hills National Park, a title document for L.R. No. 24362 measuring 73,265 Ha was issued to the 3rd Defendant; that the land was surveyed under survey plan number F/R No. 287/36; that there is no boundary plan depicting this area and that the survey plan F/R No. 287/36 which includes the extension does not follow the 1975 Gazette Notice as depicted in survey plan F/R No. 143/4.

18. PW2 stated that in 1995, a new boundary was deliberately created in favour of the 3rd Defendant. PW2 informed the court that the land that was allocated to Mikululo Ranching Company by the DDC is within L.R. No. 24362 and that it is the natives of Makueni who occupied the disputed parcel of land.

19. It was the evidence of PW2 that the survey plan number 143/4 of 1975 was never quoted during the preparation of the 1995 survey plan and there was no notice to acquire Trust Land as required under the repealed Constitution.

20. In cross-examination, PW2 stated that the land belonging to the Park is found in the boundary plan of 1979 which is boundary plan number 204/51; that it is a boundary plan that depicts the beacons of the Chyulu National Park and that the extension of the boundary of the Park on the Western- Northern side and the Southern side was an illegality because the land belonged to the natives.

21. It was the evidence of PW2 that if the government wanted to increase the acreage of the Park, then it should have degazetted the 1979 boundary plan first and prepare a fresh Part Development Plan and that the title for L.R. No. 24362 should never have been issued in favour of the National Park before degazetting the 1979 boundary plan.

22. The evidence of PW2 was that a title document under the Registration of Titles Act *(repealed)* cannot be issued on the basis of a boundary plan. It was his evidence that after the boundary plan is prepared, a Part Development Plan should have been prepared, then a survey plan and thereafter a title issued. It was his evidence that boundary plans are usually prepared for Parks, Forests and other Government facilities and that the land that the 3rd Defendant acquired in 1995 was Trust Land belonging to the natives.

23. PW2 stated that the land belonging to the 3rd Defendant measuring 47,090 Ha is depicted in the 1979 boundary plan, survey plan number

143/4 and that the additional land on the 3rd Defendant's tittle does not have a survey plan.

The Defendants' case:

24. The 3rd Defendant's witness, DW1, informed the court that she is a Warden in the company of the 3rd Defendant working at Chyulu Hills National Park. It was the evidence of DW1 that the 3rd Defendant has full jurisdiction and authority in respect of all the protected areas under the Wildlife Conservation and Management Act and that the areas include National Parks and National Reserves.

25. It was the evidence of DW1 that two surveys have been conducted in respect of Chyulu Hills National Park; that after the first survey, the Plaintiff's members were resettled and that the Plaintiff's members declined to collect the letters of allotment in respect of the land that they were being resettled on. It was the evidence of DW1 that the 3rd Defendant was issued with a title document in respect of the land belonging to the Park on 14th July, 2000 and that the Deed Plan shows the Park's boundary.

26. DW1 informed the court that the Plaintiff has previously sworn an Affidavit that it does not challenge the Legal Notice dated 2nd May, 1995 extending the Park and that the disputed portion of land is a water catchment area which should be preserved.

27. In cross-examination, DW1 stated that the Plaintiff's members had settled on land reserved for Chyulu Hills National Park whom they evicted in the year 2016. DW1 informed the court that the land belonging to the Park measures 73,427 Ha and that the schedule in the Kenya Gazette shows the land initially occupied by the Park to be 471 Km^2. It was her evidence that the Park was later extended and that there were no people to be consulted before the said extension was done.

28. DW1 finally informed the court that before 1990, there was no dispute as to the land occupied by the Park and that she did not know if the only extension of the Park was the one in respect of 47,000 Ha. DW1 admitted that the County Council of Makueni should have been consulted before boundary plan number 204/71 was prepared extending the Park.

29. The 3rd Defendant's Surveyor, DW2, informed the court that two surveys were conducted which confirmed that the disputed land is part of the Park; that the land in question was initially a game reserve where grazing was allowed and that the Plaintiff's members started settling in the game reserve in early 1990's. That is when it was decided that the whole land should be gazetted as a National Park.

