



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. E1 OF 2021

KARISA KENGA MBOGO.....1ST PLAINTIFF

BONIFACE MASHA CHARO.....2ND PLAINTIFF

JOSHUA KAHINDI MKAMBA.....3RD PLAINTIFF

KADENGE CHARO GONA.....4TH PLAINTIFF

SAFARI NGUMBAO MBOGO.....5TH PLAINTIFF

AMOS GONA CHARO AND 24 OTHERS

(Suing on behalf of the Amilulu Clan)

-VERSUS-

LENNOX FAKURO RANDU..... 1ST DEFENDANT

CHARO KAZUNGU RANDU..... 2ND DEFENDANT

RULING

1. By their Notice of Motion dated 12th January, 2021 as filed herein on 14th January 2021, Karisa Kenga Mbogo and 24 Others (*the Plaintiffs*) suing on behalf of the Amilulu Clan pray for an order that pending the hearing and determination of this suit, a temporary order of injunction do issue restraining the two Defendants from entering, trespassing, alienating, selling and or disposing off, occupying, transferring or dealing with all that parcel of land situated in Tsangatsini Sub-location Mariakani Location measuring 364 acres. The Plaintiffs also pray for an order that the OCS Mariakani Police Station do effect the orders of injunction and compel compliance.

2. The application which is supported by an affidavit sworn by the 1st Plaintiff is premised on the grounds *inter alia*:

(i) *That the Plaintiffs have been authorised to institute the suit on behalf of the Amilulu clan who are the owners of the said parcel of land;*

(ii) *That on or about 1900, the founding father s and/or ancestors of the clan entered the suit property, erected houses and raised their families on the land thereby establishing the Amilulu clan who have since remained in possession of the suit property.*

(iii) *That in or about 1940, the clan donated a portion of their land to a businessman known as Ali Swada to establish his business;*

(iv) *That in or about 1968, the clan gave out a portion of their land for the construction of the Tsangatsini Dispensary and in 1970 they gave out other portions for construction of the*

Assistant Chief's office and construction of a Mosque as the

legitimate owners of the land;

(v) That the Defendants who are not members of the Clan have been without any colour of right trespassing on the suit property and have since forcefully taken occupation of portions thereof with the ultimate aim of dispossessing the clan of their land;

(vi) That the Defendants and or their agents have without any legal basis whatsoever hindered the members of the Amilulu Clan from developing, selling and or disposing off their land and thus violating their rights as enshrined under the law; and

(vii) That as a result thereof, the entire Amilulu Clan and its members suffer and continue to suffer immense harm and damage as they have been denied the exclusive use and possession of the land while it is being wasted, sub-divided, alienated and disposed off by the Defendants.

3. Despite service of the application upon themselves, Lennox Fakuro Randu and Charo Kazungu Randu neither entered appearance nor did they respond to the application.

4. The 30 Plaintiffs herein bring this suit on behalf of their Amilulu Clan and urge the Court to restrain the two Defendants from trespassing upon, selling or dealing with a parcel of land they described as 364 acres of land situated in Tsangatsini Sub-location in Mariakani

Location. It is the Plaintiff's case that the said parcel of land comprises of their community land and they accuse the Defendants of unlawfully taking over the same and hindering members of the clan from developing and/or selling the same.

5. While the Defendants did not file anything in opposition to the application, this Court deemed it appropriate to render a considered ruling given the orders that were sought and their likely consequences.

6. In this respect, it is to be noted that **Article 63(2) of the Constitution** defines "Community Land" as follows:

"Community land consists of land that is-

(i) Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines.

(ii) Ancestral land and land traditionally occupied by hunter-gatherer communities;

(iii) Lawfully held as trust land by the County Government but not including any public land held in trust by the County Government under Article 62(2).

7. **Article 63(4) of the Constitution** further provides that **"Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually or collectively."**

8. From the material placed before me, I was not persuaded that the land in question had been clearly described and that the same was distinctively identifiable from other adjacent parcels of land. To enable this Court to be able to ascertain in which category of land the 364 acres fall, it was incumbent upon the Plaintiffs to adduce some evidence to support their contention that the suit land is unregistered community land falling under **Article 63 of the Constitution of Kenya**.

9. A Court of law ought to issue orders that are capable of being enforced. If this Court were to allow the application for injunction as sought under Prayer No. 3, difficulties would certainly arise in enforcing such orders taking into consideration that the land is vast and not clearly defined.

10. While the Plaintiffs claim that they bring the suit on behalf of their Amilulu Clan, I did not find any evidence that leave had been sought to give notice to the institution of this suit to other members of the said clan who had no notice of this suit save for the 30 Plaintiffs herein who have given authority to the 1st and 2nd Plaintiffs to execute documents on their behalf.

11. It was also clear to me from a perusal of the Affidavits of service that the two Defendants reside within the 364 acres of land claimed by the Plaintiffs. If the Court were to grant the orders sought under prayer No. 3 of the Motion, that would be tantamount to issuing permanent orders against the Defendants removing them from the land before the suit is heard and disposed off.

12. In the result, I was not persuaded that the Plaintiffs had met the threshold for the grant of the orders sought at this stage and I decline to allow the Motion dated 14th January, 2021.

13. The costs of the application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 17TH DAY OF MARCH, 2022.

In the presence of:

No appearance for the Applicant

No appearance for the Respondent

Court assistant - Kendi

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J. O. OLOLA

JUDGE