



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. 18 OF 2018

KENYA AGRICULTURAL AND LIVESTOCK

RESEARCH ORGANIZATION (KALRO).....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF KITUI.....RESPONDENT

JUDGMENT

1. In the Petition dated 24th September, 2018, the Petitioner has averred that it is a Public State organ established under the Kenya Agricultural and Livestock Act No. 17 of 2013; that it is the national premier agricultural and livestock public research organization and that it is mandated to promote, streamline, co-ordinate and regulate research in crops, livestock, genetic resources and biotechnology in Kenya.
2. The Petitioner has further described itself as the successor of Kenya Agricultural Research Institute (KARI) which owned, occupied, ran and carried out agricultural research activities at Ithookwe Sub-Centre since its establishment in 1979 and that the ownership and occupation rights of Kenya Agricultural Research Institute (KARI) over the suit property was acknowledged by the County Council of Kitui.
3. The Petitioner has averred that despite the Respondent being aware of, acknowledging and recognizing the Petitioner's ownership, possession and occupational rights over the suit land, the Respondent, through its officers and employees, wrongfully entered and took possession of a portion of the Petitioner's land measuring approximately 17.5 Hectares.
4. According to the Petitioner, the Respondent, after clearing a portion of the suit land, also erected eighteen (18) green houses, sank a borehole, put up six (6) plastic water tanks and built a water pen covering approximately three (3) acres of the suit land.
5. The Petitioner is seeking for a declaration that it is entitled to exclusive and unimpeded right of possession, occupation and use of all land known as Kyangwithya/Tungutu/440 measuring approximately 17.5 Ha; a permanent injunction restraining the Petitioner from remaining or continuing in occupation of the suit land and vacant possession of the suit property. The Petitioner is also claiming for general damages for trespass and the costs of the suit.
6. In response, the Respondent's Chief Officer responsible for Agriculture and Livestock Development deponed that the Petitioner has never purchased or acquired land known as Kyangwithya/Tungutu/440; that the Respondent and its predecessor in title has always been the legal owner of the suit land and that the Petitioner never entered into any Agreement for the transfer of the suit land with the Respondent and that the use of the suit land by the Petitioner was out of the Respondent's goodwill.
7. The Respondent's officer finally deponed that the Petitioner has no vested registrable interests in the suit land; that the Kenya Agricultural and Livestock Research Organization (KALRO) Ithookwe Dryland Research Sub-Centre never acquired the suit land and that the Respondent and its predecessor have never recognized the Petitioner or its predecessor as the owners of the suit land.
8. The Respondent's Chief Officer finally deponed that upon promulgation of the Constitution, the functions and powers of aspects of agriculture, including research, were vested in the County Governments and that the Respondent is merely carrying out its constitutional mandate of agriculture including crop and animal husbandry and that the suit land is public land vesting in and owned by the Respondent.
9. In his Further Affidavit, the Petitioner's Legal Officer deponed that the suit land was reserved and allocated to the Petitioner and its predecessor for public purposes of agricultural research; that the Petitioner and its predecessor have occupied and used the land for more than forty (40) years and that the Respondent's predecessor held the title to the suit land on behalf of the Petitioner and the public at large.
10. The Petitioner's advocate submitted that Article 62(1) (b) of the Constitution defines "public land" as land lawfully held, used and occupied by any State organ; that the Petitioner is a public State Corporation and that the Petitioner holds, uses and occupies the suit land which is comprised in its Ithookwe Research Sub-Centre.

11. The Petitioner's advocate submitted that the Certificate of Search produced by the Petitioner shows that the suit land was reserved for Ithookwe Sub-Station for Agriculture Research; that the Petitioner and its predecessor have been using the land since 1966 and that the attempt to alienate and or acquire the suit land by the Respondent is a gross infringement of the Petitioner's right to own property as provided under Article 40.

12. On the issue of the functions of the National and County Governments, Counsel submitted that the functions of a County Government do not include Agricultural Research and Development. Counsel submitted that the Petitioner is entitled to damages for trespass assessed at Kshs. 700,000.

13. The Respondent's advocate submitted that the suit land is registered in the name of its predecessor; that the reservation of the land for Ithookwe Sub-Station of Agriculture Research does not give the Petitioner the right to ownership of the land and that Section 37 of the Land Registration Act provides the manner in which ownership of land is transferred from one party to the other.