30. DW2 informed the court that when land is set aside for a particular purpose, a boundary plan is usually prepared as a guide and then people are notified of the same vide a Gazette Notice. After the expiry of the notice, it was the evidence of DW2 that a Legal Notice is then issued and then a survey plan is prepared. DW2 stated that the 3rd Defendant did not consult the County Council of Makueni while extending the boundaries of the Park because the disputed land was government land and not Trust Land.

31. Although every boundary plan must be gazetted, DW2 stated that there was no Gazette Notice in respect for boundary plan number 204/71 that was done in 1991; that boundary plan number 204/75 done in 1995 was duly gazetted and that the 1995 plan covers the disputed land. It was the evidence of DW2 that Chyulu Hills National Park was initially a game reserve and the County Council should have given its consent before the extension of the boundaries of the Park.

32. The 4th Defendant's Surveyor, DW3, stated that the suit land is Trust Land and was before the promulgation of the 2010 Constitution administered by the County Council of Makueni as Trustee for the local communities before a portion of it was alienated to the 3rd Defendant for conservation purposes as part of Chyulu National Park.

33. It was the evidence of DW3 that before 1983, the boundary demarcating Tsavo West National Park was not in dispute; that at that time, the Plaintiff was farming and ranching in the area bordering the National Park and that in 1983, a boundary plan number 204/51 was done extending the Tsavo West National Park by 47,090 Ha.

34. Although a survey plan was to be done after the preparation of boundary plan number 204/51, none was done in respect to the land that was extended for the Park in 1983.

35. DW3 informed the court that the further extension of the Park vide boundary plan number 204/71 was done without the consent of the then Machakos County Council; that the said boundary plan was never gazetted and that the said extension is a nullity.

36. The third extension of the Park was done in 1995 vide boundary plan number 204/76 covering an area of 7,606.4 Ha and that a survey was done in 1998 encompassing the three extensions resulting into survey plan number F/R 287/36 which created L.R. No. 24362 measuring 73,427 Ha.

37. DW3 informed the court that the title that was issued to the 3rd Defendant should be cancelled because: the boundary plan No. 204/71 of 1991 was not gazetted and the consent of the County Council was never obtained; at the time of the 1991 extension, Mikululo Ranching Company was already using the disputed land and the 1995 extension and the subsequent survey of the entire land in 1998 was carried out when a dispute was already pending in court.

38. It was the evidence of DW3 that the area that the Plaintiff is entitled to is represented in boundary plans 204/71 and 204/76 covering a total of 17,326 Ha *(approximately 43, 315 acres)*.

Submissions:

39. The Plaintiff's advocate submitted that the Plaintiff's members have always been in occupation of the suit land; that the initial size of the Park was approximately 47,090 Ha and that Boundary Plan No. 204/71 extending the Park was never gazetted.

40. Counsel submitted that the Plaintiff's members should have been consulted before the boundaries of the Park were extended and that the 3rd Defendant breached the provisions of Sections 117 and 118 of the repealed Constitution.

41. The 1st and 2nd Defendants' advocate submitted that the gazettement of Chyulu National Park was done under the Wildlife *(Conservation and Management)* Act; that under Section 6 of the Act, the Minister, after consultation with the competent authority, may declare any area of land to be a National Park and that the alteration of the boundaries of Chyulu Hills National Park was lawful.

42. The 1st and 2nd Defendants' counsel submitted that the disputed land was Trust Land and was administered by the County Council of Makueni as a Trustee for the local community; that the County Council of Makueni was consulted and that the law was complied with at the time of gazettement of the disputed area.

43. The 1st and 2nd Defendants' advocate submitted that the Plaintiff's claim is contrary to the spirit of the Constitution, and in particular Article 69; that the doctrine of public trust should take precedence and that the government agreed to resettle people who were living on the disputed land.

