



**REPUBLIC OF KENYA**

**High Court at Malindi**

**Civil Suit 168 of 2012**

**BAHOLA MKALINDI RHIGHO.....PLAINTIFF**  
**VERSUS**  
**MICHAEL SETH KASEME.....1<sup>ST</sup> DEFENDANT**  
**FAMMY MWANGI.....2<sup>ND</sup> DEFENDANT**  
**COUNTY COUNCIL.....3<sup>RD</sup> DEFENDANT**

**RULING**

- 1) The Plaintiff filed the present suit on 1<sup>st</sup> November, 2012. The substantive prayer in the Plaintiff is for a declaration that the unsurveyed and unregistered land described in paragraph 4 belongs to the Plaintiff. The Plaintiff also seeks for a permanent injunction against the Defendants restraining them, their agents employees or assigns from interfering with the Plaintiff's quiet possession and enjoyment of the suit property.
- 2) On the same day, the Plaintiff filed a Notice of Motion together with a supporting affidavit and a certificate of urgency dated 31<sup>st</sup> October, 2012.
- 3) The substantive prayers in the Notice of Motion are:
  - a) ***For an order of injunction restraining the 1<sup>st</sup> Defendant and or other agent from trespassing and or encroaching onto and or purporting to lay the poles around and or digging trenches and or constructing any structure on the portion of land next to the Redeemed Church Hola which property is also adjacent to Laza Primary School and Laza Polytechnic which property belongs to the Plaintiff as heir of the larger Duko family which is unsurveyed and therefore unregistered pending the hearing and determination of the suit;***
  - b) ***For an order of temporary injunction restraining the 2<sup>nd</sup> Defendant from constructing any additional structures on the suit property on the section/portion illegally allocated to the 2<sup>nd</sup> Defendant by the 3<sup>rd</sup> Defendant pending the hearing and determination of the suit herein;***
  - c) ***For an order of temporary injunction restraining the 3<sup>rd</sup> Defendant from allocating the Plaintiff's land to unsuspecting third parties and or members of public.***
- 1) The Notice of Motion was certified as urgent by Hon. Justice C. W. Meoli on 1.11. 2012 and was set down for hearing inter partes on 6.11.2012. The matter did not proceed on 6.11.2012 because the Respondents had not filed their respective Replying Affidavits. The application was adjourned by consent of the parties and slated for hearing on 20.11.2012.
- 2) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their Replying Affidavit together with the Preliminary

Objection on 6.11.2012 while the 3<sup>rd</sup> Respondent filed its Preliminary Objection on 16.11.2012.

3) When the advocates appeared before me on 20.11.2012, they agreed to argue orally the two Notices of Preliminary Objections. The issues in the two Notices of Preliminary Objection dated 6.11.2012 and 16.11.2012 respectively are the same and I summarize them as follows:

- a) **That the Plaintiff's suit is bad in law, incurably defective and an abuse of the court process;**
- b) **That the Plaintiff has no *locus standi*, capacity or enforceable right in law or fact to bring the suit herein against the Defendants because the grant for letters of administration have never been issued to the Plaintiff;**
- c) **That the suit as framed is a representative suit and or a class action and consequently the Plaintiff should have obtained the leave of the court or authority to bring the suit herein for and on behalf of the larger Duko Family and finally;**
- d) **That this court does not have jurisdiction to here this suit because the suit property is situated in Hola and the same should have been filed in Garissa High Court, which is the nearest High Court.**

#### **Jurisdiction**

4) As has been stated in numerous judicial decisions, a court without jurisdiction, whether pecuniary or territorial, cannot make one more step in a matter. It should down its tools and abandon the matter altogether. In the case of **The Owners of Motor Vessel 'Lillian S' Vs Caltex Oil Kenya Limited (1989) KLR 1**, Nyarangi JA stated as follows:

**“Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there will be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction.”**

5) According to Mr. Omwancha, the learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, this court does not have both the pecuniary and territorial jurisdiction to try this suit. He argued that Hola, where the suit property is situated, falls within the Jurisdiction of the Garissa High Court because it is the nearest court.

