



REPUBLIC OF KENYA

High Court at Garissa

Petition 3 of 2012

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40, 42, 42 AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

ISSACK ADEN GONJOBO, ISSACK HILLOW SHARAMO

**AND HASSAN AHMED SHEIKH (suing on their behalf and on behalf of
MANDERA BUTCHERMEN ASSOCIATION).....PETITIONER
VERSUS**

THE TOWN COUNCIL OF MANDERA.....1ST RESPONDENT

MINISTER FOR LOCAL GOVERNMENT.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. Issack Aden Gonjobo, Issack Hillow Sharamo and Hassan Ahmed Sheikh, who say they are suing on their own behalf and that of Manderia Butchermen Association (the Petitioners), have come to court seeking injunctive relief against the Town Council of Manderia, Minister for Local Government and the Attorney General (1st, 2nd and 3rd Respondents respectively) to restrain them, their agents, servants, employees and any other person from occupying, utilizing, trespassing or in any other way dealing with all that property known as Livestock Neboi Plot No. 249 (suit property) pending hearing and final determination of this petition.

2. The application dated 7th May 2012 and amended on 6th June 2012, is brought under Articles 23 (1), 40 and 43 of the Constitution and all other enabling provisions of the law. One such enabling provision of the law is Order 40 (1) (a) of the Civil Procedure Rules that gives courts discretion to grant temporary injunctions to prevent acts of waste, damage or alienation of any property under dispute in order to preserve it pending the hearing and determination of the suit. The constitutional articles quoted give the court authority to uphold and enforce Bill of Rights, specifically protection of rights to property and economic and social rights.

3. The application, filed under certificate of urgency, seeks five (5) prayers:

i. That the application be certified urgent.

ii. That an injunction be issued against the respondents, their agents, servants, employees and any other person from occupying, utilizing, trespassing or in any other way dealing with all that property known as Livestock Neboi Plot No. 249 pending hearing of the application.

iii. That an injunction be issued against the respondents, their agents, servants, employees and any other person from occupying, utilizing, trespassing or in any other way dealing with all that property known as Livestock Neboi Plot No. 249 pending hearing and final determination of this petition.

iv. That an order of reservation be issued against the Respondents to preserve all that property known as Livestock Neboi Plot No. 249 until this petition is heard and determined.

v. That costs of this application be provided for.

4. The application was certified urgent and interim orders granted on 14th of May 2012 in terms of prayers 1 and 2 respectively thereby disposing of the same. This leaves prayers 3, 4 and 5 which the court will be addressing in the course of this ruling.

5. The grounds in support of the application are found on the face of the application, the supporting affidavit of Issack Aden Gonjobo sworn on 6th June 2012, his supplementary affidavit sworn on 4th July 2012 and further grounds as are contained in the submissions by learned counsel for the Petitioners. The affidavits are detailed and contain evidence that may be useful in the hearing of the petition. For the purposes of this ruling I will endeavour to capture the key issues in summary form. The grounds are that:

i. The Petitioner, with a membership of 700 representing 7,000 families, is a Community Based Organization (CBO) registered as an association under the Ministry of Gender, Sports, Culture and Social Services.

ii. The Petitioner, whose major economic and social activity is livestock rearing, is the registered as the owner of the suit property and runs a slaughterhouse on the suit property.

iii. The Petitioner was allocated the suit property, measuring 100 hectares, on 28th January 2002 when the land consisted of bushes with no developments. The Petitioner established a slaughterhouse and intends to raise funds to develop more modern slaughterhouse structures on it.

iv. The 1st Respondent, who collects rents and rates for the use of the suit property, has used public funds to fence off part of the suit property housing the slaughterhouse and has entered into a memorandum of understanding with the Petitioner on how to run the slaughterhouse.

v. The Petitioner requires a huge parcel of land to run the slaughterhouse due to foul smell, waste disposal, treatment and other activities associated with slaughterhouse operations with a view to proper maintenance of the environment.

vi. The huge parcel of land required for the slaughterhouse has been recommended and approved by the Government and all approvals for establishing a slaughterhouse have been obtained from all Government departments.

vii. The suit property is public utility land established to further economic and social activity of the entire Manderu community and the Petitioner has been in quiet use without interference until recently when the Petitioner discovered that the 1st Respondent has been allocating the suit property to third parties. The Petitioner had been operating from two other sites before the current allocation and had been forced out by the 1st Respondent.

viii. The 1st Respondent has acted illegally in allocating the suit property and continues to do so.

ix. The 2nd and 3rd Respondents, who have a constitutional duty to protect and preserve the Petitioner's communal land, have refused to discharge their mandate.

x. The suit property is likely to be wasted by the Respondents thereby affecting the livelihood of the Petitioner and 7,000 families, if the orders sought are not granted.

