



Makori (Chairman suing on behalf of Ndonyo Grazing Ground Community Based Board Organisation) & another v County Government of Kisii & another (Environment & Land Case 1102 of 2016) [2024] KEELC 3741 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1102 OF 2016**

M SILA, J

APRIL 24, 2024

BETWEEN

JAPHES ARISA MAKORI (CHAIRMAN SUING ON BEHALF OF NDONYO GRAZING GROUND COMMUNITY BASED BOARD ORGANISATION) 1ST PLAINTIFF

EILLIAM OKACHI MAKORI (MEMBER) 2ND PLAINTIFF

AND

COUNTY GOVERNMENT OF KISII 1ST DEFENDANT

SAFARICOM LIMITED 2ND DEFENDANT

JUDGMENT

1. This suit was commenced through a plaint filed on 6 December 2016. The plaintiffs have filed this suit on behalf of Ndonyo Grazing Ground Community Based Board Organisation for the benefit of the said Ndonyo Grazing Ground community. The have introduced themselves as Chairman and Member respectively of the said organization. They have pleaded that in 1970, when land adjudication commenced, the land parcel South Mugirango/Nyataaro/1202 (the suit land) was recorded in the name of Gusii County Council (reserved for Ndonyo Grazing Ground) as proprietor. It is contended that the Adjudication Committee misrepresented itself by inserting the name of Gusii County Council instead of recording the name of Ndonyo Grazing Ground Community. It claimed that the defunct Gusii County Council colluded with the Land Adjudication Officers and inserted its name in the Land Register as owner when it knew that the land belonged to the Ndonyo Community. As particulars of fraud, it is inter alia alleged that the Land Adjudication Officers caused the forged record to be forwarded to the Chief Land Registrar and title was issued to the 1st defendant for land reserved for Ndonyo Grazing Ground Community. It is averred that on diverse dates the officials of the 1st defendant unlawfully invited the 2nd defendant to occupy a portion of the land with an aim of



disinheriting the plaintiffs land of 38 acres. The plaintiffs contend that they have been deprived of this land. They seek the following orders :

- a. An order of rectification of the register by deleting the name of Gusii County Council as the entry for the land parcel South Mugirango/Nyataaro/1202 and in its place insert the name Reserved for Ndonyo Grazing Ground Community for easy subdivision and each member takes back the portion donated.
 - b. Declaration that the Registration of land parcel South Mugirango/Nyataaro/1202 in the name of Gusii County Council was obtained by fraud and the same be deleted.
 - c. Costs of this suit together with interest thereon at the rate of 14% p.a from the date of filing suit until payment in full.
2. The 1st defendant entered appearance through the County Attorney and subsequently filed a statement of defence. It is pleaded that though the plaintiff might have acquired the suit property as alleged the allotment was irregular and unlawful and in blatant breach of all the tenets of the law. It is averred that the defunct Municipal Council of Kisii never resolved to allocate the said land as alleged or at all. It is pleaded that despite the plaintiff being the registered owner of the suit property she has never been in actual possession or occupation of it. It was said that a preliminary objection will be raised for the suit to be dismissed for being barred by the *Limitation of Actions Act*, Cap 22, Laws of Kenya.
 3. The 2nd defendant appointed counsel and filed defence. It denied being unlawfully invited to occupy a portion of the suit land with the aim of disinheriting the plaintiffs. It pleaded that on 31 December 2007, it entered into an agreement with the County Council of Gucha, to lease portions of the land parcels South Mugirango/Nyataaro/1201 and 1202. For the land in dispute, that is South Mugirango/Nyataaro/1202, the portion leased measures 10.4 metres by 7.4 metres (76.98 square metres). It is averred that the lease was entered on the strength of the title document showing the 1st defendant as registered proprietor. It pleaded to be a stranger to the contentions of the plaintiffs and was of opinion that the dispute herein is between the plaintiffs and the 1st defendant. It pointed out that no orders are sought against her. It also pleaded that it is willing to make its rent payments to whichever party the court declares to be the rightful owner of the land provided the terms of lease are honoured.
 4. The preliminary objection of the 1st defendant was heard by Onyango J and dismissed in a ruling delivered on 1 December 2020 paving way for the hearing of the case. Hearing commenced on 8 December 2021 before Onyango J and she took the evidence of PW-1 . There was no appearance on that date on behalf of the County Government of Kisii.
 5. In his evidence, PW-1, Japhes Arisa Makori, testified that he comes from Ndonyo Village and there is a Safaricom mast erected on the suit land. He stated that the suit land belongs to his community, which he described as Abarwora Ndonyo Community, and was set aside as a grazing field. He stated that the County Government gave the land the name Ndonyo Grazing Ground. He contended that the land was donated by about 32 members of the community and is on top of Ndonyo Hill. He testified that he grew up in this area and has been seeing members of the community grazing their livestock on the land. He elaborated that the land is currently used for farming and cultivation. He testified that in 2016, the 2nd defendant, Safaricom Limited (Safaricom) , installed a mast on the grazing land. He testified that Safaricom entered into a contract with Daudi Nkoba Nyaboga, Ndonyo Primary School and the County Government of Kisii. He stated that as members of the community they were not paid any money by Safaricom. He produced a copy of an official search showing the registration of the land and a Certificate of Registration of Ndonyo Grazing Ground Community Based Organisation. He also produced a list of the members said to have donated the land. He testified that on 7 March