44. The 3rd Defendant's advocate submitted that two surveys were conducted and concluded that the suit property is part of Chyulu National Park *(the Park);* that the whole area was gazetted and the squatters were resettled somewhere else and that the 3 rd Defendant is in possession of a Title Deed.

45. Counsel submitted that the Plaintiff has not challenged the validity of the Grant that was issued to the 3 rd Defendant and that the Plaintiff is bound by its own pleadings. Counsel summited that the Plaintiff did not prove that the suit land was Trust Land prior to the Legal Notice of 2nd May, 1995 extending Chyulu National Park and that the mere occupation of Government Land by an individual or a group of people does not entitle them to the property.

46. The 3rd Defendant's counsel submitted that the documents that were produced by the Plaintiff do not give them the right to own or occupy the suit land and that the Plaintiff was never allocated the suit land.

47. Counsel submitted that the suit land was Government land at all times before it was allocated to Kenya Wildlife Service; that County Councils had no role to play in the allocation of unalienated Government land and that the Government complied with the provisions of the Wildlife *(Conservation and Management)* Act, 1985 in extending the boundaries of Chyulu National Park. The 3rd Defendant's counsel relied on several authorities which I have considered.

48. The 4th Defendant's counsel submitted that on or about 1975, the members of the Plaintiff entered into and occupied the disputed land with the permission of the then County Council of Machakos; that the disputed land was Trust Land and that the law relating to setting a part of the land in dispute was not followed. Counsel submitted that the 4th Defendant has no objection to the 3rd Defendant being given a title to the parcel of land represented by boundary plan number 204/51 and also the area covering the historical caves for purposes of conservation.

49. The 4th Defendant's advocate submitted that the title that was issued to the 4th Defendant should be cancelled and proper planning and survey to be undertaken to demarcate the correct boundaries of the area covered by the two unlawful extensions of the Park. The 4th Defendant's counsel relied on several authorities which I have considered.

Analysis and finding:

50. The Plaintiff's claim in this matter is that in 1975, several people started utilizing by grazing and farming the land in Mikululo area; that in 1982, the group that was in occupation of Mikululo area incorporated the Plaintiff and that the Plaintiff's members numbering 2,000 people have been in occupation of the disputed area measuring approximately 42,000 acres. It is the Plaintiff's case that by way of a Gazette Notice dated 2nd May, 1995, the 3rd Defendant unlawfully extended the boundary of Chyulu Hills National Park *(the Park)* by annexing the 42, 000 acres of land that was occupied by its members. The Plaintiff is seeking for a permanent injunction restraining the 3rd Defendant from evicting its members from the land that they occupy in Mikululo area of Makueni County. The 4 th Defendant has supported the Plaintiff's claim.

51. On the other hand the 1st, 2nd and 3rd Defendants have argued that the disputed land belongs to the 3rd Defendant by virtue of it being registered in the name of the 3rd Defendant.

52. The issues for determination in this matter are as follows:

> ***a. Did the Plaintiff's members occupy the disputed land prior to the Gazette Notice extending Chyulu Hills National Park in 1995?***
>
> ***b. Is the land in dispute Trust land?***
>
> ***c. Was the right procedure followed in allocating the disputed land to the 3rd Defendant?***

d. Which orders should issue?

53. The evidence of the Plaintiff's Chairman, PW1, was that him, together with other people, began utilizing the suit land in 1975. It was his evidence that in 1977, they requested the District Commissioner to allow them cultivate the disputed land and also rare livestock on the land, which request was granted. PW1 stated that after incorporating the Plaintiff in 1982, the Plaintiff sub-divided the land amongst 2,000 members and that it was not until the year 1993 that the 3rd Defendant's officials showed up claiming that the land belongs to the 3rd Defendant.

54. PW1 produced in evidence the Certificate of Incorporation showing that the Plaintiff was incorporated on 29th August, 1982 as a limited liability company. PW1 also produced in evidence a letter dated 17th May, 1993 by the Kibwezi District Officer *(DO)* addressed to the District Commissioner, Machakos, informing him that the Plaintiff was utilizing 42,000 acres and should be issued with a Lease.