6) Counsel relied on the Practice Directions which were issued by the Chief Justice which stated that all disputes relating to the environment and the use, and occupation of and title to land should be filed in the nearest Environment and Land Court. Consequently, counsel argued that the present suit should have been filed in the High Court in Garissa. Counsel did not address the court on why he thinks this court does not have the requisite pecuniary jurisdiction to hear the suit. This argument was supported by Mr. Mwadilo, counsel for the 3<sup>rd</sup> Defendant.

7) In response, the advocate for the Plaintiff argued that this court has jurisdiction to determine the issues raised in the Plaint by virtue of Article 63 of the Constitution. The Plaintiff's advocate was of the view that this court has unlimited and original jurisdiction in land matters. It was the Plaintiff's advocate position that Tana River and Garissa are two distinct counties, and that the law contemplates that we have the Environment and Land court in every county.

8) My response to the above arguments is as follows: The Environment and Land Court (the court) was established pursuant to the provisions of **Article 162 (2) (b) and (3)** of the Constitution which states as follows:

**“Parliament shall establish courts with the status of the High Court to hear and determine disputes**

*relating to the environment and the use and occupation of, and title to, land.”*

9) **Article 162 (3)** of the Constitution mandates Parliament to determine the jurisdiction and functions of the Environment and Land Court, thus the enactment of the Environment and Land Court Act, No. 19 of 2011. **Section 4** of the said Act as read together with **Article 162 (2) and (3)** of the Constitution established this court. Section 4 of the Environment and Land Court Act, no. 19 of 2011 states as follows:

**“4 (1): There is established the Environment and Land Court.**

**(2): The court shall be a superior court of record with the status of the High Court.**

**(3): The court shall have and exercise jurisdiction throughout Kenya and shall pursuant to section 26, ensure reasonable and equitable access to its services in every county.”**

10) It is clear from the provisions of Article 162 (2) (b) of the Constitution and sections 4 and 26 of the Environment and Land Court Act that this court has unlimited and original jurisdiction to deal with disputes relating to the environment and the use and occupation of, and title to land in the whole country.

11) Indeed, the intention of the law is to have this particular court in every county for equitable access to justice for every citizen of this country. This is so because the Constitution guarantees equal protection of the law to everyone. It also demands that State organs must ensure access to justice for all persons. To achieve this, effective steps have to be taken to ensure proximity and physical access to courts. This, of course, cannot happen overnight but happen it must.

12) I am aware that an Environment and Land Court has not been established in Garissa and even if it was, the right thing that this court would have done, if indeed Hola is closer to Garissa than Malindi is to transfer the file to Garissa for hearing and disposal and not for dismissal as argued by the Defendants’ advocates.

13) Having observed that this court has unlimited and original jurisdiction to deal with disputes relating to the environment and the use and occupation of, and title to land, I decline to dismiss the Plaintiff’s suit on the ground that this suit should have been filed in Garissa and not Malindi.

**Is this a representative suit?**

14) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ advocate argued that what is before the court is a representative suit and consequently the Plaintiff should have sought for leave to represent the “larger Duko family.” Counsel referred the court to the pleadings filed by the Plaintiff and specifically ground number 3 in the Plaintiff’s Notice of Motion dated 31.10.2012. The said ground states as follows:

***“THAT the 2<sup>nd</sup> defendant has been illegally allocated by the 3<sup>rd</sup> defendant the Plaintiff’s property which portion of land form part of the land belonging to the larger Duko family.”***

15) According to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ counsel, the said ground prima facie shows that the suit property is a class action and therefore the Plaintiff should have sought the authority of the Duko family before filing the present suit.

16) This position was supported by the 3<sup>rd</sup> Defendant’s advocate who stated that the Plaintiff should have sought the leave of the court to file the suit pursuant to the provision of Order 4 Rule 4 of the Civil Procedure Rules. Counsel, while submitting stated that the Plaintiff has not stated in his pleading in which capacity he has filed the suit. According to counsel, Order 4 Rule 4 as read together with Order 1 Rule 8 of the Civil Procedure Rules obligates the Plaintiff to obtain authority from the people he is representing. The said authority, according to counsel, must be filed in court.

