



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 243 OF 2014

(Formerly Mombasa ELC. No. 95 of 2011)

TSANGWA NGALA CHOME (*Suing as the Administrator of the*

Estate of the late MUMBA CHOME NGALA -deceased).....**PLAINTIFF**

VERSUS

TOWN COUNCIL OF MARIAKANI.....**1ST DEFENDANT**

KETRACO COMPANY LIMITED.....**2ND DEFENDANT**

MWABEJA, MWAMUNDU, MWAKAI CLANS.....**OBJECTORS**

KATEMBE NZEMBE LEWA & 13 OTHERS....**1ST INTERESTED PARTIES**

ATTORNEY GENERAL.....**2ND INTERESTED PARTY**

NATIONAL LAND COMMISSION.....**3RD INTERESTED PARTY**

JUDGMENT

Introduction and pleadings:

1. This is one of those matters that have pleadings and proceedings running into hundreds of pages; with several consent orders, some of which are disputed but have never been set aside; and several Applications which were never prosecuted. It is a matter that will give any Judge sleepless nights in an effort to write a coherent, justifiable Judgment. It is therefore not a surprise that the matter was transferred by the court on its own motion from Mombasa to Malindi, notwithstanding the fact that the suit property, although situated in Kilifi County, is nearer Mombasa than Malindi. Indeed, the Plaintiff's advocate protested at the order of the transfer of the suit to this court in his letter of 12th March, 2015 in which he stated as follows:

“We need to emphasize that there was no reason or need at all for transfer of the suit because the matter has been in Mombasa Law Courts for well over 44 years. Mariakani, where the suit land is situated is nearer to Mombasa”

2. The Plaintiff commenced this matter by way of Plaint dated 14th April, 2011 in which he sued two Defendants: The Town Council of Mariakani and Ketraco Company Limited (*the 1st and 2nd Defendants*). In the Plaint, the Plaintiff averred that he is the administrator of the Estate of the late Mumba Chome Ngala.

3. The Plaintiff averred in the Plaint that the deceased was the legal owner of all the piece of land measuring 2,328Ha or thereabout situated in Mariakani-Mitangoni; that they have resided on the said land for many years and that the remains of the late Mumba Chome were interred on the land on 6th April, 2001.

4. The Plaintiff further averred that before the death of Mumba Chome, two suits had been filed in Mombasa and that the court in those two matters gave to the late Mumba Chome the whole land; that the said decisions, including the decision in District Magistrate Court Case No. 26 of 1977, have never been challenged and that the late Mumba Chome was declared the owner of the land by the court.

5. The Plaintiff complaint was that the Town Council of Mariakani (*the 1st Defendant*) has purported to allocate or deal with the suit land on

the pretext that the land is Trust land and has proceeded to allocate the 2nd Defendant 200 acres of land; that the 1st Defendant has wrongfully identified three (3) claimants, that is, Mwamundu, Mwakai and Waliare as the only settlers on the suit land and that the said two groups (*clans*) were the same ones whose claims were dismissed by the courts in earlier proceedings.

6. The Plaintiff averred that the 1st Defendant should be restrained from dealing with the suit land and from receiving any money for compensation from the 2nd Defendant for the 200 acres that the 2nd Defendant intends to acquire. The Plaintiff then sought for the following orders:

a. A declaration that the suit land containing by measurement 2328 hectares as already surveyed by Pinatech Land Surveyors and Consultant is the property of Mumba Chome Ngala and the same be registered in the names of M/S Tsangwa Ngala Chome to hold in trust for the benefit of the family of the late Mumba Chome Ngala.

b. A permanent injunction barring any person howsoever whatsoever from trespassing upon the suit land.

c. Costs of the suit.

7. After the Summons and Plaint were served on the two Defendants (*1st and 2nd Defendants*), the matter came up for the hearing of the Plaintiff's Application for injunctive orders. However, while the matter was pending for the delivery of the Ruling, the parties' advocates informed the court that the Plaintiff had filed a notice withdrawing the suit as against the 2nd Defendant. That was on 11th May, 2012. On the same day, the advocates for the Plaintiff and the 1st and 2nd Defendants informed the court that they had recorded a consent which had compromised the suit. The court recorded the said consent as follows:

“The Plaintiff's suit is marked as settled in terms of the consent dated 7th May, 2012 with no order as to costs. The order of injunction is discharged.”

8. The record shows that on 12th October, 2012, the 1st Defendant filed an Application, in which it sought to set aside the consent order of 11th May, 2012. I shall revert to this Application later on in this Judgment.

9. The 1st Defendant also filed another Application dated 27th November, 2014 in which it sought for an order enjoining the Land Registrar, Kilifi County and for an injunctive order.

10. While the Application dated 27th November, 2014 by the 1st Defendant was pending, the 1st Defendant entered into another consent order dated 20th November, 2015 with the Plaintiff in which they agreed as follows:

“a. The suit between the 1st Defendant and the Plaintiff be and is hereby compromised, withdrawn and marked as settled.

b. The Application dated 27th November, 2014 is hereby withdrawn and an order of injunction, inhibition and prohibition in regard to the Title No. Kilifi/ Madzimbani/Mitangoni/B/1 are hereby discharged forthwith.

c. Each party to bear its own costs.”

11. On 26th May, 2015, the 1st Interested Party filed an Application in which they sought to be enjoined in the suit. The said Application was allowed by the consent of the parties.

12. The said 1st Interested Parties filed their Defence on 23rd June, 2015 in which they averred that since the days of their ancestors, they have been in actual, physical and uninterrupted occupation and use of various portions of the suit property; that the 2nd Defendant (*Ketraco*) had several portions of the Interested Parties' land excised for its project and that the Interested Parties were partially compensated by Ketraco in respect of their crops and trees. According to the Interested Parties, the discussion for the compensation in respect of the land has never been concluded to date.

13. The 1st Interested Parties have prayed for an order to compel the 2nd Defendant and the relevant government agencies to undertake an adjudication of the various portions of the Interested Parties' land that have been expropriated by the 2nd Defendant and an order for valuation and compensation be made by Ketraco to them.

14. The Objectors, who are also Petitioners in Petition Number 14 of 2014, filed a detailed Defence and Counter-claim on 12th May, 2016. The Objectors averred that they are clan members from various clans living and doing business on the suit land; that they are the owners of the unsurveyed parcels of land located at Mariakani location, Mitangoni Sub-location, Maji ya Chumvi village, Kaloleni area in Mariakani Division and that the suit land is about 6-13km from Mariakani Township on the Mombasa-Nairobi Highway.

15. The Objectors denied the allegations in the Plaint and averred that at all material times, the Mwabeja, Mwamundu and Mwakai clans have always resided on the disputed land since time immemorial; that the Land Case Number 26 of 1977 does not support the Plaintiff's claim and that the Objectors were able to request for and were granted proper proceedings from the Principal Magistrate's Court at Kaloleni and found that Mumba Chome lost the suit and was condemned to pay the costs.

16. The Objectors averred that sometimes in the year 2010, the Mwabeja clan realized that another clan called Walaire, who were licensees on the suit land, had started selling the suit land; that the Mwabeja clan filed a dispute with the District Land Disputes Tribunal which delivered its decision in favour of the Mwabeja clan and that the Plaintiff has so far filed three (3) suits in respect of the same land.

17. The Objectors finally averred that they are the lawful owners of the suit land; that the Plaintiff does not reside on the suit land; that the Plaintiff, in collusion with the then Deputy County Commissioner, stole money that had been deposited with the Deputy County Commissioner by Ketraco for compensation, thus undermining the due process and that the Plaintiff used a forged court order to have the green card opened in his favour and Title Deed issued to him.