6. Annexed to the grounds in support of the application are a copy of registration of the Petitioner; memorandum of understanding to operate the slaughterhouse; minutes of special Town Planning, Works and Market Committee held on 28th January 2002; list of the Petitioner's members; an assortment of receipts from the 1st Respondent; pleadings from the Manderu Principal Magistrate's court and various correspondences regarding the suit property.

7. The supplementary affidavit of Issack Aden Gonjobo and the oral submissions of the learned counsel for the Petitioner amplify the grounds narrated above. The contents of the supplementary affidavit touch on the evidence that may be useful in the hearing and determination of the Petition itself.

8. The application has been opposed by the Respondents. The grounds opposing the application are contained in the replying affidavit of Ahmed Hassan Surrow the Town Clerk of to the 1st Respondent sworn on 14th June 2012 and in his further replying affidavit sworn on 13th July 2012. In summary he deposes that:

i. The supporting affidavit contains falsehoods and is meant to mislead the court by distorting facts and the purported minutes are not genuine and did not emanate from the 1st Respondent.

ii. The land for the slaughterhouse, being public utility and not property of the Petitioner, was fenced off at the expense of the 1st Respondent to preserve it from potential grabbers.

iii. The Petitioner has repeatedly confused public utility with private property and has failed to appreciate that the suit property where the slaughterhouse is located is public and is held by the 1st Respondent in trust for the public. Further, it is mischievous and in bad faith to allege that the 1st Respondent intends to allocate individuals or any private person such land.

iv. The land within the jurisdiction of the 1st Respondent is allocated in accordance with the provisions of the Local Government Act Cap 265 Laws of Kenya and as such the procedure of acquisition of land is clearly spelt out therein. The applicants for such land ought to demonstrate that they ever applied and were or were not allocated any land.

v. The Petitioner is making wild, alarmist and unsubstantiated allegations to state that the 1st Respondent has been allocating the property to individuals and to its officers.

vi. The purported letter of allotment dated 5th June 2002 by the then Town Clerk to the 1st Respondent one K.K Ibrahim and marked exhibit 16 is a forgery and the said Ibrahim wrote a disclaimer on it dated 15th February 2012 (**annexed and marked AHS1**)

vii. The purported minutes vide TP/No. 6.2002 and signature of one D.H Hassan thereon being exhibit 17-20 is a forgery and that the said Hassan has written a disclaimer on it dated 13th February 2012 (**annexed and marked AHS2**).

viii. The 1st Respondent took initiative to investigate the above documents and found they were not genuine as per the police report (**annexed and marked AHS3**) and in the circumstances the Petitioner has not come to court with clean hands and therefore should not be allowed to benefit from an illegality.

ix. The receipts attached to the application have nothing to do with the slaughterhouse but

rather are for auction of animals bought or sold at the 1st Respondent's Livestock market and the memorandum of understanding relates to management and operations of the slaughterhouse and was not intended to confer ownership of land.

x. The main issue is not the slaughterhouse but the land allegedly in excess of 100 hectares which the 1st Respondent has not allocated to the Petitioner.

xi. As the Town Clerk of the 1st Respondent he is by law privy to all the 1st Respondents Minutes, records and information by virtue of being the 1st Respondents Chief Executive Officer.

9. The rest of the contents of both affidavits sworn by Ahmed Hassan Suroor and the oral submissions by learned counsel for the 1st Respondent summarise the grounds of opposition.

10. The application is further opposed by the 2nd and 3rd Respondents. They have not filed any replying affidavit but have submitted orally on points of law during the hearing of this application. The 2nd and 3rd Respondents are saying that the Petitioner has not shown how the 3rd Respondent has abdicated his duties under the Constitution; that Petitioner has not demonstrated how its economic and social rights have been violated; that what the Petitioner is claiming is ownership of property but no documents have been attached to prove ownership; that the copy of the certificate attached does not prove ownership.

11. At this stage, I wish to restrict myself to the issues that need to be considered to determine whether the Petitioner is entitled to the prayers it is seeking. The other issues are better left out to be considered fully during the hearing when all the evidence for and against the Petition will be produced and carefully scrutinized and documents examined and verified. I make the above observation bearing in mind the fact that we are at the preliminary stage of this Petition and I am not required to make any definite findings of fact and law at this stage.

