



**Kalutu & 1704 others v County Government of Taita Taveta (Environment & Land Petition E005 of 2024) [2024] KEELC 6767 (KLR) (Environment and Land) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6767 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND PETITION E005 OF 2024  
EK WABWOTO, J  
OCTOBER 16, 2024**

**BETWEEN**

**KENYA KALUTU ..... 1<sup>ST</sup> PETITIONER  
CHARD LEWELA ..... 2<sup>ND</sup> PETITIONER  
DOMINIC KITANDO & 1702 OTHERS & 1702 OTHERS & 1702  
OTHERS ..... 3<sup>RD</sup> PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF TAITA TAVETA ..... RESPONDENT**

**JUDGMENT**

1. The Petitioners in the petition dated 23<sup>rd</sup> May 2024 seeks for the following reliefs;
  - a. A declaration that gazette notice no. 3052 issued on 15<sup>th</sup> March 2024 dated 13<sup>th</sup> March 2024 by the County Government of Taita Taveta through its Governor Andrew Mwadime referring land no. LR No. 3880/3 Taita Taveta as a community land to be held by the County Government of Taita Taveta in trust of communities represented by Mgeno Grazers Integrated Community Based Organization (CBO) be declared illegal, unconstitutional and hence null and void on the onset.
  - b. An order suspending the implementation of gazette notice no. 3052 dated 13<sup>th</sup> March 2024 pending the hearing and determination of the Petition.
  - c. An order directing the process of settling Mgeno Squatters do proceed as planned.
  - d. Costs of this Petition be borne by the Respondent.



- e. Any other relief this Court may deem fit to grant and your humble Petitioners pray that the Petition herein be allowed as prayed.
2. The subject Petition is premised on the various grounds alluded to and or enumerated in the body thereof and the same is supported by the Affidavit sworn by Kenya Kalutu, Chard Lewela, Dominic Kitando sworn on 23<sup>rd</sup> May 2024.
  3. Upon being served with the petition, the Respondent only entered appearance by filing a Notice of Appointment through Mwang'ombe John Mwakio dated 16<sup>th</sup> day of July 2024. No response nor written submissions was filed by the Respondent in respect to the Petition despite being granted an opportunity to do so.
  4. Pursuant to the directions issued by the court, the Petition was canvassed by way of affidavit evidence, oral and written submissions filed by the parties.
  5. The Petitioners case as presented in the Petition and the Supporting Affidavit sworn by Kenya Kalutu, Chard Lewela and Dominic Kitando is that the Petitioners are residents and squatters in public land known as LR No. 3880/3 Taita Taveta. They have lived there peacefully, they have established homes, farm lands, grazing zones and have known the said land as their home.
  6. It was averred that the Government of Kenya recognized the Petitioners as lawfully being on the said land and decided to settle them on the said land. It was also averred that the said land L.R. No. 3880/3 was surrendered to the Government by the previous registered owner Taita Estate (1972) Ltd. The Government through the Ministry of Lands started the process of settling the Petitioners on the said land in 2019 and later in 2020 the National Land Commission also initiated the process of settling the Petitioners on the said land. It was also averred that the said land is approximately 6,000 acres and has 3,300 people living there.
  7. It was also averred that sometimes in 2022 a community-based organization called Mgeno Graze Integrated CBO filed a case in court at the Mombasa Environment and Land Court vide Mombasa ELC Case No. E006 OF 2022 attempting to scuttle the process. The said suit was struck out on 23<sup>rd</sup> May 2023.
  8. The Petitioners grievances against the Respondent is that while they were waiting for the process to settle them to continue, the Respondent through its Governor vide a Gazette Notice dated 13<sup>th</sup> March 2022 issued on 15<sup>th</sup> March 2024 being Gazette Notice No. 3052 gazetted the said public land wrongly as a community land to be held by the Respondent for the benefit of Mgeno Grazes Integrated Community based Organization (CBO).
  9. It was contended that the said land is a public land and not community land as described by the said Gazette Notice No. 3052 and hence the Respondent cannot in law gazette the said land as community land since the same is contrary to Article 62(2) of *the Constitution*.
  10. The Petitioners filed written submissions dated 19<sup>th</sup> June 2024. Counsel for the Petitioners submitted that the Gazette Notice No. 3052 dated 13<sup>th</sup> March 2024 was illegal null and void for offending the provisions of *the Constitution*.
  11. It was submitted that LR No. 3880/3 was converted from private land to public land as contemplated under Section 9(2)(c)(iv) of the *Land Act* and further pursuant to Section 12(1) of the *Land Act*, the National Land Commission is the only body mandated to allocate public land to any person and or entity.