18. The Objectors have sought for the following orders:

a. A declaration that the disputed land belongs to the Objectors to the exclusion of the Plaintiff and that the same be registered under their respective clan Trusts;

b. That this court do order prompt payment in full to the Objectors for part of their land which is in the process of being compulsorily acquired by the 2nd Defendant and that the money already deposited with the Deputy County Commandant, Kaloleni by Ketraco, be released to them and;

c. The costs of the suit to be awarded to them.

19. The Attorney General, who joined the suit, filed his Statement of Defence and Counter-claim which it withdrew vide a consent letter dated 27th February, 2017. I shall therefore not make any reference to the withdrawn Defence and Counter-claim. The 2nd Defendant filed its Defence and Counter-claim on 23rd June, 2016. The said Defence was also withdrawn by the 2nd Defendant vide a consent letter dated 27th February, 2017.

20. The 1st Defendant filed its Defence dated 27th June, 2016 on 27th June, 2016. In the Defence, the 1st Defendant, now the County Government of Kilifi, averred that the suit land has always been Trust land which was held by the defunct Town Council of Mariakani on behalf of the original residents of the said land.

21. The 1st Defendant further averred that if indeed Mumba Chome was a resident of Mitangoni, then he was one of the residents on the suit land on whose behalf the Town Council of Mariakani was administering the land; that the 2nd Defendant made a formal application for setting apart of 200 acres of the suit land for the purpose of constructing a 220/400KV electricity sub-station and that the 1st Defendant identified the indigenous clans that were occupying the suit property for compensation by the 2nd Defendant, which was assessed at KShs. 26,000,000.

22. Although the National Land Commission was enjoined in the matter as an Interested Party, it did not file any pleading.

The Plaintiff's case:

23. The Plaintiff's case commenced on 30th November, 2016, when the Plaintiff, PW1, testified. PW1 informed the court that he is the leader of the family of Mumba Chome Ngala who has since died; that he obtained the limited letters of administration for the Estate of Mumba Chome on 3rd June, 2011 and that he obtained the said limited letters of administration after being advised to do so by the court.

24. According to the evidence of PW1, who informed the court that he was 82 years old, the dispute in respect to the suit land started in the year 1970; that the dispute over the land was between the Ngala family and the family of the Durumas whose home is in Kwale; that the Durumas were traders in charcoal and that they were represented by Madzao Mangale.

25. It was the evidence of PW1 that the said family of Madzao Mangale claimed ownership of the suit land which led to the filing of Civil Case No. 26 of 1977 in Kaloleni by Mumba Chome; that Mumba Chome and his brother sued his father and that the Magistrate decided the matter in their (*Objectors*) favour; that on appeal, Hon. Randu, DM III, awarded the land to his late father and that the said award was made after the court visited the land.

26. According to PW1, when his uncles lost the case, they filed an appeal which was heard by the then Resident Magistrate, Hon. D. Schofield, who then ordered that the matter be retried by Hon. Randu. PW1 relied on the Judgment of Hon. Randu which was delivered on 23rd January, 1982.

27. Other than the court case, PW1 stated that the matter was a subject of debate in Parliament in the year 1978. It was the evidence of PW1 that the area Member of Parliament, Hon. Chibule wa Tsuma, had asked the Attorney General under question and answer number 449 about the ownership of the land, which answer was given by the Attorney General in favour of the Ngala family.

28. PW1 informed the court that there was another dispute in court between Mumba Chome and Mugoya Construction Company Limited in Mombasa HCCC No. 205 of 1987 over the suit land, which matter was decided in favour of Mumba Chome and that it was after the advertisement by the then Town Council of Mariakani to acquire part of the suit land for the management of garbage in the year 2009 that all manner of claims arose in respect of the suit land. That is when he filed the present suit in Mombasa.

29. PW1 informed the court that he filed the suit against the 1st and 2nd Defendants to restrain them from setting apart 200 acres of the suit land for the 2nd Defendant; that after negotiations, he agreed to the setting apart of the 200 acres and that a consent order was filed and

recorded in court on 11th May, 2002 in the presence of the advocates of the 1st and 2nd Defendant. It was the evidence of PW1 that a Decree was extracted pursuant to the consent order marking the matter as settled.

30. The evidence of PW1 was that the Decree of this court has never been set aside. According to PW1, the Chief of the area was asked by the then District Commissioner to inform him about the ownership of the land and that in her letter of 27th July, 2012, the Chief confirmed that the suit land belonged to the descendants of Ngala.

31. PW1 informed the court that in an attempt to acquire the suit land, the 1st Interested Parties and the Objectors forged a Judgment in Kaloleni RMCC No. 26 of 1977 and that they were charged in Criminal Case No. 2831 of 2013 (*Kaloleni*) for the offence of forging judicial proceedings.

32. It was the evidence of PW1 that the 1st Defendant having confirmed that the land was his, the area was declared an adjudication area and the suit property was registered in his name as Kilifi/Madzimbani/ Mitangoni/B/1 measuring approximately 2,861Ha.

33. According to PW1, the late Mumba Chome was his young uncle and he died without siring any children; that his father had three (3) children and that the entire Chome family has more than two hundred (200) people who are entitled to the land.

34. It was the evidence of PW1 that most of the Chome family members who have died have been buried on the suit land and that the suit land is their ancestral land; that the Objectors and the 1st Interested Parties came from other areas and invaded on the land and that because they are trespassers, they cannot be compensated for the 200 acres that Ketraco wanted to acquire. It was the testimony of PW1 that both the 1st and 2nd Defendants had admitted that the suit land belongs to him and that Ketraco was allowed to take the 200 acres after he agreed to the setting apart of a portion of the suit land.

35. On the issue as to why the Judgment in Kaloleni RMCC No. 26 of 1977 was issued on a Saturday, PW1 stated that during those days, courts used to work on Saturdays; that it is only on Sundays that civil servants never used to work and that it is President Moi who changed that system in 1982.

36. It was the evidence of PW1 that he lodged a complaint in respect to the suit land with the National Land Commission who heard him and the Interested Parties; that after hearing them, the National Land Commission confirmed that the land belongs to his family and that the National Land Commission stated in its Report that some portions of the suit land can be given to the Objectors and the Interested Parties who are squatters on the land. PW1 stated that he has no objection to that as long as he is recognized as the owner of the land. PW1 produced in evidence a bundle of documents which I shall refer to later.

37. In cross-examination, PW1 stated that he has bought land in Kaloleni where he lives with his family; that he used to live in Mariakani until when he moved to Kaloleni ten (10) years ago; that he was testifying on behalf of the Mumba Chome clan and that Mumba Chome was a brother of Ngala, his father.

38. PW1 stated that he obtained the title document to the suit land on the basis of a court order and that he knows the boundaries of the suit land. According to PW1, the boundaries to the suit land are demarcated by a railway line, a river bed, the Matoya's family and the clan of Mwameni; that his neighbours do not have an issue with his claim and that the people who have trespassed on the suit land are from Kwale County.

39. PW1 admitted having received the Kshs. 26,000,000 that was deposited with the County Commissioner by Ketraco to compensate the owner(s) of the suit land. According to PW1, it is after he was paid the money that he agreed to withdraw the suit as against the 2nd Defendant. This, according to PW1, was after he removed the squatters who were cultivating the 200 acres that Ketraco wanted to develop.

40. PW1 maintained that the 14 Interested Parties are squatters who came from Kwale County. Although he was willing to give some of the squatters portions of the suit, it was the evidence of PW1 that he cannot give all of them the land; that he could not have sued them when he filed the claim because he did not know them and that by the time the squatters referred the matter to adjudication officers for adjudication, he had filed the current suit.