14. The Respondent's advocate submitted that the Respondent's predecessor did not have the powers and functions of agriculture and that is why it allowed the Petitioner to use the suit land and that the Respondent is using the suit land for public purpose.

15. The Respondent being the registered proprietor of the suit land, counsel submitted that the Petitioner cannot claim that the Respondent has trespassed on the land and that the Petition should be dismissed.

Analysis and findings:

16. The Petitioner is a public agricultural and livestock research organization established under the Kenya Agricultural and Livestock Research Act, No. 17 of 2013. The Act mandates the Petitioner to expedite equitable access to research, information, resources and technology to the public and promote the application of research findings and technology in the field of agriculture.

17. It is not in dispute that the Petitioner is the Successor of Kenya Agricultural Research Institute (KARI) which was established under the Science and Technology Act (*repealed*). It is also not in dispute that KARI operated the Kenya Agricultural and Livestock Research Organization (KALRO) Ithookwe Dryland Research Sub-Centre from around the year 1979.

18. The Certificate of Official Search annexed on the Petitioner's Legal Officer's Affidavit shows that parcel of land known as Kyangwithya/Tungutu/440 measuring approximately 17.5 Hectares was registered in the name of the then Kitui County Council on 5th May, 1977. On the same day, the suit land was "*reserved for Ithookwe Research Sub-Station for Agriculture Research.*"

19. The Respondent has not disputed the Petitioner's averment that the land has also been used and operated from time to time since 1979 by the Petitioner's predecessor (*KARI*) for agricultural and research purposes. The Respondent has also not denied that it was not until the year 2018 that it entered the suit land and erected green houses, sank a borehole and built a water pen covering approximately 3 acres of the suit land.

20. According to the Respondent, its predecessor (*Kitui County Council*) being the registered proprietor of the suit land, it is entitled to the suit land, and that it only allowed the Petitioner's predecessor (*KARI*) to use the land because the then Kitui County Council did not have the mandate to engage in agricultural activities. However, it is the Respondent's case that under the current constitutional dispensation, it is the county government that has been given the responsibility "*to develop better agricultural practices and for agricultural purposes.*"

21. The only issue that I am supposed to determine is who between the Petitioner and the Respondent is entitled to use and or occupy the suit land.

22. The suit property was registered in the name of the then Kitui County Council in 1977. In the same year, the suit land was reserved for "*Ithookwe Sub-Station for agriculture research,*" which was an establishment of the Petitioner's predecessor, *KARI*. The Petitioner and its predecessor are State organs. Considering that the suit land was registered in 1977, the law applicable is the repealed Constitution and the Registered Land Act (*repealed*).

23. It is trite that under the repealed Constitution, all Trust land vested in the County Council within whose area of jurisdiction it was situated, except for any body of water that immediately before 12th December, 1964 was vested in the Government of Kenya and minerals or mineral oils (*See Section 115(1) of the repealed Constitution*).

24. Section 115(2) of the repealed Constitution provided that the County Councils were to hold Trust land vested in them for the benefit of the persons ordinarily resident on that land. The Constitution further provided the manner in which Trust land could be removed from the purview of communal ownership of the people. In the case of *Bahola Mkalindi Rhigho vs. Michael Seth Kaseme & 3 others (2016) eKLR*, this court held as follows:

"93. 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."

25. It is therefore obvious from the provision of Section 117(1) of the repealed Constitution that the County Council could "*set apart*" Trust land for use and occupation by a public body. Indeed, the setting apart of Trust land for public purpose happened in the whole country, whereby several public bodies like schools, hospitals, national parks, stadiums, bus parks, public spaces, agricultural research centres etc.

were set up.

26. In some instances, the Trust land that was set apart for public purpose was reserved by issuance of titles in the name of the respective County Councils and specifically stating the purpose for which the land had been “reserved” for. In other instances, such land was reserved either by way of approved Part Development Plans or duly registered maps. In few instances, the concerned public bodies would be registered as the proprietors of the land so set apart.

27. The evidence before me shows that the suit land has always been used and occupied by the Petitioner’s predecessor (KARI) before the Petitioner took over its functions, assets and liabilities in the year 2003. Indeed, the suit land was reserved for agricultural research purposes, and handed over to the Petitioner’s predecessor as at the time of registration in 1977.

28. In his letter dated 6th August, 2009, the then County Clerk of the Respondent’s predecessor informed the Director of KARI that indeed the suit land was reserved for “Ithookwe Sub-Centre for agriculture Research,” and that the issue of processing the title in the name of KARI was to be placed before the Education Housing and Social Services Council Committee. That seems not to have happened to date.

