



**REPUBLIC OF KENYA**

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

**E.L.C CASE NUMBER 26 OF 2018**

**COUNTY GOVERNMENT OF TANA RIVER.....PLAINTIFF**

**VERSES**

**FARAH ALI IBRAHIM.....1<sup>ST</sup> DEFENDANT**

**SULEIMAN IMOLE BITACHA.....2<sup>ND</sup> DEFENDANT**

**ABDI KARIM BOCHO.....3<sup>RD</sup> DEFENDANT**

**ASMAN BACHO BITACHA.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

The plaintiff, vide a plaint dated 23<sup>rd</sup> July, 2018 filed contemporaneously with a notice of motion of even date under certificate of urgency seeks the following orders;

- 1) Interlocutory injunction to restrain the Defendants, jointly and/or severally by themselves, their agents, employees and/or any other person howsoever from clearing bushes, dealing in, trespassing, fencing, transferring, disposing, erecting or causing to be erected thereon any structures, disposing and/or in any other manner interfering with all that piece of un-surveyed land measuring approximately 200 metres by 1500 metres which land borders River Tana to the East, mzee Jelle Abdi Ibrahim 's farm to the South and Suleiman Imole Bitacha farm to the North situated at Faf Bare Village, Mullango Sub-location, Saka Location, Madogo Division, Tana North Sub-County within Tana River County.
- 2) A declaration that the suit property has been and still is an un-registered Community land held in trust by the plaintiff on behalf of the local community and therefore the sale Agreement dated 12<sup>th</sup> march, 2018 be revoked.
- 3) A permanent injunction to restrain the defendants jointly and/or severally by themselves, their agents, employees and/or any other person howsoever from clearing bushes, dealing in, trespassing, fencing, transferring, disposing,, and/or in any other manner interfering with the suit property and any other community land owned by the local community until the land Adjudication programme is commenced and completed and the respective community land title documents are issued
- 4) General damages with interest thereon at prevailing bank rates from the date of judgment till payment in full.
- 5) Any other orders and reliefs the court may deem just, expedient and fit to grant
- 6) Costs of this suit together with interest thereon at prevailing bank rates from the date of judgment till payment in full.

The defendants engaged the firm of GARANE & SOMANE Advocates who filed a Notice of Appointment of Advocates dated 30/08/2018 on 03<sup>rd</sup> September, 2018. On 24/10/2018, the defendants through the said firm of Advocates also filed a Memorandum of Appearance and on 24/02/2021, a Notice of Change was filed by the firm of Faruq Kyallo & Company Advocates and again on 04/06/2021, a notice of change was filed by the firm of Roble & Company Advocates and on 03/10/2021, they filed their Defence to the plaintiffs' claim. On 27/10/2021, this matter proceeded for hearing.

**SUMMARY OF THE PLAINTIFF'S CASE**

The plaintiff called one Mahad Barissa Jillo as the first witness(Pw1) who adopted his witness testimony dated 24/09/2021 and stated that he is a community leader of Hirdida clan also known as ILani clan which is one of the clans of a larger clan known as Munyoyaya clan which is a closely-knit community living in the North Coast of Kenya, Tana River County, concentrated mainly in Tana North sub-county, Madogo