41. The Chief of Mariakani Location, PW2, stated that she is the one who authored the letter of 27th July, 2012 which was addressed to the District Commissioner; that the letter was in regard to the compensation that was to be made by Ketraco (*the 2nd Defendant*) in respect to a portion of the suit land; that the suit land belongs to the late Chome Mumba Ngala whose son is the Plaintiff and that she stands by the contents of her letter of 27th July, 2012.

42. According to PW2, she is the one who recommended to the District Commissioner that the Kshs. 26,000,000 should be released to the Plaintiff as compensation for the 200 acres which was to be acquired by the 2nd Defendant and that she has known the Plaintiff's family for more than 40 years.

43. It was the evidence of the Chief that she relied on the court proceedings in Case No. 26 of 1977 and the interviews she had with the elders to draft her letter of 27th July, 2012; that Mumba Chome was buried on the land and that she did not have to go around the whole land to form the opinion that she arrived at.

44. On the issue of the other people who are claiming the suit land, PW2 stated that most of them usually come on the land and then go away and that she did some two letters on behalf of the two people who were claiming that they own small portions of the suit land. PW2 stated that the suit land has two public institutions: that is a primary school and a dispensary.

45. It was the evidence of PW2 that the people who had crops on the land that was acquired by Ketraco were paid for their crops by Ketraco and that by the time the adjudication process commenced, she had already done the letter of 27th July, 2012.

46. A forensic document examiner, PW3, produced in evidence his Report in respect of the investigations he undertook. According to PW3, his brief was to forensically analyze the Judgment that was purportedly delivered by Hon. P.J.D. Mwangulu, DM III and Hon. M.C. Randu, DM III in Civil Case No. 26 of 1977.

47. According to PW3, after examining the copy of the Judgment of Hon. P.J.D. Mwangulu, DM III, which was not signed, he was of the opinion that the instrument that was used to type the Judgment, Remington Ribbon typewriter, was not available in the market at that time. PW3 further stated that the rubber stamp impression of the Senior Resident Magistrate on the Judgment by Hon. P.J. D. Mwangulu DM III could not have been in use in 1977.

48. On the Judgment by Hon. M.C. Randu DM III in Kaloleni District Magistrate Court Land Case Number 26 of 1977, PW3 stated that the instrument used to type the Judgment is consistent with Olivetti Ribbon typewriter technology version that was available in the market at the time. The Report of PW3 gives the methodology that he used to arrive at his conclusions and the characteristics and similarities he used while analyzing the two Judgments. PW3 concluded his evidence in chief by stating that the Judgment of Hon. P.J.D Mwangulu which the Objectors were relying on was forged.

49. In cross-examination, PW3 stated that Remington Ribbon typewriter was invented in 1932; that the technology of the machine cut stamp was not available in 1977 and that the said machine cut stamp was invented in 1990. It was his evidence that the Olivetti Ribbon typewriter was invented in 1940's although he did not know the country of origin.

The 2nd Defendant's case:

50. The evidence of the 2nd Defendant's witnesses (*DW1 and DW2*) was taken before the 2nd Defendant withdrew its Defence on 27th February, 2017. DW1 was the 2nd Defendant's (*Ketraco's*) accountant. He informed the court that on 26th October, 2010, he transferred Kshs. 26,000,000 to the District Commissioner's account; that it had been agreed that the 2nd Defendant was to compensate the owner(s) of the land that the 2nd Defendant was to acquire at the rate of Kshs. 130,000 per acre and that the total payable amount for the 200 acres was Kshs. 26,000,000.

51. In cross-examination, DW1 stated that other than the Kshs. 26,000,000 that was deposited in the District Commissioner's account, Ketraco had paid off all the individuals that had crops on the land.

52. The 2nd Defendant's company secretary, DW2, stated that the 2nd Defendant required 200 acres of land for the construction of a sub-station for the transmission line in the Mariakani area; that public meetings were held with the people who were to be affected by the setting apart of the 200 acres and that the 2nd Defendant deposited Kshs. 26,000,000 with the District Commissioner for compensation.

53. It was the evidence of DW2 that when the Plaintiff filed the present suit, they entered into a consent with him on 7th May, 2012 in which the Plaintiff agreed to withdraw the suit as against Ketraco; that the portion of the suit land was then set apart and Ketraco was issued with a letter of allotment and a grant for L.R No. 29836 which was registered on 11th October, 2013 as CR. No. 60952.

54. However, according to DW2, they later learnt that the Plaintiff had caused the whole land, including the 200 acres, to be registered in his name. That notwithstanding, DW2 stated that they took over possession of the 200 acres of land and are still in possession of the same to date. DW2 stated that it is the District Commissioner who was to identify the people who were to be compensated for the 200 acres that was set apart.

55. According to DW2, the value of Kshs. 130,000 per acre was given to Ketraco by the District Commissioner and the 1st Defendant and that it is only the Plaintiff who objected to the setting apart of the land. DW2 stated in re-examination that he was not made aware of the existence of Land Case No. 26 of 1977 and that 2nd Defendant entered into a consent where it was stated that the Plaintiff was entitled to the suit land subject to the process of setting apart.

The Attorney General's case:

56. The evidence of the Attorney General's witness (*DW3*) was taken by the court before the Attorney General withdrew its Defence on 27th February, 2017. The Attorney General called DW3 as his witness. DW3 informed the court that he is the Chief Land Adjudication and Settlement Officer in charge of Kilifi North, Kilifi South, Kaloleni, Rabai and Ganze Sub-Counties. It was the evidence of DW3 that the suit land was at all material times Trust land; that being unadjudicated and unregistered, the suit land belonged to all local tribes, groups, families and individuals of the area and that the land did not belong to the government or the County Council.

57. According to DW3, Trust land may be alienated through the process of adjudication and setting apart; that the suit land was subjected to adjudication and registration; that his request to commence adjudication in respect of the suit land was granted by the Commissioner of Lands on 27th March, 2012 and that a total of eight (8) cases were referred to the Arbitration Board during the adjudication. Thereafter, he prepared an adjudication register.

58. DW3 stated that the adjudication process was stopped when his office was served with a court order dated 25th February, 2013 and that the order required the District Land Registrar to issue to the Plaintiff a Title Deed for the suit land; that a Title Deed was eventually issued to the Plaintiff and that the Title Deed was issued to the Plaintiff due to the immense pressure that was exerted on his office.