55. In the letter dated 28th February, 1985, the District Agricultural Officer informed the Commissioner of Lands as follows:

> ***"This land was not allocated to the group by anybody. They went to graze in the area during the drought of 1975/76 and up to now they are grazing there. Land allocation is done by your office and what has been recommended by the DAC and PAB is a 45 years Lease to the company so that they can graze in a more organized manner and conserve the available natural resources. Please do the needful."***

56. The correspondence produced by the Plaintiff shows that prior to the incorporation of the Plaintiff in 1982, there were people who were utilizing an unspecified acreage of the disputed land which had not been alienated either by the government or the then County Council of Machakos. Indeed, it was not until 1995 that the Plaintiff's members came to learn about the annexation of the land they were using for farming and raring livestock when Legal Notice number 180 of 12th May, 1995 was published. In the said Legal Notice, the then Minister of Tourism and Wildlife decreed as follows:

> ***"IN EXERCISE of the powers conferred by Sections 6(1) and 8(b) of the Wildlife Conservation and Management Act, after consultation with the relevant authorities, make the following order:-***
>
> ***ADDITION TO CHYULU***
>
> ***HILLS NATIONAL PARK***
>
> ***All that area of land measuring approximately 76.0 square kilometers (76,000 Ha) situated North-West of Mtito Andei Town in Makueni District of Eastern Province, the boundaries of which are particularly delienated and edged purple on Boundary Plan No. 204/76 which is signed, sealed and deposited at the Survey Records Office, Survey of Kenya, Nairobi."***

57. This is the Legal Notice that the Plaintiff has claimed incorporated the disputed parcel of land, and which gave rise to the title document that was issued to the 3rd Defendant for land known as L.R. No. 24362.

58. The Plaintiff has therefore shown by way of documentary evidence that before Legal Notice No. 180 of 12th May, 1995 was issued, which notice gave rise to the title in respect of L.R. No. 24362 measuring 73,427 Ha *(approximately 184,000 acres),* the Plaintiff's members were in occupation of the said land. Indeed, the presence of the Plaintiff's members on the land before 1995 was corroborated by DW1. According to DW1, the government was willing to resettle the Plaintiff's members on another parcel of land but they declined to collect their letters of allotment.

59. That being the case, the next issue for determination is how the 3rd Defendant acquired its title and more particularly the extension of its boundaries.

60. All the parties in this matter called expert witnesses who gave a chronology of how the 3rd Defendant acquired the title for land measuring 73,427 Ha. Indeed, a joint report that was prepared by the District Surveyor, Makueni and the 3rd Defendant's Surveyor, was produced in evidence. The two Surveyors testified in this court and agreed on the contents of the report and the survey plans that were available.

61. The evidence of the Plaintiff's Surveyor *(PW2)* and 3rd Defendant's Surveyor *(DW2)* was that in 1983, the boundaries of the then West Tsavo National Park was extended by way of Boundary Plan number 204/51. The said boundary plan was produced in evidence by the two Surveyors. Other than the beacons, and as happens with all boundary plans, the acreage of the land that was acquired was not indicated.

62. The boundary plan of 1983 shows the extend of Tsavo West National Park, and the additional land that was taken up after the extension. It is the extension of the old Park vide boundary plan number 204/51 of 4th February, 1983 that established the Chyulu Hills National Park, an off-shot of Tsavo West National Park. The Plaintiff has no qualms with the 1983 boundary plan. According to the Plaintiff and the 4th Defendant, the Plaintiff's occupation was to the North-Western side of the boundary of the 1983 boundary plan number 204/51.

63. The Surveyors of all the parties are agreeable that there was a further extension of the Park's boundary in 1991 measuring 9,720.91 Ha *(approximately 24,300 acres).* By this time, the Plaintiff had already started asking the County Council of Makueni and the 1st Defendant that the land extending to the 1983 boundary plan should be allocated to them. The 1991 Boundary Plan No. 204/71 was produced in evidence.