Division, ( within Mororo, Madogo and Saka location), Mbalambala Division, ( within Buwa and mbalambala location) along Tana river. He further stated that they lived in this part of the country since pre-colonial times and were the first to settle in this part of the upper Tana. That the Munyoyaya local community are composed of six inter-dependant clans namely Karara clan, Mandoyyu clan, Baretuma clan, Metta clan, Nyurtu clan, and Ilani clan. He stated that each clan has a clan community leader elected by the members of each clan. He also stated that the clan community leaders are the spokes persons of the members of each respective clan. That Munyoyaya community are essentially patriarchal and are organized along patrilineal households, clans and sections. That authority and decision making within the community is vested in elder men, who play a crucial role based on their extensive experience and knowledge. That because of the traditional patriarchal system, the munyoyaya women and children are often victims of dispossession of land ownership and inheritance as the men dispose off family land and properties without consulting women and the male domination and suppression of women s' among the munyoyaya is increasingly being perpetuated unless immediate intervention by the courts. That That the property at the heart of this suit as described in the sale Agreement dated 12<sup>th</sup> march, 2018 which was produced in evidence in this case was entered into between the defendants is all that un-surveyed and un-registered parcel of land measuring approximately 200 metres by 1500 metres which land borders River Tana to the East, mzee Jelle Abdi Ibrahim's farm to the South and Suleiman Imole Bitacha farm to the North at Faf Bare village, Mullanjo sub=location, saka location, madogo Division, Tana North sub-county within Tana River County. He further stated that the suit property which is situated at the Tana Delta has diverse ecosystems habitats and a variety of plant and animal species and that the munyoyaya clans have co-existed with these species such that their livelihood is directly dependant on the river which supports their farming and fishing activities along the coastland. That being an un-surveyed and un-registered land means that there are no Government survey records and therefore the same is being held by the County Government of Tana River (plaintiff) in trust for the local community. He averred that the proprietorship rights over Community land can only crystallize upon registration and subsequent issuance of certificate of titles pursuant to section 18(1) of the community land Act 2012. The witness stated that the plaintiff herein holds the suit property in trust for the ancestral residents of Faf-Bare village within Tana River County for the benefit of the local community known as Munyoyaya Local Community pursuant to section 6 of the Community land Act. That the plaintiff's interest in this suit is purely to exercise its mandate within its trusteeship constitutional and statutory obligation under the law on behalf of the beneficiaries , the Munyoyoya local Community. He further stated that the plaintiff herein, in consultation with the relevant Authorities is in the process of coming up with a comprehensive Adjudication programme of all the un-registered land within its jurisdiction. These programmes, he said, include identification and registration of communities, formation of community land administration committees, identification of community land registration units, inventory of all un-registered community land, certificate of reservation and registration of community land. In conclusion, the witness averred that in accordance with its statutory mandate, the plaintiff has taken positive steps towards realising its mandate when on January 25<sup>th</sup>, 2019 vide Kenya gazette No. 497-vol. CXXI-NO.12, the Governor of Tana River county His Excellency Dhadho Gaddae Goghana appointed a seven-member task force to investigate illegal and irregular land Allocation within its jurisdiction. Again on 2<sup>nd</sup> September, 2019 the plaintiff officially launched its Geographic Information System Laboratory (GIS) to collect and collate data on land within its territorial jurisdiction

The second witness called by the plaintiff was Joseph Tola Ipu( Pw2) who works as Madogo sub-county physical planner within Tana North sub-county Tana River County. He reiterated his averments in his witness statement dated 27/9/2021 and stated that the suit property is part of a larger parcel of land situated at Faf- Bare village, Mullanjo sub-location, Saka location, Madogo Ward, Tana North sub-County within Tana River County. He reiterated the evidence adduced by Mahad Barrisa Jillo (Pw1) and stated that the suit property is part of and still is unregistered community land that is held by the plaintiff in trust for the Munyoyaya ethnic community residing within Madogo Area within Tana River County. He stated that the suit property has neither been surveyed nor Adjudicated meaning there is no government survey records and therefore the land is a community land held by the plaintiff in trust for the residents of Faf-Bare village for the benefit of the local community known as the Munyoyaya local community as per the provisions of section 6 of the community land Act. He stated that the plaintiff's mandate in the suit property herein is constitutional and statutory and no more. He said that the plaintiff in consultation with the relevant authorities is in the process of coming up with a comprehensive Adjudication programme of all the un-registered land within its jurisdiction which include identification and registration of Communities, formation of community land administration committees, identification of land registration units, inventory of community lands, certificate of reservation and registration of community land. Finally, the witness said that the plaintiff on 25/01/2019, vide Kenya gazette NO. 497-vol. CXXI-NO.12, the Governor His Excellency Dhadho Gaddae Godhana appointed a seven member task force to investigate illegal and irregular land allocation within his territorial jurisdiction and on 02/09/2019, he also officially launched its Geographic Information Systems Laboratory (GIS) to collect and collate data on land within its territorial jurisdiction. In conclusion the witness stated that by virtue of the sale agreement, the suit property is in the verge of being illegally and irregularly disposed of by the defendants unless this honourable court intervenes.

### **THE DEFENDANTS SUMMARY OF FACTS**

The defence called four (4) witnesses. The first witness was Farah Ali Ibrahim who is also the 1<sup>st</sup> defendant in this case. He is a resident of Garissa and doing farming in Saka location, Tana North Sub- county within Tana River County. He referred to his witness statement filed in court on 08/10/2021 which he adopted in his evidence and confirmed that he bought a parcel of land from one Abdi Karim Bocho (3<sup>rd</sup> defendant), Asman Bacho Bitacha and Suleiman Imole Bitacha. He stated that before he bought the land, he did due diligence where he was told that the property belonged to the family of the vendors herein . He said that there was no one from the vendors' family who complained as they have another land where they live and do farming.