12. The law on injunctions is settled as per the case of **Giella versus Cassman Brown [1973] E.A 358**. An applicant who comes to court must demonstrate that (i) there exists a prima facie case with a probability of success; (ii) the applicant stands to suffer irreparable harm if the relief he is seeking is denied; and (iii) on which side does the balance of convenient lie? These are the principles I will proceed to discuss by looking for the answers. If the answer is not fully found in the first principle, I will proceed to the second and if no answer, to the third principle (**see Law Society of Kenya versus the Attorney General [2008] eKLR**).

13. Does the Petitioner have a prima facie case? In **Joseph Kinuthia Kuria v. Housing Finance Company of Kenya Ltd & Another [2006] eKLR**, prima facie case in a civil suit application is defined as a case which, on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. It includes but is not confined to a "genuine and arguable case."

14. The Petitioner ought to establish that it is the registered owner of the suit property. The evidence attached to support by the Petitioner to prove ownership is the disputed minutes dated 28th January 2002. The 1st Respondent has disowned these minutes and attached documents disputing ownership of the suit property by the Petitioner. The allocation letter dated 5th June 2002 purportedly issued by one K. K. Ibrahim has been disowned by the same person by his letter dated 15th February 2012. A look at the letter shows lack of clarity. It talks of a piece of land measuring "ten" and then "100" hectares! The minutes allocating the suit property to the Petitioner have also been disowned by the 1st Respondent as not emanating from it.

15. The allocation of land held in trust by Municipal/Town Councils is done as per the provisions of the Local Government Act. The Petitioner has not demonstrated that this procedure was followed to allocate it the suit property. The Petitioner has also not attached a certificate of registration as the owner of the suit property. From the statements of both the Petitioner and the 1st Respondent there is no dispute that the

suit property is public land. Who then is the custodian of public land under the jurisdiction of the Town/Municipal/County Councils? This, to me, is a question that can be answered during the full hearing.

16. On the first principle in **Giella v. Cassman Brown case**, I find that there is no answer provided. With disputed evidence on ownership and without anything showing the Petitioner is registered as owner of the suit property, this court cannot make a finding in the Petitioner's favour and therefore the Petitioner has failed to prove prima facie case at this stage with a probability of success.

17. Does the Petitioner stand to suffer irreparable harm if the relief is denied? Without proof of ownership of the suit property, and taking into account that the 1st Respondent does not lack suitable land in Mandera Town to allocate to the Petitioner or any other group or person for the purpose for which the suit property is need, it is my finding that the Petitioner does not stand to suffer irreparable harm.

18. On which side does the balance of convenience lie? When I consider that there are more questions than answers surrounding the claim of ownership of the suit property by the Petitioner at this stage, I come to a considered conclusion that the balance of convenience lies on the side of the Respondents.

19. I wish to discuss a further principle that exists in respect of granting injunctions. This is the principle Justice Ojwang, as he then was, calls '**intrinsic test**, in the nature of a general principle; the court "should always opt for the lower rather than the higher risk of injustice" (see **Amir Suleiman v. Amboseli Resort Limited, Nairobi HCCC No. 1078 of 2003**). In the event this court is wrong in its findings on the three principles in **Giella v. Cassman Brown**, then I wish to go by this test. I am of the considered view that the lower risk to take in deciding this case at this stage would be not to grant the prayers sought. For granting the prayers sought by the Petitioner on the strength of questionable allocation documents and without proof of ownership at this stage is a bigger risk of injustice.

20. I wish to point out that there is lack of clarity on the issue of ownership of 100 hectares and the slaughterhouse. There is need to clarify this and I think this can be done during the hearing. What is the size of land upon which the existing slaughterhouse stands? Who owns the slaughterhouse, is it the Petitioner or the 1st Respondent? Is there a dispute between the Petitioner and the 1st Respondent in respect of the land where the slaughterhouse currently stands? What is the relationship between that piece of land and the 100 hectares under dispute? I am raising these questions in this ruling to point out that more work needs to be done to bring before this court all the relevant and necessary evidence to enable this court dispense justice fairly to all the parties.

21. In conclusion therefore, the Petitioner has failed to show that it deserves the orders it is seeking at this stage. The Petitioner has failed to persuade this court to rule in its favour and this failure translates into this court declining to grant the prayers sought in the application dated 6th June 2012. I hereby dismiss that application with costs to the Respondents. I make orders accordingly.

STELLA N. MUTUKU, JUDGE

Delivered, dated and signed this 24th September 2012.

Mr. Kivuva Counsel for the Petitioner

Mr. Omboga Counsel for 1st Respondent

Ms E. Makori Counsel for 2nd and 3rd Respondents

Abdikher Court Clerk