**Kambanga Ranching (DA) Co Ltd v Ndoro & 146 others (Environment & Land Case 9 of 2023) [2024] KEELC 333 (KLR) (Environment and Land) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 333 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT VOI**

**ENVIRONMENT AND LAND**

**ENVIRONMENT & LAND CASE 9 OF 2023**

**SM KIBUNJA, J**

**JANUARY 31, 2024**

**[FORMERLY MOMBASA ELC NO. 21 OF 2022]**

**BETWEEN**

**KAMBANGA RANCHING (DA) CO LTD ..... PLAINTIFF**

**AND**

**KOMBOZA NDORO & 146 OTHERS ..... DEFENDANT**

## JUDGMENT

1. The plaintiff commenced this suit through the plaint dated the 28th February 2022, seeking for:
    1. A declaration that the Defendants' occupation of the plaintiff's parcel of land being LR No. 29094 is unlawful, illegal and an affront to sanctity of title.
    2. A mandatory order compelling the Defendants, by themselves, their families, servants and or any person(s) claiming right under them ot through them to vacate and deliver up to the plaintiff, in vacant possession, all that parcel of land being LR No. 29094.
    3. A permanent injunction restraining the Defendants by themselves, their families, servants and/ or any person(s) claiming right under them or through them from going into , or in any way whatsoever entering and/or interfering with, or any part of, all that parcel of land being LR No. 29094.
    4. Damages.
    5. Costs of this suit.
    6. Interest on (4) and (5) above at court rates from the date of judgment until payment in full.

7. Such other or further orders as the Honourable Court may deem fit and just to grant.

The plaintiff avers that the suit land was set aside for ranching and not human habitation. That it was allotted to the plaintiff in 2010 by the Government of Kenya, and formally registered in its name on 11th March 2013. That in 2011, some people started trespassing on portions of the land carrying out charcoal burning, poaching and building shanties. The plaintiff's effort to stop those people's activities did not succeed and hence this suit.

2. The defendants opposed the claim through their statement of defence and counterclaim dated the 22nd April 2022. They averred that they have been living on 3,753 acres of the 33,000-acre suit land for between 15 to 50 years as owners of their respective portions. That the plaintiff was allotted the land through letter of allotment dated 28th December 2010 and issued with a title in 2013 for 45 years lease from 1st January 2011 while knowing the defendants were in possession of their portions, and cannot claim a better title than the defendants. In their counterclaim, the defendants prayed for following:

   a. A declaration that the plaintiffs are the lawful owners of three thousand seven hundred and fifty three (3,753) acres in Kambanga area.

   b. The plaintiffs have acquired the area of land measuring three thousand seven hundred and fifty three (3,753) acres by way of adverse possession.

   c. A declaration that by virtue of the provision of the constitution as regards duty of government to settle all Kenyans the Plaintiffs cannot be dispossessed of the portion of land they occupy by strength of a lease from the government.

   d. A declaration that the defendants can only lay claim on the unoccupied areas of land leased and has no power to lay a claim on occupied areas if it is within the leased area.

   e. Costs and interest of the counterclaim to be provided for.

   f. Any other relief this court deems just and fair to grant.

3. During the hearing, the plaintiff called George Mwakideu Mwasho, a director of the plaintiff, who testified as PW1. He adopted his statement dated 21st February 2022 and filed on 1st March 2022 as his evidence in chief. It was his testimony that the suit property was government land, that was leased to the plaintiff and certificate of lease dated 16th January 2013 issued. That the land was set aside for ranching purposes. That the plaintiff has been paying ground rent of Kshs.160,250, and was engaged in carbon trade. He admitted that the acreage in their letter of allotment dated 28th December 2010 was 12,948 hectares, while that in the title was 13,665 hectares. He explained that the acreage in the letter of allotment was only an approximation. The plaintiff testified that it is cultural practice for the Kasigau elders to settle any visitors who visit the area and agreed that the Wata community might have been living on the land in the past. He added that the Wata people were not there when the suit land was allocated to the plaintiff. He explained that in 1972, the District Agricultural Officer had allocated the ranches that were previously used as hunting blocks to various groups, including the plaintiff. He admitted that there were developments such as a school and health centre on the suit land, but stated he could not recall when they were built. The plaintiff also called Bartholomew Mwanyungu, a registered land surveyor, who testified as PW2. He told the court that he had conducted a survey of the suit land under instructions from the plaintiff and prepared a report dated 7th July 2021 that he produced as exhibit. He stated that the area encroached by the Zungulukani settlement is 1519 ha or 3753 acres. He admitted that there were buildings such a nursery school, primary school and a shopping centre on that portion of the land. Furthermore, he explained that the Zungulukani informal settlement had spilled over to the suit land and he had even recommended compulsory acquisition.