The second witness called by the defence was Abdi Karim Bocho ( pw2) who is also the 3<sup>rd</sup> defendant in this petition who also adopted his witness statement filed in court on 08/10/2021. According to him, he lives in Faf-Bare village with his family where he was born . He stated that he inherited the land where he lives from his grand-mother, one Hachela Malavu who settled in Mullanjo area before independence. He stated that all his life, the different families in Faf-Bare village farm have parcels of land which are known to belong to a particular family and the family farms on its own land. He further stated that they are farmers and each family farms on its parcel of land individually and not jointly as members of Faf- village or Munyoyaya community. He said that it is understood in the community that each family is free to deal with their parcel of land as they please as long as they do not interfere with other peoples land. That a family can sell part of their land to raise money to build or pay school or cater for any other need(s). He stated that in march, 2018 his cousin Suleiman Imole Bitacha , his brother Asman Bacho Bitacha and him sold part of their land which they inherited from their father Bacho Bitacha to Farah Ali Ibrahim and retained a sizeable portion for use by their family where they live and cultivate bananas.

The third defence witness was Guracho Abuwataa (pw3) who testified and stated that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are his nephews as their father was his step-brother. He said that the suit property belongs to Bitacha family before it was sold to Farah Ali Ibrahim. He said that the

Bitacha family has been cultivating bananas and maize in the suit land for several decades since he was young and that the land holding system among the Munyoyaya residing in Faf-Bare and neighbouring areas is private family land and not community land

The 4<sup>th</sup> and last witness called by the defence was Barow Kolacha Abwata who also gave sworn testimony and stated that he a resident of Faf-Bare village and a neighbour to the Bitacha family before they sold a portion to Farah Ali Ibrahim. He said that the farms in Faf-Bare is held by various families as private land and that a family can sell a part of their land to cater for their needs provided there is consensus between the family members. He said that the land holding system among the Munyoyaya residing in Faf-Bare area is private family land and not community land. In conclusion, the witness stated that the suit land was and is private family land and not community land.

### **PLAINTIFF'S SUBMISSIONS**

The plaintiff through the firm of CNN Advocates LLP framed three issues which she submitted on as follows;

- 1) Is the suit property a private family land or an un-registered community land?
- 2) Was the suit property disposed in accordance with the law?
- 3) Why should this Honourable court fully grant the plaintiff's prayers?

#### **1) IS THE SUIT PROPERTY A PRIVATE FAMILY LAND, OR AN UN-REGISTERED COMMUNITY LAND?**

On this first issue, the plaintiff's counsel submitted that Article 6(2) of the constitution classifies land in Kenya as either being communal or private land. She submitted that other than the defendants' mere allegations that the suit property is a family land, they have not produced any documents of title evidencing private ownership of the same. She argued that as long as the suit property remains un-adjudicated and un-registered, it remains to be community land and no individual can place an individual ownership claim over the suit property. She submitted that the mere occupation of an un-registered community or any portion thereof exclusively or otherwise by a specific family, clan or group does not crystallize private proprietorship claims and neither does it grant any community member thereof the right to engage in illegal and irregular dealings over the said community at the expense of the other community members, clan, or group. That proprietorship rights over community land can only crystallize upon registration and subsequent issuance of a certificate of title pursuant to section 18(1) of the CLA

#### **2) WAS THE SUIT PROPERTY DISPOSED IN ACCORDANCE WITH THE LAW?**

On the second issue, the learned Counsel submitted that by their own admission through the sale Agreement produced in evidence, the defendants have illegally and irregularly disposed of the suit property thereby perpetuating an illegality. In conclusion, the plaintiff submitted that the defendants' actions offend the provisions of the law by disposing the suit property in the manner in which they did and the sale should be nullified.

The plaintiff has cited the following decided case and citations in support;

- 1) COUNTY GOVERNMENT OF TANA RIVER V DAKANE SHAKE BOCHA & 10 OTHERS, ELC NO. 16 OF 2018(GARRISA)
- 2) COUNTY GOVERNMENT OF TANA RIVER V MOHAMED AMIN MUHUMED & 3OTHERS, ELC NO. 25 OF 2018(GARRISA)
- 3) BAHOLA MKALINDI RHIGHO & 9 OTHERS V MICHAEL SETH KASEME & 3 OTHERS(2016)Eklr
- 4) COMMUNITY LAND ACT,2016

### **DEFENDANTS' SUBMISSIONS**

The defendant did not file submissions in accordance with the directions given by the court

### **LEGAL ANALYSIS AND DECISION**

**I have considered the pleadings by the two parties, their testimonies, their documentary evidence and the law. The issues for determination between the parties which can be discerned from the pleading can be framed as follows;**

- 1)Whether the suit property is a private family land or an un-registered community land?
- 2)Whether the suit property was disposed of in accordance with the law?
- 3)Who will bear the costs of this suit?