The Objectors' case:

59. DW4 stated that he was born in the year 1941 in Kitsimani village, Mitangoni Sub-Location, Mariakaini. It was the evidence of DW4 that the suit land is situated in Mitangoni Sub-location; that the land belongs to the Mwakai clan and that he is the Chairman of the Mwakai clan.
60. According to DW4, the clan has approximately 8,000 people who live on the suit land; that the Mwakai clan is from the Duruma sub-tribe, which is one of the Mijikenda tribes; that the Plaintiff is a Giriama and not a Duruma and that he lives in Kaloleni. According to DW4, they have been living and grazing on the suit land since the days of his grandfather and that it is his grandfather who invited Chome Ngala on the suit land.
61. DW4 stated that his late grandfather, Kegombe Mungala Majembe, allowed the Plaintiff's grandfather to cultivate three (3) acres of the suit land after he gave him three (3) bottles of coconut palm; that as a visitor on the land, he was not allowed to plant permanent trees or to put up a permanent house and that the Plaintiff's grandfather, Ngala Chome complied with those conditions.
62. DW4 stated that other than inviting Chome Ngala on the suit land, they also invited other clans who also occupied the suit land and that the boundary to Chome's land was demarcated using a tree known as "Mkulu" on the Northern side, a "Mnagu" tree to the East and other trees to the West.
63. It was the evidence of DW4 that the land belonging to his clan measures 3,000 acres and that his clan borders the Mwamundu clan and Mwabeja clan. DW4 informed the court that he was aware of the dispute that was there between Nyawa Mbega and Mumba Chome in Civil Case Number 26 of 1977; that he was the Assistant Chief in the area between 1968-1994 and that the dispute started when Mumba Chome filed the dispute with the Chief's office.
64. According to DW4, when the Chief summoned him, he informed him that the Chomes were invited on the land and that it is the Chief who advised his father to sue Mumba Chome in Civil Suit No. 26 of 1977.
65. DW4 stated that on 19th October, 1977, Hon. Mwangulu visited the suit land which was only three (3) acres; that his father and Mumba Chome testified and so was Ngao Shahe and that the court ordered the Defendants (*the Chomes*) to vacate the suit land. That is when the Plaintiff and Chome moved out of the land.
66. The witness finally testified that it is the Plaintiff who forged the Judgment in Land Case Number 26 of 1977 and that although he is the one who reported the said forgery, he was arrested and charged for uttering a forged Judgment; that the order of the court which gave rise to the issuance of the Title Deed to the Plaintiff was forged and that he has never been heard by the National Land Commission on the issue of ownership of the suit land.
67. In cross-examination, DW4 admitted that they met with the Chairman of the National Land Commission who heard them on the issue of ownership of the land and promised to resolve the problem within two weeks.
68. The representative of the Mwabeja clan, DW5, stated that he was born in 1954; that he went to Mitangoni in 1980 as a preacher and that after inquiring from Mwakalela Wewa, father to Nyamawi Rumba, he was allocated land on the disputed portion. According to DW5, the Mwabeja clan is entitled to land measuring 2,800 acres and that the occupants of the suit land are Mwamundu, Mwakai, Mulaire, Mwachili and Mwatsingoza clans, amongst other clans.
69. DW3 stated that there are more than 10,000 people occupying the suit land and that the various clans allowed public utilities to be built on the suit land and that he only knew the Plaintiff in the year 2013. According to DW5, they never participated in Land Case Number 26 of 1977; that they should be compensated for the land that was taken by Ketraco and that the whole land is occupied.
70. In cross-examination, DW5 stated that he did not know about the history of the land prior to 1980 and that he bought the land that he is occupying on 27th August, 2011. It was his evidence that the land belongs to Mwabeja clan.
71. DW6 stated that he is from the Mwabeja clan whose members live in Mitangoni, Mariakani; that the clan is of Duruma tribe and that he was born in 1969. It was his evidence that the land they occupy was bought by Mwatseka Masheka Beja, which was inherited by Wewa Mwatseka and then Mwakalela Wewa. After Wewa's death, Nyamawi Rumba took over the land.
72. It was the evidence of DW6 that they invited the Walaire clan to live and cultivate the land but not to sell it and that when they realized that the Walaire clan were selling the land, they reported the issue to the Chief. According to DW6, the Plaintiff does not own the suit land and should not be compensated by Ketraco; that more than 20,000 people live on the suit land and that they raised the issue of ownership of the land with the National Land Commission which promised to resolve it.
73. In cross-examination, DW6 stated that the land was bought by his grandfather before he was born in 1969; that his identity card shows that he hails from Samburu Division which is in Kwale County and that it is true that his original home is Maji ya Chumvi. It was the evidence of DW6 that he does not know when his grandfather bought the suit land and that Mwakalela Wewa was his uncle. DW6 stated that his father, Kazungu Salim, did not inherit any portion of the suit land. According to DW6, Mwatseka Masheka Beja was his uncle, and that Nyamawi Rumba is his cousin. According to DW6, the land for the Mwabeja clan measures 2,008 acres.

The 1st Defendant's case:

74. The former Clerk of the 1st Defendant, DW7, informed the court that the suit land is Trust land; that the 1st Defendant was established in

1992 vide gazette notice number 289 of 2nd June, 1992; that the suit land was held by the 1st Defendant on behalf of and for the benefit of the people and communities living thereon and that the land is public land under the current constitutional dispensation.

75. DW7 informed the court that the Plaintiff fraudulently obtained a Title Deed with a view of evicting the people living on the land and that such a scenario will lead to a breach of peace.

76. In cross-examination, DW7 admitted having authored the letter of 3rd May, 2012. According to DW7, there were documents showing that the land was owned by the Plaintiff. According to DW7, the consent of 7th May, 2012 was qualified and that the 1st Defendant made its presentations to National Land Commission.

77. DW7 stated that the Kshs. 26,000,000 paid by Ketraco was to be paid to the squatters having inhabited the suit land; that the Plaintiff was one of the inhabitant of the land and that the consent of 7th May, 2012 related to the clan of Mumba Chome Ngala and not an individual.

The 1st Interested Parties' case:

78. DW8 informed the court that he was born in 1952 on the suit land; that he has always lived on the suit land and that they were later joined by the Mwakai, Mwamundu, and Walaire clans. According to DW8, they lived in peace on their respective parcels of land until when Ketraco came and took the land they were cultivating.

79. According to DW8, they were compensated by Ketraco for the trees and crops which were on the suit land; that the land has many people including Giriamas, Kambas, Durumas and others.

80. In cross-examination, DW8 stated that they do not recognize the Plaintiff's title; that their advocate did a letter dated 20th March, 2015 and that the statement he made does not indicate the acreage he is claiming.

81. DW9 stated that his initial home was in "Mitangoni weighbridge"; that they moved from the weighbridge area to allow the construction of the Army Barracks and moved to the suit land; that it is Ndegwa Madzeyo and Mzungu who gave him the portion of land he is occupying and that he is from the Mugiza clan. According to DW9, he is entitled to the compensation that was paid by Ketraco for the 200 acres of land that it acquired. In cross-examination, DW9 stated that he bought his portion of land and that he was not aware of the dispute in Land Case Number 26 of 1977.

82. DW10 stated that him, together with other co-claimants, are the owners of the subject land; that he was born on the land in 1984 and that they have lost most of their parcels of land to Ketraco.

83. According to DW10, he was paid Kshs. 2,850 by Ketraco as compensation for the crops which he had on the suit land and that the suit land does not belong to the Plaintiff.

84. In cross-examination, DW10 stated that the identity card shows that he was born in Chanzou Sub-Location, Samburu Division, Kwale County; that his father had two houses, one in Chanzou and Mitangoni and that he did not know Madzeyo Mangale-although he had heard of him.

The National Land Commission's case:

85. The Chief Land Administrative Officer with the National Land Commission (NLC), DW11, informed the court that he participated in the preparation of the Report of 9th May, 2016 which was signed by the Chairman, National Land Commission.

86. According to DW11, before the Report was prepared, all the parties who were laying a claim on the suit land were summoned by the Commission; that the said parties sent their advocates who included Mr. Muchiri (*the Objectors' advocates*), Mr. Kiarie (*the 2nd Defendant's advocate*), Mr. Onyango (*the Interested Parties' advocate*), Ms. Jadi (*the 1st Defendant's advocate*) and Mr. Kadima (*the Plaintiff's advocate*). DW11 stated that the Commission received written submissions from the advocates in respect to the dispute herein, whereafter the Commission prepared its Report.

87. DW11 stated that they visited the suit land and analyzed all the documents in relation to the suit land, including the court records.