- 2016, they wrote to the Chairman, National Land Commission, complaining that some people had planted trees on the land without their knowledge and that they wished to have the land transferred to Ndonyo Grazing Ground since the County Council was holding it in trust. He wanted Ndonyo Grazing Ground to be declared as owner of the suit land and title be registered in name of Ndonyo Grazing Ground Community. He stated that he has no problem with Safaricom having installed a mast on the land but stated that they should pay for the use of the land. He wished to have the County Council restrained from carrying on activities on their land without their consent. He elaborated that they came and fixed beacons and planted trees without their consent.
6. Cross-examined by counsel for the 2nd defendant, he testified that they sued Safaricom because they installed a booster on their land without their consent. He however was categorical that they have no problem with the booster installed since it is beneficial to the community though they wish to be paid for the use of their land.
 7. With that evidence the plaintiffs closed their case.
 8. Shortly thereafter Onyango J was transferred from the station and the rest of the hearing was conducted before me. The 1st defendant did not appear at the date fixed for defence hearing which was on 1 February 2023. However, the 2nd defendant appeared and called one witness, Mr. Fredrick Okech. He works with Safaricom as a site acquisition manager. He is a Land Economist and a valuation surveyor. He confirmed that Safaricom has installed a Base Transceiver Station (BTS) on the suit land and they have a lease agreement with the County Government of Kisii for use of the land. They took up this portion as it was pointed out by their engineers to be a good location for a BTS. He testified that they did a search which confirmed that the land is of Gusii County Council (now defunct) and they entered into a lease agreement dated 31 December 2007. He explained that they do remit annual rent to the County Government of Kisii and in his view they do remit rent to the rightful owner. He added that once the court determines the rightful owner they will pay rent to that person. Cross-examined, he could see that the official search certificate of the land has the words “reserved for Donyo Grazing Ground.” He affirmed that when making the lease agreement, the plaintiffs were not involved. According to him, they do agreements with title holders. For leases where land is owned by the County Councils though reserved, an example being given ‘reserved for a certain Primary School’, they do the agreements with the County Government, and if the County deems fit they can share the proceeds with the school (or any other entity depending on the context). He testified that they were aware that this was County land held in trust for the community. They pay rent to the County Government and not the community. He affirmed that the land is 38 acres and they have leased about 80 square metres. They have access to the land but they do not pay for roads of access. The right to access is in the lease agreement. He was not aware that the land was given out by the community for a grazing area and he did not have the history of the land. He stated that if the court orders that they pay the plaintiffs then they will do so.
 9. With the above evidence, the 2nd defendant closed her case.
 10. I asked Mr. Sagwe, learned counsel for the plaintiffs whether the community want the BTS removed. His answer was that the BTS is useful to the community and they do not want it removed. He stated that they only wish to have the whole rent paid to them since the 1st defendant is only holding the land in trust for the community.
 11. At this juncture, I felt strongly that this was a suit which parties can agree. I made various directions including engagement with the Member of County Assembly for the area and the County Attorney for purposes of settlement. There were insinuations that parties would agree and I mentioned the case a record seven times. In one of the mentions, Mr. Sagwe, learned counsel for the plaintiff stated that



he had sent a draft consent to his counterparts, but they had not come back to him with anything concrete. I frankly did not see any seriousness on the part of the defendants to settle the matter, which was unfortunate, as I had given them close to a year to settle the matter. There being no movement in that front I reserved the matter for judgment.