4. In their defence, the defendants called Bashora Muhindi Guyo, Zipporah Mbula Ndongo and Mabakani Badipha who testified as DW1 to DW3 respectively. DW1 testified that he was 53 years and had lived on the land since birth. He explained that Zungulukani settlement consists of three villages which has more people than the defendants herein. That the same settlement has water pans, schools and a dispensary which were built between 2016 and 2017. He denied that they were engaged in cutting down trees and burning charcoal on the land. He testified that he is from the Wata tribe who resides in Voi and other areas of Taita Taveta County. He disclosed that there was a meeting between the residents of Zungulukani and government officers where they were told to continue residing there as the government tries to bring an accord between them and the plaintiff. In cross examination he stated that the Wata came from a Kibas Mountain which is near the Zungulukani, and that they were not even aware that they were living on a ranch. He admitted that he did not have a birth certificate, but insisted that he is from Wata tribe from Kasigau and not a Duruma from Samburu, Kwale County. DW 2, Zipporah Mbula Ndongo, a resident at Zungulukani testified that she has resided at Kasigau location for over 30 years. That she was married on the suit land and her children were attending Zungulukani Primary School. She also testified that her home is between Kwale and Taita Taveta Counties. DW 3, Masakani Badipha, a septuagenarian resident at Zungulukani testified that he has lived on the suit land from the time he was born in 1940. He stated that he was a farmer, and was not aware that the plaintiff had acquired title of the suit land. He added that his wife was buried on that land in the year before the suit was filed. He denied being a Duruma by tribe and testified that he was from the Wata tribe. He added that the Health Centre on the land was constructed by the County government.

5. The learned counsel for the plaintiff and defendants filed their submissions dated the 16th October 2023 and 27th November 2023 respectively that the court has considered.

6. The following are the issues for the determinations by the court:

   a. Whether LR No. 29094, the suit land, is private or public land.

   b. Whether the said land is registered with the plaintiff, and if so, whether it is entitled to the orders sought.

   c. Whether the defendants are entitled to the prayers in the counterclaim.

   d. Who pays the costs in the main suit and counterclaim?

7. The court has carefully considered the pleadings by both sides, evidence tendered by PW1, PW2, DW1 to DW3, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following determinations:

   a. Articles 62 and 64 of the *Constitution of Kenya* defines public and private land tenure as follows:

      " 62.

         (1) Public land is—

            a. land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

            b. 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;

c. land transferred to the State by way of sale, reversion or surrender;

d. land in respect of which no individual or community ownership can be established by any legal process;

e. land in respect of which no heir can be identified by any legal process;

f. all minerals and mineral oils as defined by law;

g. government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

h. all roads and thoroughfares provided for by an Act of Parliament;

i. all rivers, lakes and other water bodies as defined by an Act of Parliament;

j. the territorial sea, the exclusive economic zone and the sea bed;

k. the continental shelf;

l. all land between the high and low water marks;

m. any land not classified as private or community land under this Constitution; and

n. any other land declared to be public land by an Act of Parliament—

i. in force at the effective date; or

ii. enacted after the effective date.

(2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—

a. clause (1) (a), (c), (d) or (e); and

b. clause (1) (b), other than land held, used or occupied by a national State organ.

(3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

(4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use."

64. Private land consists of —

a. registered land held by any person under any freehold tenure;

b. land held by any person under leasehold tenure; and

c. any other land declared private land under an Act of Parliament."