64. After the second extension of Chyulu Hills National Park was done in 1991 *(the undisputed extension having been done in 1983)*, the third extension of the boundaries was done on 22nd August, 1994 vide Boundary Plan No. 204/76. It is Boundary Plan number 204/71 *(9,720.91 Ha)* and 204/76 *(7,606.4 Ha)* that were combined together with the 1983 boundary plan that gave rise to the combined land which is L.R. No. 24362 measuring 73,427 Ha.

65. The joint report of the Surveyors has an illustration of the extensions of Chyulu Hills National Park and the distribution of villages. The diagram shows the boundaries of the 1983 boundary plan; the 1991 boundary plan measuring 9,720 Ha and the 1994/1995 boundary measuring 7,608 Ha.

66. From the diagram that was produced by the two Surveyors who visited the suit land, most of the villages are concentrated on Boundary Plan Number 204/76 of 1994/1995. The said diagram also shows the existence of a borehole and a maize farm on boundary plan number 204/76. The Surveyors concluded their report by stating that *"all the land occupied by Mikululo Ranching Company is under the Lease given to Kenya Wildlife Service..."*

67. The Surveyors further stated in their report that although they managed to get the gazette notices for boundary plan number 204/51 *(the 1983)* and 204/76 *(the 1995),* they did not get a Gazette Notice for boundary plan number 204/71 *(the 1991).*

68. All parties are therefore agreeable that the Grant that was issued to the 3rd Defendant in the year 2000 for L.R. No. 24362 is a combination of the three Boundary Plans, which are extension of the original Tsavo West National Park. The Plaintiff and the 4th Defendant have claimed that extension of the 1983 boundary vide Boundary Plan numbers 204/71 and 204/76 was illegal because firstly, the Plaintiff's members they were already in occupation of the land and secondly, there was no consultation with the 4th Defendant or the Plaintiff's members before the said extensions of the boundary was done.

69. Though the 3rd Defendant produced in evidence Gazette Notice No. 12 of 4th February 1983 which altered the boundary of Tsavo West National Park vide Boundary Plan Number 204/51, it did produce in evidence the Gazette Notice that purported to extent the Park by a further 9,720.91 Ha vide Boundary Plan Number 204/71 in 1991 which the Plaintiff's members are claiming.

70. The evidence of the Surveyors, *(PW2 and DW3)* was that the extension of the Park in 1991 past the *"Wikiamba"* beacon was illegal because the said land was Trust Land and was already occupied by the natives. It was the evidence of PW2 that in any event, the 1991 Boundary Plan number 204/71 was never gazetted as per the law and should be invalidated.

71. This matter having been filed in 1995, the applicable law is the law that was subsisting then. The Wildlife Conservation and Management Act, which came into force on 10th January, 2014 repealed the Wildlife *(Conservation and Management)* Act Cap 376 *(the Act).*

72. Section 6 of the Act *(repealed)* provided that the Minister, after consultation with the competent authority, may by order declare any area of land to be a National Park. The Act further provided that where the competent authority declines to give consent, the National Assembly could approve the order. The Act further stated that in the case of Trust Land, the area concerned must first be set apart in accordance with Section 118 of the Constitution.

73. Section 8 of the Act *(repealed)* further provided that subject to the provisions of Section 6, the Minster may alter the boundaries of a National Park by adding or subtracting from the area thereof. The law therefore gave to the Minister the mandate to alter boundaries of National Parks but on condition that he consults *"competent authorities."*

74. The Plaintiff has argued that the disputed area is Trust Land and that the Park could not have been lawfully extended in 1991 and 1995 before setting apart the land. This court analyzed extensively the law relating to the alienation of Government land and Trust Land. In the case of ***Bahola Mkalindi Rhigho & 9 others vs. Michael Seth Kaseme & 2 others (2016) eKLR,*** the court held as follows:

> ***"100. 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.***
>
> ***101. Under Section 3 of the Government Land Act, it is only the President who was allowed to make grants or dispositions over unalienated Government land.***
>
> ***102. ...***
>
> ***103. Once the approved candidate for the land had been selected, and the approved Part Development Plan (PDP) by the Director of Physical Planning is issued, an offer was made to the person by the Government. The offer is what came to be known as a letter of allotment which used to be signed by the Commissioner of Lands, or his nominee."***

75. The above process in respect of allocation of unalienated government land was reiterated by PW2. It was the evidence of PW2, a Government Surveyor, that even if the suit land was unalienated government land, the 3rd Defendant was required to follow the above procedure before extending the boundaries of the Park in 1991 and 1995. It was the evidence of PW2 and DW3 that in any event, the land that the 3rd Defendant purported to acquire in 1991 and 1995 was Trust Land and not Government Land.

76. The Wildlife and Conservation Management Act *(repealed)* provided that the Minister could acquire Trust Land for the purpose of a

National Park after setting apart the land pursuant to the provisions of Section 118 of the repealed Constitution.

77. Section 118 (1) of the repealed Constitution provides as follows:

> ***"Where the President is satisfied that the use and occupation of an area of Trust land is required for any of the purposes specified in subsection (2), he may, after consultation with the County Council in which the land is vested, give written notice to that County Council that the land is required to be set apart for use and occupation for those purposes; and the land shall then be set apart accordingly and there shall be vested in the Government of Kenya or in such other person or authority referred to in subsection (2) as may be specified in the written notice, such estates, interests or rights in or over that land or any part of it as may be specified in the written notice."***

78. The procedure for setting apart Trust Land is provided under Section 13(2) of the Trust Land Act as follows:

> ***"(2) The following procedure shall be followed before land is set apart under subsection (1) of this section—***
>
> > ***(a) the council shall notify the chairman of the relative Divisional Board of the proposal to set apart the land, and the chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall meet to consider the proposals, and the chairman shall forthwith inform the council of the day and time of the meeting;***
> >
> > ***(b) the council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered;***
> >
> > ***(c) the Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting;***
> >
> > ***(d) the recommendation of the Divisional Board shall be considered by the council, and the proposal to set apart the land shall not be take not have been approved by the council except by a resolution passed by a majority of all the members of the council:***
>
> ***Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three-quarters of all the members of the council."***

79. In the ***Bahola*** case *(supra),* this court analyzed the law relating to Trust Land as follows:

> ***"85. Under the repealed Constitution and the Trust Land Act, Trust Land was neither owned by the Government nor by the County Council within which the land fall. The County Council simply held such land on behalf of the local inhabitants of the area.***
>
> ***86. 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.***
>
> ***89. 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."***

80. Indeed, setting apart of Trust Land pursuant to the provisions of Section 118 of the repealed Constitutional and Section 13 of the Trust Land Act could not be complete until prompt payment of full compensation is done 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 *(See Section 117 (4) of the repealed Constitution).*

81. I have perused the Trust Land Act which was repealed by the Community Land Act (No. 27 of 2016). The Act has a Schedule depicting *"Makueni Area"* as an area of land situated in the Machakos District, whose boundaries are delienated in *"Boundary Plans No. 183/12 and No. 183/17, which are deposited in the Survey Records, Survey of Kenya."* Although the land encompassing Trust Land for Makueni is clearly defined in the Act, neither the Plaintiff nor the Defendants produced the Boundary Plan Nos. 183/12 and 183/17. The description of *"Makueni Area"* as *"Trust Land"* is in line with Section 114(1) (a) of the repealed Constitution which provided as follows:

> ***"(1) Subject to this Chapter, the following descriptions of land are Trust land –***
>
> ***(a) land which is in the Special Areas (meaning the areas of land the boundaries of which were specified in the First Schedule to the Trust Land Act as in force on 31st May, 1963), and which was on 31st May, 1963 vested in the Trust Land Board by virtue of any law or registered in the name of the Trust Land Board."***

82. The non-production of the boundaries delienating the Trust Land for *the "Makueni Area"* can only be used as against the 1st and 2nd

Defendants, who, as the custodian of the plans, should have produced them. Indeed, the 1st, 2nd and 3rd Defendants did not place any record before the court to show that the land that the 3rd Defendant acquired in 1991 and 1995 was unalienated Government, and therefore did not require them to consult the then County Council of Makueni and the local residents.