12. I have considered the pleadings, the evidence, and the submissions that I have before me. I will start by saying that parties are tied to their pleadings and the court can only make a decision that is within the context of the pleadings of the parties. This court cannot go outside what is pleaded to be the cause of action of the parties. I am saying so because within the proceedings of the case, it appeared as if what the plaintiffs want is different from what their pleadings say. It will be recalled that it was said from the bar that what the plaintiffs want is only a benefit sharing formula with the County Government for the rent that is paid by Safaricom. But there is no such pleading nor prayer in the plaint. If this is what the plaintiffs wished this court to pronounce itself on, the plaintiffs needed to provide the correct pleadings for this to be interrogated. Given the failure to come up with any consent on this and the lack of pleadings thereof, it is not an area that I am convinced I should go into. I will restrict my decision to what the parties have presented and my analysis of the case is on that basis.
13. The pleadings contend that the registration of the suit land in the name of the Gusii County Council (the County Council) was obtained through fraud, in that there was misrepresentation in recording the name of the County Council in the adjudication register instead of recording Ndonyo Grazing Ground Community. There is allegation that there was forging of the adjudication register and that the forged register was forwarded to the Chief Land Registrar so that title was issued in the name of the Gusii County Council. It is for these reasons that in prayer (b) of the plaint, the plaintiffs seek orders , for a declaration that the registration of the suit land in the name of Gusii County Council was obtained by fraud and the same should be deleted.
14. I am not, from the evidence presented, persuaded that there is any shred of evidence which supports the contention of the plaintiffs that the registration of the suit land in the name of the Gusii County Council was through fraud. The plaintiffs did not present any adjudication record to court and neither did they demonstrate what forgery was committed in the adjudication record. In fact, from their own evidence, it was stated that it was 32 members of the community who donated the land so that it can be set aside for grazing purposes. If it was donated by members of the community so that there can be an open grazing area that members of the community can access without hindrance where is the fraud in the land being registered in the name of the Gusii County Council so that the Council can hold it in trust for the community ? That is exactly what the persons who donated the land and the community wanted and this was effected.
15. Indeed, the [Land Adjudication Act](#), Cap 284, Laws of Kenya, made provision for such occurrence and directed that such land be registered in the name of County Councils. This comes out in Section 23 and of the [Land Adjudication Act](#), which is drawn as follows :

23. Preparation of adjudication record

- (1) The forms prepared by the recording officer under section 19 of this [Act](#) shall together comprise the adjudication record.
- (2) In preparing the adjudication record, the recording officer, if he is satisfied that—
 - (a) any person has, under recognized customary law, exercised rights in or over land which should be recognized as ownership, shall determine that person to be owner of that land:

Provided that if—



- (i) the land adjoins land of which a group is determined under paragraph (b) of this subsection to be the owner; and
 - (ii) that person desires to join the group and to have his land added to the group's land; and
 - (iii) the group is willing to have that person as a member, the recording officer shall determine that group to be the owner of that land, and thereupon that person shall become a member of that group;
- (b) any group has, under recognized customary law, exercised rights in or over land which should be recognized as ownership, shall determine that group to be the owner of that land;
 - (c) land has been set apart under the Constitution, shall determine the person in whom the land is vested to be the owner of the land set apart;
 - (d) land is entirely free from private rights, or all private rights in or over the land have been relinquished in favour of the county council, shall determine the county council to be the owner of the land;
 - (e) any person or group is entitled to any interest in land not amounting to ownership, including any lease, right of occupation, charge or other encumbrance, whether by virtue of recognized customary law or otherwise, shall determine the nature, incidents and extent of the right to enable it to be recorded in the name of the person or group entitled to the benefit of it.
- (3) Each of the forms which comprise the adjudication record shall contain the following information—
- (a) the number of the parcel as shown on the demarcation map and its approximate area;
 - (b) a record of—
 - (i) the name and description of the owner, with particulars of any restriction on his power of dealing with it;
 - (ii) where the land has been set apart, the year and number of the Gazette notice by which, and the purpose for which, the land was set apart; and
 - (iii) where the land is recorded under subsection (2)(d) of this section as being in the ownership of the county council, the fact that the land remains Trust land.