88. According to DW11, they came to the conclusion that the suit land was owned by the Plaintiff although the "genuine" people who were occupying the land should be considered; that the Plaintiff agreed to the resettlement of the people who were on the suit land and that they are supposed to undertake a verification exercise.

89. DW11 stated that the Appeal Case in Land Case No. 26 of 1977 gave the suit land to the Plaintiff; that the Attorney General has confirmed that the land belongs to the Plaintiff and that the Judgment in Land Case No. 26 of 1977 being held by the Plaintiff is the one that is genuine.

90. It was the evidence of DW11 that it is Mr. Muchiri, the advocate for the Objectors, who lodged a complaint with the National Land Commission and that all warring parties filed their respective submissions.

The Plaintiff's submissions:

91. The Plaintiff's counsel submitted that the Plaintiff has filed the suit on behalf of the Mumba Chome clan and that the late grant of the letters of administration upon being directed by the court only served to substitute him as a party to litigate on his behalf; that the court in DMCC No. 26 of 1977 (*Kaloleni*) held that the suit land did not belong to the Objectors' forefathers and that the said Judgment was made a subject of debate in Parliament.

92. Counsel submitted that in its letter of 3rd May, 2012, the 1st Defendant acknowledged that the suit land belonged to the clan of Mumba Chome Ngala and that the Plaintiff has proved that he is the owner of the suit land; that the Objectors and the Interested Parties were not born on the suit land and that the Attorney General and the 2nd Defendant have conceded to the fact that the Plaintiff is the owner of the suit land vide the consent that was recorded in court on 27th February, 2017.

93. The Plaintiff's counsel submitted that the Plaintiff's title was issued pursuant to a consent order and that this court has the power of rectifying any anomaly on the Title Deed in terms of the consent agreement.

The 1st Defendant's advocates submissions:

94. The 1st Defendant's advocates submitted that the suit land is Trust land; that the Judgment in Land Case Number 26 of 1977 never mentioned the size of the land and that the title that the Plaintiff is holding was obtained during the pendency of the suit.

95. Counsel submitted that although the National Land Commission vouched for the Plaintiff's Title Deed, it did not mention the process that was followed before the said title was issued; that the Plaintiff recognized the process of setting apart a portion of the suit land and that the suit land was held by the 1st Defendant in trust for the local inhabitants of the area.

The 2nd Defendant's advocates submissions:

96. The 2nd Defendant's advocate submitted that this suit was filed to stop the setting apart of the suit land in favour of the 2nd Defendant; that the Plaintiff entered into a consent with the 2nd Defendant on 7th May, 2012 allowing the setting apart of 200 acres and that the Kshs. 26,000,000 that was deposited with the District Commissioner by the 2nd Defendant was to compensate the people who were to be affected by the setting apart of the 200 acres.

97. Counsel submitted that the issue of valuation of the land that was to be set apart would only have arisen if the Objectors and the Interested Parties had successfully objected to the setting apart of the land; that the 200 acres is for public purpose and that the court should uphold the 2nd Defendant's Title Deed.

The Objectors' advocates submissions:

98. The Objectors' counsel submitted that the Objectors came to learn about the suit in the year 2012 after numerous consents had been recorded; that the Objectors are clan members living and doing business on the disputed land and that the Plaintiff is an unknown entity.

99. Counsel submitted that the proceedings and Judgment held by the Plaintiff in Land Case Number 26 of 1977 are neither certified originals; that 28th November 1981 was a Saturday and that the purported Judgment was delivered on 23rd January, 1982 which was also a Saturday.

100. The Objectors' advocate submitted that they are in possession of the certified proceedings in Land Case No. 26 of 1977 and that the document examiner was casual in his conclusion that they were holding a forged Judgment. Counsel submitted that although there was an order freezing the release of Kshs. 26,000,000, the said money was released to the Plaintiff. According to counsel, the Plaintiff should be punished for being in contempt of the court order and should be ordered to refund the said money.

101. Counsel submitted that the Report of the National Land Commission offends the provisions of Section 24(1A) of the National Land Commission Act; that such a Report can only be authentic if signed by the Commission's Secretary and the Chairman and that the determination of the dispute by the National Land Commission is not binding on the court.

102. The Objectors' counsel submitted that ownership of the suit land was subject to the process of adjudication; that all the consents are only binding in persona; that the consents are intended to interfere with the court process and that the Plaintiff's claim is not genuine.

103. Counsel finally submitted that the Plaintiff did not have the *locus standi* to file the suit; that the Objectors' claim is based on customary land rights as communities living on the disputed land that the Objectors' Counter-claim should be allowed.

The 1st Interested Parties' advocates submissions:

104. The advocate for the Interested Parties repeated most of the submissions by the Objectors' advocate, which I have summarized. Counsel submitted that even if the Judgment in Land Case No. 26 of 1977 and the Hansard were genuine, the two documents did not confer on the Plaintiff interests in the land.

105. Counsel submitted that the registration of the suit land in the name of the Plaintiff was fraudulent and unlawful because the matter was *sub-judice* and that the provisions of the Land Adjudication Act were not complied with. According to counsel, his clients have proved that they are the rightful owners of the suit land and that the suit land remains unalienated Trust land.

Analysis and findings:

106. The Plaintiff commenced this matter by way of Plaint dated 14th April, 2011 in which he sued two Defendants: The Town Council of Mariakani and Ketraco Company Limited (*the 1st and 2nd Defendants*). In the Plaint, the Plaintiff averred that he is the administrator of the Estate of the late Mumba Chome Ngala.

107. The Plaintiff averred in the Plaint that the deceased was the legal owner of all the piece of land measuring 2,328Ha or thereabout situated in Mariakani-Mitangoni; that they have resided on the said land for many years and that the remains of the late Mumba Chome were interred on the land on 6th April, 2001.

108. The genesis of this suit, and the reason why the Plaintiff sued only the 1st and 2nd Defendants, was because the 2nd Defendant had expressed an interest to acquire 200 acres of land for the building of a sub-station for the transmission line in the Mariakani area. According to the evidence of DW2, the 2nd Defendant approached the 1st Defendant and formally requested for the setting apart of the 200 acres.

109. The record shows that the Plaintiff's advocate not only filed a Plaint opposing the setting apart of the suit land in favour of the 2nd Defendant, but also obtained an ex-parte injunctive order. The said order was granted after the Plaintiff's advocate submitted as follows:

“The 1st Defendant has received over Kshs. 26 million from the 2nd Defendant to compensate third parties. The owner of the land is the Plaintiff. The third parties have litigated with the Plaintiff... There is proof of ownership.”

110. The Objectors, who claim to be the Mwabeja, Mwamundu and Mwakai clan members and the Interested Parties, claim that the land belongs to them exclusively. The issues for determination are therefore as follows:

a. Whether suit land is/was Trust land;

b. Who between the Plaintiff's family and the Objectors and the Interested Parties are entitled to the suit land and the compensation for the 200 acres which have been acquired by the 2nd Defendant?

c. Whether the Plaintiff has the locus standi to institute the suit.

111. The above issues cannot be addressed with clarity without going through the entire proceedings, and specifically the numerous consent orders that were entered into between the Plaintiff and the 1st and 2nd Defendants. The orders which were issued by this court, from the time the suit was filed in Mombasa as HCCC No. 95 of 2011 are found in the Objectors' bundle of documents filed on 27th June, 2016 and on the court record.

112. The record shows that while the matter was pending the delivery of the Ruling in respect to the Plaintiff's Application for injunction, the advocates for the Plaintiff and the 1st and 2nd Defendants appeared before the Judge on 11th May, 2012 and recorded a consent to the following effect:

“1. That the suit against the 2nd Defendant is confirmed withdrawn with no order as to costs.