29. Article 62(1) (b) of the Constitution has defined Public land to include “land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease.” Such land vests in the national government in trust for the people of Kenya, and is to be administered on their behalf by the National Land Commission (See Article 62(3) of the Constitution).

30. Indeed, Article 62(1) (b) of the Constitution, just like the repealed Constitution, does not require a public body or State organ to have a title for the land it is using or occupying to prove ownership of the same. All that a State organ is supposed to prove is that it is “lawfully holding, using or occupying” land except in a situation where it has leased the land from a private person.

31. As I have stated above, the suit land was reserved by the Respondent’s predecessor for agricultural research purposes in 1977, and has always been used by the Petitioner and its predecessor since then until now. Being the custodians of the records of its predecessor, the burden of proving that the suit land was not lawfully set apart for research purposes was on the Respondent and not the Petitioner. The Respondent failed to do so.

32. Having reserved the land for agricultural research purposes in 1977, and having handed over the land to the Petitioner and its predecessor who have continued to use it for the reserved public purpose, I find and hold that the Petitioner and its predecessor are entitled to the said land. Indeed, the suit land was being lawfully held, used and occupied by the Petitioner, which is a State organ, and is public land pursuant to the provision of Article 62(2) (b) of the Constitution.

33. Although it is true, as submitted by the Respondent’s advocate, that Agriculture, including crops and animal husbandry; livestock sale yards; County abattoirs; plant and animal disease control; and fisheries, was devolved to the county governments pursuant to the Fourth Schedule of the Constitution, the Constitution is silent on which level of government is responsible for promotion, streamlining, coordinating and regulating research in crops, livestock, genetic resources and biotechnology in Kenya, which function is currently being undertaken by the Petitioner.

34. In a situation where the Constitution or national legislation does not assign a function to a County, then such a function or power belongs to the national government (See Article 186(3) of the Constitution). Consequently, it is erroneous for the Respondent to hold the view that it can take over the functions of the Petitioner, and all the land reserved for such functions just because “Agriculture” was devolved to Counties.

35. Having found that it is the Petitioner that is entitled to the suit land, I find and hold that the purported takeover of the suit land by the Respondent is an infringement of the Petitioner’s right to own property as provided under Article 40 of the Constitution. The Respondent should therefore vacate the said land.

36. Although this court has unfettered discretion to order for damages for trespass, no evidence was placed before me to show that the Plaintiff was utilizing the land as at the time the Respondent cleared it and drilled a borehole, built a water pen and put up tanks. Consequently, and in the absence of evidence on the damage that was occasioned on the land by the Respondent, I decline to order for the payment of damages for trespass.

37. For the reasons I have given above, I allow the Petitioner’s Petition dated 24th September, 2018 as follows:

a. A declaration be and is hereby issued that the Petitioner is entitled to exclusive and unimpeded right of possession, occupation and use of all that property known as Title Number Kyangwithya/Tungutu/440 measuring approximately 17.5 Hectares comprised in the Petitioner’s Ithookwe Research Sub-Centre.

b. A declaration be and is hereby issued that the Respondent, whether by itself, servants or agents or otherwise howsoever, has no right, interest and or title to the said property Title Number Kyangwithya/Tungutu/440 measuring approximately 17.5 Hectares comprised in the Petitioner’s Ithookwe Research Sub-Centre and are wrongfully in occupation of the same, if at all, and are accordingly trespassers on the same.

c. A declaration be and is hereby issued that the Respondent, whether by itself, officers, servants or agents or otherwise howsoever, are not entitled to remain on the said property being Title Number Kyangwithya/Tungutu/440 measuring approximately 17.5 Hectares comprised in the Petitioner’s Ithookwe Research Sub-Centre.

d. A permanent injunction be and is hereby issued restraining the Respondent, whether by itself, officers, assigns, servants, agents or otherwise howsoever, from entering, accessing, occupying, remaining on or continuing in occupation of the

Petitioner's property or any portion thereof being title number Kyangwithya/Tungutu/440 measuring approximately 17.5 Hectares comprised in the Petitioner's Ithookwe Research Sub-Centre and or occupying, possessing and or erecting any structures thereon.

e. The Respondent to give vacant possession of the Petitioner's property.

f. The Respondent to pay costs of this suit.

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

O.A. ANGOTE

JUDGE