As required by section 107 of the *Evidence Act* chapter 80 of Laws of Kenya, the plaintiff and the defendants herein have the duty to tender proof in support of their respective claims as contained in the plaint and counterclaim for the court to make a finding in their favour.

b. The plaintiff contends that it is the registered owner of the suit land. It has produced through PW1 a copy of the certificate of title as exhibit, which bears the name of the plaintiff. Section 26 of the *Land Registration Act* No.3 of 2012 provides that a certificate of title is prima facie proof of ownership unless it was acquired through, fraud, misrepresentation, illegality or unprocedurally. Those challenging the plaintiff's title, like the defendants herein, would need prove that that it was either obtained through fraud, misrepresentation, illegally or unprocedurally to succeed.

c. The defendants' main contention with the plaintiff's acquisition of title over the suit land is because it included the portion of the land they had settled on and where public utilities like school, bore holes and health centre had been set up for their use by the Government. They have no claim over the rest of the suit land. In their submissions, counsel for the defendants argue that the land is government land and that the government has been constructing public amenities like boreholes and schools there. However, the fact that public utilities like school, borehole and health centre are on a certain land do not make it public land as it is not one of the indicators of public land as defined under Article 62 of the *Constitution of Kenya*.

d. The plaintiff's evidence as presented by PW1 that is undisputed by the defendants is that it was allocated the suit land estimated to be 34,000 acres in 1972 by the Provincial Agricultural Board. That it was on 28th October 2010 issued with a letter of allotment, and grant over LR No. 29094 issued on 1st January 2011. This confirms that the origin of the suit land was as public land up to 2010 when the then Commissioner of Lands alienated or granted it to the plaintiff for private use on leasehold basis. It appears a portion of the suit land was already

occupied by some Wata people by the time it was allotted to the plaintiff. In his testimony, PW1 stated as follows during cross examination;

> "…. The plaintiff has a right to have the defendants who are squatters on the land evicted. I do not know the defendants individually, but I know when they started to come onto the land.
>
> Culturally, visitors to the area would have come to the Kasigau elders to be allowed to settle there. I know the Wata people who move from place to place in Voi and Kasigau area. There may have been Wata people on the land before it was allocated to us, but they were not on it when it was granted to the plaintiff.
>
> I am aware of the Surveyor's report, MFI (6). The whole Zunulakani Settlement Scheme is within our land.....
>
> There is a school and health center on the portion of the land defendants are occupying.....
>
> I cannot recall when the school and health center were erected on the land. To my knowledge, the plaintiff did not complain when the school and health center were erected.....
>
> When the defendants came to the land, we complained to the Central Government Administrative offices who visited the land before we filed this suit."

Though it is apparent from the above excerpt that PW1 kept changing his position on whether or not there were Wata people settled on a portion of the suit land when it was public land and before it was allocated to the plaintiff, the fact that public utilities like school and health center were built on that land can only point to one conclusion, that there were human beings residing in that neighbourhood. The facilities could not have been put up on the land if there were no people to use them.

e. The existence of the public utilities on the suit land was confirmed by PW2 who stated as follows during cross examination;

> "…. I noted an informal settlement on the land. I saw a nursery school and a primary school and a small shopping center on the land in dispute.....
>
> I recommended compulsory acquisition."

The defendants' case is that they have lived on a portion of the suit land even before the plaintiff was registered as proprietor of the leasehold interest. The fact that public utilities were indeed established, on the portion of the suit land that PW2 confirmed in his report was an informal settlement scheme, and with little or no objections from the plaintiff, gives credence to the defendants' case that they were indeed settled on that portion of the suit land when it was public land.

f. It is however unclear how the Government through the Commissioner of Lands proceeded to allocate and issue a lease to the plaintiff over the land without first removing or resettling the occupants thereon. It becomes more baffling that public utilities continued being developed on that portion of the suit land, definitely using public resources, even after the land was allocated and title issued to the plaintiff. Had the plaintiff joined the Attorney General and National Land Commission, that took over the functions of the defunct Commissioner of Lands, probably the thinking within the Government in allocating the suit land to the plaintiff,

while there were people residing on a portion of the said land. It would possibly been clarified what was meant to happen to the people on the land in view of the provisions of Article 43 of the *Constitution* on economic and social rights including housing, and the decision in the *Mitubell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR cited by the defendants.