2. That the interim order of injunction as against the 2nd Defendant is hereby discharged.”

On the same, the Judge noted as follows:

“The Plaintiff's suit is marked as settled in terms of the consent dated 7th May, 2012 with no order as to costs and the interim order of injunction is discharged.”

113. Based on the consent letter of 7th May, 2012 and the order of Muriithi J. quoted above, the Plaintiff extracted a Decree whose penultimate paragraphs read as follows:

“3. That the clan of Mumba Chome Ngala is entitled to and possessed of all that unregistered land/property known and compromised in Mariakani Mitangoni Kitsimani measuring 2,861 Hectares or thereabout subject to the process of setting apart the Trust Land Act(sic).

4. That the clan of Mumba Chome Ngala has no objection to the planned setting apart process of 200 acres in favour of Ketraco Company Limited.

5. That the interim order of injunction is hereby discharged.”

114. The said Decree was issued by the Deputy Registrar on 14th February, 2013. That Decree has never been set aside or varied by the court to date.

115. After the consent order of 7th May, 2012 was recorded and adopted by the court on 11th May, 2012, the 1st Defendant filed an

Application dated 12th October, 2012 in which it sought to set aside the order on the ground that the 1st Defendant had realised that the Commissioner of Lands had allocated the suit land to various people. While the Application by the 1st Defendant was pending, the Objectors filed the Application dated 28th March, 2013. The court granted the Objectors an order restraining the Plaintiff from executing the consent Decree pending the hearing of the suit.

116. While the Applications by the 1st Defendant and Objectors were pending, one Nyamawi Rumba Wewa (*on behalf of the Mwabeja clan*) had filed Mombasa Petition No. 15 of 2013 in which he had obtained an order on 21st March, 2013 restraining the District Commissioner, Kaloleni from releasing the Kshs. 26 million that he was holding as compensation for the 200 acres of land that it had acquired pending the hearing of the Application.

117. In the meantime, and even before the Objectors had obtained an order restraining the Plaintiff from executing the Decree, the Plaintiff had already obtained the order of 18th February, 2013 where the Land Adjudication officer was directed to adjudicate the suit land, within seven (7) days, in favour of the Plaintiff. The Land Registrar informed the court that a Title Deed in respect of the suit land was issued to the Plaintiff pursuant to the said court order.

118. After those interim orders were issued, the parties' attention diverted to the proceedings in Kaloleni DMCC No. 26 of 1977. The record shows that on 16th May, 2013, and at the request of the parties, the court ordered that "*the court file number DMCC No. 26 of 1977 at Kaloleni be forwarded to the Criminal Investigations Department (Mombasa) for investigations as to the circumstances that led to two Judgments by two different Magistrates, and whether one Judgment is falsified and for the culprits to be charged with relevant criminal offences.*" The matter was then stood over until 16th July, 2013 pending the finalization of the investigations in respect of the two Judgments in DMCC No. 26 of 1977 (*Kaloleni*).

119. When the investigating officers filed their report in respect of Kaloleni DMCC No. 26 of 1977, which implicated the Objectors in the purported forgery of proceedings and Judgment, the Objectors' advocate sought to have the investigation officer cross-examined in that regard. Although the court allowed the Objectors' oral application to have the investigating officer cross-examined on his report, the Objectors' advocate seems not to have pursued the issue any further. Indeed, this file was then transferred to Malindi where the advocates agreed to abandon all the Applications on record and proceed with the hearing of the suit. However, none of the advocates informed the court on what was to happen on the consent orders that were on record.

120. While the hearing of this matter was going on, the Plaintiff entered into another consent with the 2nd Defendant (*Ketraco*) and the Attorney General dated 27th February, 2017. The said consent was in the following terms:

"By Consent:-

- 1. The Plaintiff confirms and recognizes that the 2nd Defendant's Title No. C.R. No. 60592 being L.R. No. 29836 registered on 11th October, 2013 was properly issued pursuant to the consent order recorded in court on 11th May, 2012 and setting apart from the unsurveyed and unregistered land now registered as Kilifi/Madzimbani/Mitangoni/B/1 issued on 26th August, 2014 in the name of the Plaintiff.***
- 2. The Plaintiff confirms that at the time the Plaintiff procured its title for Kilifi/ Madzimbani/ Mitangoni/B/1 issued on 26th August, 2014 for approximately 2,861 hectares or thereabout, the Plaintiff failed to consider the existence of the 2nd Defendant's Title No. C.R. 60592 being L.R. No. 29836 which was already in existence and issued after setting apart as a result of the consent order registered in court as aforesaid and as a result the Plaintiff's title was issued over the said Title No. C.R 60592 being L.R. No. 29836 of the said 2nd Defendant.***
- 3. That the Plaintiff shall return its title for correction to the Land Registrar, Kilifi County so that the 2nd Defendant's Title No. C.R. 60592 being L.R. No. 29836 whose acreage is 80.03 hectares or approximately 200 acres is excluded from the Plaintiff's title which correction shall bring to an end the dispute between the Plaintiff and the 2nd Defendant.***
- 4. That the Plaintiff confirms having collected and received the sum of Kshs. 26,000,000 deposited with the District Commissioner, Kaloleni (later Deputy County Commissioner) which sum was deposited in with a view to compensate any person affected by the setting apart of the 200 acres for and on behalf of the 2nd Defendant and which is now comprised in the Title No. C.R. No. 60592 being L.R. No. 29836.***
- 5. The Plaintiff confirms that they shall indemnify the 2nd Defendant in respect of any claim by any party claiming to be entitled to the said sum of Kshs. 26,000,000 and/or the 200 acres contained in the Title No. C.R. 60592 being L.R. No. 29836 and it is hereby agreed that any such claim shall be the sole responsibility of the Plaintiff and shall be defended for and on behalf of the Plaintiff.***
- 6. That the 2nd Defendant in recognition of the above withdraws the Defence and Counter- claim dated 22nd June, 2015 and filed in court on 23rd June, 2015 which withdrawal shall be a confirmation that the dispute between the Plaintiff and the Defendant is settled as the Plaintiff also withdraws simultaneously his claim against the 2nd Defendant contained in the Plaintiff dated 6th September, 2012 and filed in court on 7th September, 2012.***
- 7. That the office of the Attorney General does withdraw wholly its Defence and Counter-claim dated 28th April, 2016.***

8. That upon signing and filing of this consent order, the Plaintiff shall be and is at liberty to settle the remaining dispute with the 1st Defendant and the Interested Parties in any manner which may be agreeable to the Plaintiff, 1st Defendant and the said Interested Parties.

9. Each party shall bear its own costs.”

121. The above consent was adopted by the court as an agreement between those parties which agreement was binding the court. The consent, as I understand it, means that other than the 200 acres that the 2nd Defendant had acquired from the suit land, it conceded to the Plaintiff's proprietorship of the suit land. The Attorney General, through that consent, also admitted the Plaintiff's claim that the suit land measuring approximately 2,861Ha belongs to the Plaintiff and the clan of Mumba Chome Ngala and not the Objectors or the Interested Parties.

122. The Attorney General and the 1st Defendant having conceded to the Plaintiff's claim, I will have to determine the 1st Defendant, the Objectors and the Interested Parties' claim over the suit land respectively.

123. The 1st Defendant's former clerk, DW7, informed the court that the suit land was Trust land and that the 1st Defendant held it in trust for all the people residing on the land, including the Plaintiff. It was the evidence of DW7 that the Plaintiff was not entitled to the said land to the exclusion of the Objectors and the Interested Parties.