16. Section 23 is of course a lengthy section which I have opted to copy in full so that it can be put into context, but what is important for our circumstances is Sections 23 (2) (d) and 22 (3) (iii) which I have highlighted. From them, it will be seen that during adjudication, land could be set free from private rights, and also persons who could have private rights over such land could relinquish them in favour of the County Council in which instance the County Council would be considered the owner of the land. It would still remain land held in trust as provided for under Section 22 (3) (iii) and such land would remain Trust Land. In other words, though the County Council would be recorded as proprietor it would be holding the land in trust, with the particulars of the said trust being indicated in the register. In our circumstances, this is precisely what happened. Some persons who would otherwise have private



- rights over the land wished to have it set apart for the community and they relinquished their private rights to it. The land therefore fell to be registered under the name of the Gusii County Council holding it in trust and the nature of the trust is in the register, that is, in trust for Donyo Grazing Community.
17. I have already said that I have not been shown anything that would indicate fraud and neither is there any illegality, as I have demonstrated above, in the registration of the County Council as proprietor of the land as trustee for the Donyo Grazing Community. Prayer (b) of the plaint therefore cannot succeed.
18. I will now turn to prayer (a) which seeks an order for rectification of the register to delete the name of the Gusii County Council and have the land registered in the name of Ndonyo Grazing Ground 'for subdivision so that each member takes his portion.' This again is misplaced in the context of this case. As observed in what is provided in the [Land Adjudication Act](#), such land is trust land. Trust land was initially held under the [Trust Land Act](#), Cap 288 Laws of Kenya which was repealed by the [Community Land Act](#), Act No. 27 of 2016. Such land is community land and now falls under the [Community Land Act](#).
19. The [Community Land Act](#) and the [Community Land Regulations](#) outline the process that needs to be followed to convert community land into private land. Section 16 of the Regulations states :
16. Conversion of community land to private land
- (1) A community may convert whole or part of its land to private land through transfer with the approval of at least two thirds of the community assembly.
 - (2) Upon approval under paragraph (1), a transfer instrument shall be prepared and executed by the Chairman and the Secretary of the community land management committee and presented to the registrar for registration in accordance with the [Land Registration Act](#) (Cap. 300).
 - (3) A community may allocate whole or part of its land to the members in accordance with the Act with the approval of at least two thirds of the community assembly.
20. The procedure is there for the plaintiffs to follow and it has not been shown to me that there has even been any attempt to comply with the requirements of the law for conversion of community land to private land. I therefore regret my inability to grant prayer (a).
21. It will be seen that I am not persuaded that the plaintiffs deserve any of the prayers that they brought to court. In fact it would appear that the issue has little to do with the prayers as presented but with the aspect of benefit sharing of the rent paid by the 2nd defendant. On the face of it is unfair that the community does not benefit from the payments made by the 2nd defendant. That is an issue that needs to be negotiated and addressed. If it fails then the plaintiffs are at liberty to file an appropriate suit for redress. I am also not too impressed by the rather laid back approach that I saw being taken by the 2nd defendant. I think she needs to be more proactive in amicably resolving disputes emanating from its use of community resources.
22. For the case at hand I have demonstrated that it is devoid of merit and I have option but to dismiss it. It is hereby dismissed. I however make no orders as to costs.
23. Judgment accordingly.

DATED AND DELIVERED THIS 24TH DAY OF APRIL 2024

JUSTICE MUNYAO SILA



JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of :-

Mr. Sagwe for the plaintiff

Mr. Oirere for the 1st defendant

Mr. Ogari for the 2nd defendant

Court Assistant – David Ochieng’