12. During the plenary hearing of the Petition, Learned Counsel Mr. Muthami adeptly submitted in support of the Petition. Learned Counsel reiterated the contents of the Petition and written submissions filed and urged the court to grant the reliefs sought in the Petition. There were no written or oral submissions made by the Respondent for consideration by this court.
13. Upon considering the Petition, affidavit filed, written and oral submissions made by the Petitioners, the court is of the view that the salient issue for determination herein is whether the impugned gazette notice No. 3052 of 2024 was made contrary to *the Constitution* and other statutory powers and hence null and void.
14. It is trite law that even in cases where a Petition is undefended like the case here, the Petitioner retains the burden of proof. He or she has to discharge that burden on a balance of probabilities.
15. On 15<sup>th</sup> March 2024, the following Gazette Notice No. 3052 was gazetted by the Governor Taita Taveta County;-

“Gazette Notice No. 3052

*The Constitution* Of Kenya

The County Government Act

(no. 17 Of 2012)

Community Land

IT IS notified for the general information of the public that community land L.R. 3880/3 Mwatate is held by the County Government of Taita Taveta in trust of communities represented in Mgeno Grazers Integrated Community Based Organization (C.B.O).

Patrick Mwavula Jonathan – Chairman

John Kenyatta Mengo – Secretary

Wilfred Mbonnke Mkubwa – Treasurer

Richard Mwambacha Mwangano,

Veronica Mghoi Mwawasi,

Dianah Mghoi Masumani,

Eddah Msae Nyange,

Venany Mwaivu Machocho,

Prestone Mwaisaka Mwambela,

Jackson Lundi Wakio,

Daudi Mtiriri Mwashimba,

Elvis mwandonyi Msagha,

Benson Kitavi Muganga,

Sunstone Kambale Tole,

Oscar Ndigila Righa,

Are members of the Management Committee of Mgeno Graziers Integrated Community Based Organization (C.B.O).



Dated the 13<sup>th</sup> March, 2024.

Andrew Mwadime,

Governor, Taita Taveta County”

16. The Petitioners argued that the actions of the Respondent in gazetting the said Gazette Notice was unlawful and hence null and void. It was also argued that the National Land Commission is the entity vested with the powers to manage and deal with public land. The Petitioners argued that the said property was public land which had been surrendered to the Government by Teita Estate (1972) Limited.
17. Article 62(3) of *the Constitution* provides that certain classifications of Public land shall be administered on their behalf by the NLC.
18. Section 5(2) of the NLC Act Apart from the functions listed under Article 67(2) of *the Constitution*, Section 5(2) of the Act assigns other tasks to the NLC, in the following terms:
  - “(a) on behalf of, and with the consent of the National and County Governments, alienate public land;
  - (b) monitor the registration of all rights and interests in land;
  - (c) develop and maintain an effective land information management system at National and County levels; and
  - (d) manage and administer all unregistered trust land and unregistered community land on behalf of the County Government.”
80. It is evident that the National Land Commission has been given powers in respect to any dealings of Public Land. The Supreme Court in the matter of the National Land Commission [2015] eKLR stated:

“...the requirement of consent to such a transaction, from the National or County government is certainly a check and balance relationship between the two state organs. The NLC’s function of monitoring the registration of all rights and interests in land is another mechanism of checking the powers of the body responsible for registration.”
19. Then the *National Land Commission Act* confers power upon the National Land Commission to administer and manage public land that is vested in County Government. The *National Land Commission Act* further requires National Land Commission to undertake certain functions for effective management of land.
20. In the instant case, the court has carefully perused the copy of Title marked KK1 that was produced by the Petitioners in evidence herein and notes that L.R. No. 3880 was initially surrendered to the Crown on 15<sup>th</sup> April 1953 vide entry No. 4. The said position was not challenged or controverted by the Respondent. Once land is surrendered, it is reinstated back to the grantee – the Government of Kenya. In view of the foregoing the said land could not have been community land upon which the Respondent could have the mandate to issue the impugned gazette notice.
21. It therefore follows that the impugned gazette notice could not have been sound. The same was done contrary to the law. There was no evidence that the Petitioners were engaged prior to the issuance of the same. Looking at the totality of the Petitioners case, this court is persuaded and agrees with



the Petitioners contention that there was a violation of Articles 40, 47 (1), 62(2) and 67(2)(a) and (h) of *the Constitution*. Consequently, it is the finding of this court that the Respondent's action was unconstitutional and contrary to the law.

22. In view of the foregoing, the court is satisfied that the Petition is merited and the reliefs sought are for granting.
23. On the issue of costs, its trite law that the court has discretion as to whether costs are payable by one party to another. Having regard to all the relevant circumstances in the instant petition it would only be fair, if each of the parties herein bear their own costs.

### **Final Disposition**

24. In the end, the Petition dated 23<sup>rd</sup> May 2024 succeeds in the following terms:-
  - a. A declaration is hereby issued that Gazette Notice No. 3052 issued on 15<sup>th</sup> March 2024 and dated 13<sup>th</sup> March 2024 by the County Government of Taita Taveta through its Governor Andrew Mwadime referring to L.R No. 3880/3 Taita Taveta as a community land to be held by County Government of Taita Taveta in trust of communities represented by Mgeno Grazers Integrated Community Based Organization (CBO) is declared unconstitutional, illegal and null and void.
  - b. An order is hereby issued directing the process of settling Mgeno Squatters do proceed as earlier planed.
  - c. Each party to bear own costs of the petition.

Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 16<sup>TH</sup> DAY OF OCTOBER 2024.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Mr. Muthami for Petitioners.

N/A for Respondent.

Court Assistant: Mary Ngoira.