124. Article 61 of the Constitution provides that land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. Article 63(2) (d) (ii) defines community land as land that is ancestral land. Article 63(3) on the other hand states that any unregistered community land shall be held in trust by County Governments on behalf of the communities for which it is held.

125. Community land as defined under the 2010 Constitution is what used to be referred to as Trust land under the repealed Constitution and the Trust Land Act. Considering that the Trust Land Act was repealed in the year 2016, it was the applicable law when this suit was filed. I shall therefore rely on the provisions of the Trust Land Act in this Judgment, and not the Community Land Act, 2016.

126. The law governing Trust land is customary law. Section 69 of the Trust Land Act (*repealed*) provides as follows:

“In respect of the occupation, use, control, inheritance, succession and disposal of any Trust land, every tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing African customary law....”

127. The Act further provides at Section 8 that where land is set aside at the instance of the government, full compensation shall be promptly paid by the government to any resident of the area of land set apart who under African customary law for the time being in force and applicable to the land has any right to occupy any part thereof. The status of the “resident” who is entitled to Trust land has therefore to be determined by the customary law, meaning that not all residents occupying Trust land are necessarily entitled to such land.

128. The 1st Defendant, being a custodian of the suit land, on behalf of the rightful owners of the land, was under an obligation to identify the genuine owner(s), and in accordance of African customary law, of the land that was to be set aside for use by Ketraco, a State organ. Other than the 1st Defendant, the District Commissioner was also mandated by the law to identify the people entitled to the said compensation and then pay them. This position is supported by the provisions of Section 9(2) of the Trust Land Act which provides as follows:

“If, after consultation with the Divisional Board, the District Commissioner is satisfied that the Applicant is entitled to compensation, he shall award the Applicant a sum of compensation in accordance with sub-section (3) of this Section; and if he is not satisfied the District Commissioner shall reject the application.”

129. The 1st Defendant's witness, DW7, admitted having authored the letter dated 3rd May, 2012 which was addressed to their advocate. In the letter, DW7 acknowledged the fact that there were “squatters” who were on the 200 acres that the 2nd Defendant intended to acquire. The letter further stated as follows:

“3. From the history of this matter and the parliamentary proceedings in Parliament in Parliamentary Question No. 449 of 1987, the District Magistrate Court Case No. 26 of 1977, the Ministry of Lands letter dated 7th August, 2008, a letter dated 28th February, 2011 by doctor Chibule wa Tsuma, who brought the question and confirms the assurance from the Attorney General that the land belongs to Mumba Chome and various other correspondences by the human rights commission and the advocates letter to the council regarding this land, the clan of Mumba Chome Ngala is entitled to the land...

5.The council has no objection to any agreement reached between Tsangwa Ngala Chome and Ketraco regarding any further payments to be made as long as any dues to the council, if any are paid.”

130. The letter by DW7 therefore confirmed that based on the numerous documents in its possession, the 1st Defendant's Clerk was convinced that the clan of Mumba Chome Ngala is the one that was entitled to the land that was to be set aside. Indeed, the council instructed its advocates to enter into the consent of 7th May, 2012 which recognized the clan of Mumba Chome Ngala as the owner of the land in Mariakani Mitangoni Kitsimani measuring approximately 2,861Ha. That consent order of the court has never been set aside or appealed against.

131. The evidence on record therefore shows that the 1st Defendant, being the custodian of Trust land in its area on behalf of the residents, recognized that the land belonged to the clan of Mumba Chome Ngala and not any other clan.

132. The decision of the District Commissioner to pay the Plaintiff the Kshs. 26,000,000 that had been deposited in his official bank account was informed by the letter of 27th July, 2012 which was authored by the Chief of Mariakani, PW2. The said letter stated as follows:

“According to my investigations, I know Mr. Tsangwa Ngala Chome and his larger family there before. It is true that they were the owners of the land. The late Mumba Chome Ngala, brother to Ngala Chome jointly owned this land. The surviving son of the late Ngala Chome, and the late Chome Ngala (grandfather to Tsangwa Ngala Chome) was buried in the said land. Some of the family members are residing on the said land to date. The land dispute case of 1977 identified Mr. Mumba Chome as the owner of the land, who had no other child other than Tsangwa Ngala Chome. Therefore Mr. Tsangwa Ngala Chome is entitled to this land...”

133. On the issue of the claim by the Objectors, the Chief (PW2) wrote as follows:

“According to my investigations, the claimants are not clans. They are individuals, some of them are minors and from other districts and some come as far as Lungalunga in Kwale District. The purpose of coming together is to unlawful (sic) benefit from the money that should compensate the owner of the land who is Tsangwa Ngala Chome. I have also found that some of the individuals claiming to be clan members are the people who were defeated way back in 1977. Madzao Mangale and Muchombo Mangale, their sons are Elija Ndegwa Madzao and Andrew Mwindzagu Madzao who claim to be members of the clan. The other two clans had no interest at all by then and they do no leave (sic) on this land. They only came together and joined the group when they heard about the land compensation by Ketraco.”

134. About the Chomes, the Chief stated as follows:

“Chomes are the descendants of Tsangwa Ngala Chome who lived in this land for many years even before the building of the railway line which is the boundary of the Durumas and Giriamas... Any other parties have no right over this land. Therefore I recommend compensation to Mr. Tsangwa Ngala Chome.”

135. PW2 stood by the contents of her letter when she testified. Indeed, after hearing her evidence in chief and cross-examination, I found her to be truthful and did not see any reason as to why I should disbelieve her.

136. Both the 1st Defendant and the Chief (PW2) relied on the decision that was made in Kaloleni DMCC No. 26 of 1977 to come to their conclusion that the suit land belongs to the Plaintiff. Although the Plaintiff and the Objectors relied on the Judgment in the file, they had two different Judgments. The court ordered for an investigation to establish which of the two Judgments was a forgery.

137. According to the Plaintiff, the Objectors' predecessors invaded the suit land in 1977 and sued his uncles (*Nyawa Shehi and Mumba*). When the Plaintiff's uncles lost, they filed an appeal before the Resident Magistrate Court in Mombasa in Civil Appeal No. 11 of 1978. The copy of the Judgment shows that the Resident Magistrate referred the matter to Kaloleni for re-trial on the ground that the Magistrate who conducted the trial was related to Madzao Mangale. When the matter was retried, the Magistrate found in favour of the Plaintiff's uncles in the following terms:

“The Plaintiff Muchombo Mangale brought this action for the recovery of a piece of law from the two Defendants... This court fails to understand what is the Plaintiff's claim and where is that land he claims is situated... I find for his two Defendants. I order that the case is dismissed.”

138. On the other hand, the Objectors' claim is that the only Judgment which exists in Kaloleni DMCC No. 26 of 1977 is that of Hon. P.J.D Mwangulu, DMIII of 8/111/77 (sic). In that Judgment, the court held that the Plaintiffs were awarded the land and ordered the two Defendants to vacate the area. This is the same Judgment that the Plaintiff has stated was set aside on appeal.

139. The court ordered for the investigations to be conducted in respect of the said two Judgments. According to the evidence adduced, the Objectors have been charged in Mombasa Criminal Case No. 2831 of 2013 for uttering forged proceedings and the Judgment.

140. Although the Plaintiff called a document examiner who stated that the copy of the Judgment produced by the Objectors was a forgery, and that the said Objectors have been charged, the Objectors did not call an independent forensic document examiner to counter the evidence of PW3, meaning that the evidence of PW3 was unchallenged. I shall not say anything further in respect of the two Judgments considering that there is an ongoing criminal matter in respect of same, save to say that the Plaintiff has established, prima facie, that it is the Judgment of Hon. Randu that is genuine.