g. That despite the fact that the defendants were on a portion of the suit land when it was converted from public land to private land through the allocation and registration in favour of the plaintiff by the Commissioner of Lands, the court has to make determinations on the issues before it on the facts, evidence and the law. It is a fact that the defendants have no title to the suit land or the portion of the suit land in their occupation. The title the suit land is in the name of the plaintiff, and the Government of Kenya has not challenged it. In the case of *Karaini Investment Limited v National Land Commission & 2 others* [2021] eKLR the court held that:

> " 26. The procedure for acquisition of public land was set out under the repealed *Government Lands Act*. Under the current legal framework, title to land may be acquired in the manner prescribed by Section 7 of the *Land Act*, which is through allocation, land adjudication process, compulsory acquisition, prescription, settlement programs, transmissions, transfers, long term leases of private land exceeding 21 years or in any other manner prescribed by law. If there is a dispute as to how land was acquired then it is the ELC and subordinate courts to determine such a dispute except where the contention is that the land in question was public land and that it was improperly or illegally acquired.
>
> 27. The role to be played by the NLC on one hand and the ELC and subordinate courts on the other hand are clearly delineated by law. The jurisdiction of NLC to review grants of public land, which in any event lapsed on 2/5/2017, did not extend to dealing with interests over private land. That fell within the domain of the ELC and the subordinate courts."

Based on the above, the court finds the plaintiff has proved that the suit land is lawfully registered in its name, while the defendants have failed to prove title to the 3,753 acres or any other portion of the suit land that they claimed in their counterclaim. However, in view of the finding that defendants, and others were already settled on a portion of the suit land, by the time the land was allocated and registered in favour of the plaintiff, it would not be just to order for their eviction without giving the National Land Commission an opportunity to investigate the allocation under Article 67 (2) (e) of the *Constitution*, and make recommendations to the court.

h. On the prayer for damages, the plaintiff has not tendered any evidence of the nature of the loss it may have suffered. The fact that the defendants were already on that portion of the suit land that they occupy by the time the plaintiff obtained title is enough to conclude no loss or damage has been suffered by the plaintiff by virtue of the defendants' occupation.

i. This suit was commenced through the plaint dated the 28th February 2022 and filed on the 1st March 2022. That according to the available evidence presented by PW1, the plaintiff became the registered owner of the leasehold interest over the suit land on the 16th January 2013. That

the requisite period of twelve (12) years that must lapse before the prescriptive relief of adverse possession in favour of the defendants could kick had not passed from 2013 to the date of filing the suit in 2022. The prayer of adverse possession by the defendants through the counterclaim is therefore unavailable to them for consideration.

j. Section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya prescribes that costs should follow the events, unless otherwise ordered for good cause, I am of the view that justice will be served better by ordering each party to bear their own costs due to the unique facts in this suit.

8. That flowing from the foregoing, the court finds and orders as follows:

a. That in view of the fact that the defendants' were in occupation of the suit land, before it was allocated and registered in the name of the plaintiff, this suit is hereby referred to the National Land Commission for investigations, under Article 67(2)(e) of the *Constitution*, and recommendations on the appropriate resettlement of the defendants.

b. The report by the National Land Commission be filed with ELC Voi in ninety (90) days from the date of this judgement.

c. That each party to bear their own costs in the suit and the counterclaim.

d. That as ELC Voi will have a judge from 1st March 2024, the report ordered above be filed with ELC Voi where this file will be forwarded to after this judgement.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED ON THIS 31ST DAY OF JANUARY 2024.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

In the Presence of:

Plaintiff : Mr. Odongo

Defendants : Mr Oddiaga

Wilson – Court Assistant.

**S. M. Kibunja, J.**

**ELC Mombasa.**