83. Even if it is argued that the land that the 3rd Defendant acquired in 1991 and 1995 vide Boundary Plans number 204/71 and 204/76 respectively was unalienated Government land, the consultation with competent authority that was required by the law was never followed.

84. The evidence of the County Surveyor, DW3, that the disputed land is Trust Land was never controverted by the 1st, 2nd and 3rd Defendants by way of documents. Indeed, the Schedule of the Trust Land Act shows that at independence, the then Machakos District, which included the current Machakos and Makueni Counties, was Trust Land, and was depicted in Boundary Plans 183/12 and 183/17 held in the Survey Records Office. The use of the said land was governed by the Trust Land *(Makueni Area)* Rules which were last amended by Legal Notice No. 625 of 1963.

85. The assertion by the Plaintiff that the suit land was Trust Land was admitted by the 1st and 2nd Defendants' counsel in his submissions as follows:

> ***"The suit land in question was Trust Land and was administered by the County Council of Makueni as a trustee for the local communities whose office was sufficiently consulted at the time of gazettement of the said area to form party of Chyulu Hills National Park."***

86. By virtue of the provisions of Section 115 of the repealed Constitution, all Trust Land within the jurisdiction of any County Council was vested in the Council for the benefit of the persons ordinarily resident on that land. The Council could set aside apart such land either for purposes of Government or by the Council on its own volition for other purposes.

87. That being the case, the allocation of the disputed land in 1991 and 1995 should have complied with the provisions of Sections 117 and 118 of the repealed Constitution, Section 8 of the Wildlife *(Conservation and Management)* Act, Cap 376 *(repealed)* and Section 13 of the Trust Land Act *(repealed).* That did not happen during the extension of the boundary of Chyulu Hills National Park.

88. The extension of the boundaries of Chyulu Hills National Park vide Boundary Plan number 204/71 of 1991 was neither gazetted nor followed the above provisions of the law. The views of the then Makueni County Council were never sought for before the said extension. Indeed, the Plaintiff's members were already in occupation of a portion of the land and had recognizable interests in the land. The same anomaly occurred in 1995 when a further extension of the Park was done vide Boundary Plan number 204/76 which was gazetted in Legal Notice No. 180 of 1995.

89. Consequently, the finding of this court is that the 1998 survey of the land covering the two extensions represented in Boundary Plans number 204/71 and 204/76 was unconstitutional, unlawful, null and void. Indeed, the 1998 survey of the Park was carried out during the subsistence of this matter, and when an order of *status quo* had been granted by the court. The said survey and the issuance of the title to the 3rd Defendant should not have been issued.

90. For the reasons I have given above, I find that the 3rd Defendant is not entitled to the land represented in Boundary Plans number 204/71 and 204/76 measuring 9,720 Ha and 7,606 Ha respectively. Consequently, the Plaintiff's suit is allowed in the following terms:

> ***a. A permanent injunction be and is hereby issued restraining the Defendants from evicting the Plaintiff and its members, families, servants and/or agents from the land in Mikululo area, Makindu Division represented in Boundary Plans number 204/71 and 204/76 measuring a total of 17,326 Ha.***
>
> ***b. The Grant for L.R. No. 24362 for land measuring 73,427 Ha be and is hereby revoked, and in its place a Grant be issued to Kenya Wildlife Service as depicted in Boundary Plan number 204/51 which was gazetted in Legal Notice No. 13 of 26th January, 1983.***
>
> ***c. The 3rd Defendant to pay the costs of the suit.***

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF FEBRUARY, 2019.

O.A. ANGOTE

JUDGE