**Whether the suit property is a private family land or an un-registered community land?**

Article 61 (2) of the constitution of Kenya, 2010 classifies land in Kenya as either public, private or communal. This definition becomes even more clear in Article 64 of the same constitution where it provides thus;

Private land consists of;

- a) Registered land held by any person under any freehold tenure;
- b) Land held by any person under leasehold tenure; and
- c) Any other land declared private land under an Act of Parliament.

Again Article 63 of the Constitution defines Community land as follows;

(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consist of;

- a) Land lawfully registered in the name of a group representatives under the provisions of any law;
- b) Land lawfully transferred to a specific community by any process of law;
- c) Any land declared to be community land by an Act of Parliament; and
- d) Land that is ;
  - i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
  - ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
  - iii) lawfully held as trust land by the county Governments

Further, section 12 of the community land Act, 2016 specifies that community land may be held as communal, family, clan or as a reserve land and further, section 2 of the Land Act, NO. 6 of 2012 , defines;

“ **Community land tenure**” to mean unwritten land ownership practices in certain communities in which land is owned or controlled by family, clan, or designated community leader.”

Section 6 of the Community land Act provides the role of the County Government such as the plaintiff in this case is to hold in trust all un-registered Community land on behalf of the communities for which it is held. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in this case who are said to have sold the suit land to the 1<sup>st</sup> defendant did not have any proprietorship rights over the suit property which is an un-registered community land. They have not produced any documents showing that the land is a private family land capable of being disposed of under any written law. I agree with the plaintiff’s counsel that as long as the suit property is un-registered and un-Adjudicated, the same shall remain community land and no individual person or group of persons can claim ownership over the same other than in accordance with the law.

#### **Whether the suit property was disposed of in accordance with the law?**

**The 2<sup>nd</sup> , 3<sup>rd</sup> , and 4<sup>th</sup> defendants admitted** selling the suit land to the 1<sup>st</sup> defendant for a consideration of kshs. 2,080,000/ as indicated in the sale Agreement 12/03/2018. Section 10(3) of the Community land Act provides that until any parcel of community land has been registered in accordance with the Community land Act, such land shall remain un-registered community land and shall be held in trust by the County Government on behalf of the the communities for which it is held pursuant to Article 63(3) of the Constitution. Section 6(6) of the Community Land Act also provides that any transaction in relation to un-registered community land within the County shall be in accordance with the provisions of the Community land Act and any other applicable law. Section 6(7) of the same Act further provides that upon registration of any un-registered community land, the respective registered community shall assume the management and administrative functions provided in the Community Land Act and the trustee role of the respective County Government in relation to the land shall cease. In light of These elaborate constitutional and statutory provisions as well as the procedures therein which define community land and the role of County Governments under which such land is held, it is clear in my mind that the actions by the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants in purporting to sale the suit land to the 1<sup>st</sup> defendant was not only illegal and irregular but the same offends the provisions of the law.

In a the case of Bahola Mkalindi Rhigho & 9 Others v Michael Seth Kaseme &3 Others (2016) Eklr, the court held;

“86. For as long as Trust land remained un-adjudicated and un-registered, it belonged to the local tribes, groups, families and individuals of the area (emphasis ours). Once adjudicated and registered, trust land was transformed into private land. That is what the provisions of sections 114, 115, and 116 of the repealed constitution provided...”

87. Indeed, section 115(2) of the repealed constitution provided that Trust land could only be dealt with in accordance with the African Customary Law vested in any tribe, group, family, or individual...

**88. The constitution also provided that the only way Trust Land could be legally removed from the purview of communal ownership of the people was through adjudication and registration (emphasis ours) or setting apart**

89. Adjudication and registration of Trust land removed the particular land from the purview of community ownership and placed it under individual ownership.’’

I cannot agree more with the above decision which is similar to this case.

**CONCLUSION AND FINAL ORDERS**

In view of the aforementioned matters, I find that the plaintiff has proved her case on the required standard and hereby enter judgment with costs against the defendants jointly and severally. It is so ordered.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT AT GARISSA THIS 28TH JANUARY, 2022**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

**In the presence of:**

1. M/S Nyabuti for the Plaintiff
2. M/S Roble for the Defendants
3. Ijabo: Court Assistant.