141. I say so because the documents examiner's report was not controverted by another report. Furthermore, the Plaintiff produced the Parliamentary Hansard of 13th July, 1987 in which the then Member of Parliament for Kilifi South had asked the Attorney general to explain the *“assistance he will provide to Mr. Chome to enable him recover his piece of land”* in view Civil Case No. 26 of 1977 (*Kaloleni*). This was after it was alleged that the Objectors' predecessors had sold the land to Mugoya Construction and Engineering Company Limited.

142. In answer to the said question, the Hansard of 15th July, 1987 shows that the Attorney General answered the question as follows:

“The parties were summoned by the District Commissioner Kaloleni to his office where the matter was discussed and it was discovered that the case was concluded and Mr. Mumba Chome was awarded costs. Thereafter, Mr. Chome went ahead and instructed his lawyer who issued an injunction and stopped the company from extracting the stones and buildings and the company complied to that and stopped doing it... So I do not see what the Attorney General is required to assist. As a matter of fact, this case should not have come here...”

143. If there was any doubt as to the issue of ownership of the suit land between the Objectors' forefathers and the clan of Mumba Chome viz-a-viz Land Case Number 26 of 1977 (*Kaloleni*), the same was settled by the Attorney General in his response in Parliament on 15th July, 1987. The Parliamentary Hansard is a public document which can be availed at request. The Objectors did not bring any document from the Clerk of the National Assembly to contradict the contents of the Hansard of 15th July, 1987.

144. The claim by the Objectors that the suit land belongs to them and two other clans is therefore not true. Indeed, the claim by DW4 that it is his father who welcomed Chome Ngala, the Plaintiff's grandfather, on the land is contrary to the decision that was made in Land Case No. 26 of 1977, which was confirmed by the Attorney General in the National Assembly in 1987.

145. Having been an Assistant Chief, DW4 was well aware that his father, Madzeyo Mwangala, was not entitled to the suit land after losing Land Case No. 26 of 1977 and after being enjoined from receiving any payments from Mugoya Construction Company for the extraction of murram from the land.

146. If the three (3) clans (*the Objectors*) have been living on the land since 1982 when the decision of the court was made in Civil Case No. 26 of 1977, they have been living on the said land as squatters. They do not have occupational rights to be on the land under the Giriama or Duruma customary laws which recognize ownership of land by ancestry.

147. The Interested Parties claim also falls on the same grounds. The suit land has always belonged to the Mumba Chome clan. The mere fact that the Mumba Chome clan does not occupy the entire parcel of land cannot be a reason to deny them what was adjudicated by the court as theirs.

148. Indeed, the evidence of DW6, who is from the Mwabeja clan, was that his father, Mwatseka Masheka Beja, bought the suit; that thereafter, he invited the members of Walaire clan on the land and that those members of Walaire clan could only live on the land but could not sell it.

149. The evidence of DW6 therefore shows that they came from somewhere else and bought portions of the suit land which had been confirmed by the court to belong to the Mumba Chome clan. They cannot lay ancestry claim over the land. Indeed, from his identity card, it was shown that DW6 hails from Samburu and his father, Salim Kazungu, was not amongst the people claiming the land. That also applies to DW5 who stated that he was given a portion of the suit land by Mwakelala, the father of Nyamawi Rumba.

150. DW9 could also not prove that the suit land is his ancestral land. According to DW9, he moved from the weighbridge area and bought a portion of the suit land from Ndegwa Madzeyo and Mzungu. On the other hand, DW10, who was born in 1984 hails from Kwale County, Samburu Division, Chongoni Location, Chanzou Sub-location. He has no ancestral roots in the suit land.

151. The parties in this matter subjected themselves to the National Land Commission while this matter was ongoing. Indeed, it is the Objectors who lodged a complaint and wanted the National Land Commission to resolve the dispute. DW11 informed the court that the advocates for all the parties made detailed submissions in respect to their client's claim. DW11 stated that they visited the suit land and held barazas in Kwale. That is when the Commission prepared a Report of 9th May, 2016.

152. In the Report, the National Land Commission found that the Title Deed that was issued in this matter pursuant to the consent order is good and indefeasible; that the Parliamentary Hansard established that the land belonged to the Chomes and that there was no evidence that Mr. Tsangwa Chome was involved in any fraud. The Commission stated as follows:

“Notwithstanding the legality of Mr. Chome’s title, and pursuant to Section 14 of the National Land Commission Act that empowers the National Land Commission to give consequential order, it is hereby directed that;

i. The genuine claimants who have stayed there for long time need to be considered for some pieces of land they have been occupying;

ii. Public institutions and utilities, such as the primary and secondary school, the health centre and religious utilities must have their land set aside.”

153. No evidence was placed before me to show that the decision of the National Land Commission was erroneous or that the same was arrived at without hearing the parties or that it is *ultra-vires*. Indeed, Article 159 of the Constitution provides that in exercising judicial authority, the courts should be guided by the following principles: alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

154. Having voluntarily subjected themselves to the jurisdiction of the National Land Commission in resolving the dispute, the Plaintiff, the Defendants, the Objectors and the Interested Parties should embrace the decision and move on. In any event, I entirely agree with that decision on the grounds that I have already set out.

155. The final issue that I should deal with is the *locus standi* of the Plaintiff. The evidence that came through shows that the Plaintiff's pursuit of the suit land was for his own benefit and for the benefit of the clan of Mumba Chome. Just like the Objectors had the right to defend the suit on behalf of their entire clans, the Plaintiff was perfectly entitled to prosecute this suit on behalf of himself and the entire clan of Mumba Chome. The Plaintiff therefore did not need the letters of administration to commence the suit. The suit land belongs to the Plaintiff's clan, and not to the late Mumba Chome as an individual. The objection was therefore unfounded.

Final orders:

156. The Title Deed that was issued to the Plaintiff was issued pursuant to the orders of this court, which orders emanated from the consent of the Plaintiff and 1st and 2nd Defendants. Those orders were never set aside.

157. The Objectors and the Interested Parties have not proved that they are entitled to the suit land pursuant to the provisions of the Trust Land Act. Furthermore, there is a decision of the court in Kaloleni DMCC No. 26 of 1977 which awarded the clan of Mumba Chome the land. This position was confirmed by the Attorney General in the National Assembly on 15th April, 1987.

158. The totality of the evidence before me shows that the suit land has always been owned by the clan of Mumba Chome, and being Trust land, was held by the County Government (1st Defendant) on behalf of that family. Consequently, I find that the Plaintiff has proved his case on a balance of probability. I therefore allow the Plaint dated 14th April, 2011 in the following terms:

a. A declaration be and is hereby issued that parcel of land known as Kilifi/Madzimbani/Mitangoni/B/1 measuring 2,861 Hectares is owned by the clan of Mumba Chome Ngala, represented by the Plaintiff.

b. The Title Deed issued to Plaintiff on 26th August, 2014 to be surrendered to the Chief Land Registrar for issuance of another Title Deed to the Plaintiff, on behalf of the clan of Mumba Chome, and after reducing the acreage of the land by 200 acres which was set apart for the 2nd Defendant.

c. The National Land Commission to resettle the parties who have been living on the suit land for many years, either on the same land, with the consent of the clan of Mumba Chome, or on another parcel of land, in line with Section 134 of the Land Act.

d. The land on which public institutions have been constructed to be acquired by the National Land Commission pursuant to the provisions of the law relating to the compulsory acquisition of land.

e. Each party to bear his/its own costs.

DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF JULY, 2018.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19TH DAY OF JULY, 2018.

J.O. OLOLA

JUDGE