



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 157 OF 2015

1. CHIRUNGA BONGO MUNDALA

2. MWACHIRO BONGO MUNDALU.....PLAINTIFFS

=VERSUS=

1. DURSOMA INVESTMENT LTD

2. THE NATIONAL LAND COMMISSION

3. THE CHIEF LAND REGISTRAR

4. DIRECTOR OF SURVEY

5. COUNTY GOVERNMENT OF KILIFI

6. THE HONOURABLE ATTORNEY GENERAL.....DEFENDANTS

R U L I N G

1. This Ruling is in respect to the Plaintiff's Application dated 16th September, 2015. In the Application, the Plaintiff is seeking for the following orders:-

(a) THAT this court do grant a temporary injunction/conservatory order against the defendants, their agents, employees, proxies or anyone working at their behest from dealing, selling, damaging, wasting, alienating, destroying, disposing, or in any way interfering with the land now registered as CR 65726 and 29992 pending hearing and determination of this suit.

(b) That the costs of this application be provided for.

2. The 1st Applicant has deponed that he is the leader of the Waphande clan who are the owners of the suit land; that they have been on the land since time immemorial and that he applied to the County Council of Mariakani for setting apart of land under the Trust Land Act which application was allowed.

3. It is the deposition of the 1st Applicant that the clan was issued with leases in respect of CR No.57947,

58931 and 53908 which they sold to third parties.

4. According to the 1st Applicant, the Plaintiffs have not only built their houses on the suit land but have also put up other developments for the use of the community which includes a public school, a mosque, a dispensary, a water dam, a cemetery and a secondary school.

5. It is the Plaintiff's case that when the members of their clan were arrested for trespass, they visited the Ministry of Land's offices and found out that the 1st Defendant had been allocated a portion of land registered as CR 65726, LR No. 2992 measuring 80.94 Ha.

6. According to the Plaintiffs, the suit property could not have been registered in favour of the 1st Defendant because the land is under adjudication and that the Plaintiffs have already been given adjudication numbers.

7. In response, the 1st Defendant's Director deponed that the 1st Respondent is the Registered Proprietor of L.R. No. 29992, CR No. 65726 measuring 80.9400 Ha; that the 1st Respondent has been in occupation of the land for 20 years and that the Mariakani County Council set apart the land for the 1st Respondent.

8. The 1st Respondent denied that its land overlaps the Plaintiffs' land and that the Applicants are the registered proprietors of the suit property.

9. In his Supplementary Affidavit, the 1st Applicant deponed that the 1st Respondent has not been in occupation of the suit property for more than 20 years as alleged; that the 1st Respondent was only incorporated in 2011 and that the 1st Respondent has not exhibited evidence of any activities allegedly being carried on the land.

10. According to the 1st Applicant, at the time it is alleged that the 1st Respondent was allocated the land by the then County Council of Mariakani, the 1st Respondent was not in existence and that there is an ongoing adjudication process on the land.

11. The Plaintiffs' counsel submitted that a prima facie with chances of success has been made; that the Plaintiffs' titles were issued first and in priority to the one that was issued to the 1st Defendant and that they occupy the land and their livelihood revolves around the said land.

12. The 1st Defendant's counsel submitted that there is no evidence that the suit before the court is a representative suit; that there is also no evidence to show that the suit property overlaps CR No.29430 and that in fact, the suit property is situated in the South East of Mariakani Township while the Applicant's land is situated in North West of Mariakani Township, Kilifi.

13. The 5th Defendant's advocate submitted that this claim is a representative suit; that the Plaintiffs have admitted that they sold their land and are therefore divested of any interest in the suit property and that the Plaintiffs are mere busy bodies.

14. I have considered the authorities that were filed by the parties.

15. According to the Plaintiff, the Plaintiffs were at all material times residents of Mariakani Vume Village where they own land measuring 892.43 acres.

16. The Plaintiffs have pleaded in the Plaintiff that they are suing on their own behalf and on behalf of the Waphande clan.

17. On the basis of the averment that the Plaintiffs have filed the suit on their own behalf and on behalf of the members of the Waphande clan, it is immaterial whether they complied with the provisions of Order 1 Rule 8 of the Civil Procedure Rule which provides how a representative suit should be commenced or

not.

18. The Plaintiffs' case, as I understand it, is that the suit property, being Trust land, belongs to them and the other members of the Waphande clan.

19. Indeed, it is trite that under the Trust Land Act, Trust land can only be set apart after the residents of the area have been consulted and compensated.

20. The issue of whether the County Council of Mariakani consulted the Plaintiffs or the members of public before setting apart 80.40 Ha for the use of the 1st Defendant can only be determined at trial.

21. The Plaintiffs have also exhibited a surveyors report which shows that the survey plan that gave rise to the suit property overlaps other survey plans in the area. Again, the court can only conclusively deal with that issue after hearing viva voce evidence.

22. I have noticed that there is another suit being Malindi ELC Civil Case No. 179 of 2015, Dursoma Investments Ltd Vs Chirunga Bongo Mundalu & Others.

23. The parties and the suit property in ELC NO. 179 f 2015 are the same as the parties in this suit, save that the 1st Defendant is the Plaintiff in that suit while the Plaintiffs are the Defendants.

24. When the 1st Defendant herein sought for an injunction in ELC No. 179 of 2015, I dismissed the Application on the following ground, amongst others:-

“.....There is also no evidence before me to show that the County Government established if indeed there were people who had a right to occupy the suit property for the purpose of compensating them before setting apart.”

25. It is on the same ground that I shall allow the Plaintiff's Application for injunction.

26. It is for those reasons that I allow the Application dated 16th September, 2015 as prayed.

Dated, signed and delivered in Malindi this **16th** day of **September**, 2016.

O. A. Angote

Judge