17) In response, the Plaintiff's advocate argues that the Plaintiff has filed this suit on his own behalf and not as a representative of any body. According to counsel, the Notice of Motion has clearly stated that the Plaintiff has filed the suit on his own behalf and not on behalf of the larger Duko family.

18) I have perused the Plaintiff's Complaint and noted that the Plaintiff has described himself at paragraph 4 of the Complaint as ***"the beneficial owner of all that parcel of unsurveyed and unregistered parcel of land in Hola town...which he acquired through inheritance from the larger Duko family of which he is a member."***The same description is given in prayer number 2 and 3 of the Notice of Motion.

19) Order 4 Rule 4 of the Civil Procedure Rules, 2010 provides that where the Plaintiff sues in a representative capacity, the Plaintiff shall state the capacity in which he sues. Order 1 Rule 8 provides that where numerous persons have the same interest in any proceedings, the parties shall in such a case give notice of the suit to all such persons either by way of personal service or public advertisement as the court in each case may direct.

20) I have gone through the Plaintiff's Complaint and Notice of Motion and the said pleadings do not state that the Plaintiff is representing the larger Duko family. The Plaintiff has stated in the Complaint and the Notice of Motion that he is the owner of the suit property ***"which he acquired through inheritance from the larger Duko family of which he is a member."***The Plaintiff, at paragraph 4 of the Complaint proceeds to clarify the issue of ownership of the suit property by stating that the land is ***"ancestral land of the Duko family which it has been occupying, living and doing farming on the same since time immemorial."***

21) The Plaintiff, from his pleadings, is a member of a community or clan or family known as the Duko family. By virtue of being a member of the said family, he owns a portion of land, the unsurveyed suit property, which he says he inherited from his father. He is therefore bringing this suit in his own capacity and not as a representative of any community or family as claimed by the Defendants.

22) Consequently, the Plaintiff did not require any authority from the members of the Duko family or the leave of the court to serve the members of the said family with a notice either personally or by way of public advertisement. The Plaintiff has filed this suit as a member of (and not on behalf of) the Duko family for a portion of land which he believes in his. The suit does not offend the provisions of Order 1 Rule 8 and Order 4 Rule 4 of the Civil Procedure Rules, 2010.

### **Locus Standi**

23) The defendants' counsels submitted that the suit is incurably defective because the Plaintiff did not obtain the letters of administration before filing this claim.

24) The basis for this argument is that because the Plaintiff has pleaded in the Complaint and the Notice of Motion that he inherited the suit property from his late father, Paul Bahola Duko, he should have complied with the provisions of the Law of Succession Act, Cap. 160. According to the Defendants' advocates, the Plaintiff has no capacity or enforceable rights to file the present suit.

25) To buttress this argument, the 3<sup>rd</sup> Defendant's counsel relied on the case of ***Christine Achieng Ogesa & another Vs British American Managers Limited; H.C Succession Cause No. 2511 of 2011***. In this case, it was held that ***"without a grant of representation or a special limited grant ad colligenda bona, the Applicants have no legal capacity to sue the Respondent as yet for payment to them of the money the deceased's estate is entitled to."***

26) In the absence of the grant for letters of administration, the Defendants' counsels urged that the Plaintiff cannot claim to be the heir or beneficiary of his father's land. The Plaintiff, in their view does not have the locus standi to sue the Defendants.

27) As I have observed in this Ruling, the Plaintiff has described himself in the Complaint as ***"the beneficial owner of all that parcel of unsurveyed and unregistered parcel of land in Hola town...which he acquired through inheritance from the larger Duko family of which he is a member."*** The same

description is given in prayer number 2 and 3 of the Notice of Motion.

28) The Plaintiff avers at Paragraph 4 of the Plaint that *“the aforesaid land is ancestral land of the Duko family which it has been occupying, living and doing farming since time immemorial.”*

29) **Article 61** of the Constitution states that land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. **Article 63 (2) (d) (ii)** of the Constitution has defined community land as *“land that is ancestral land...”* while **Article 63 (3)** states that any unregistered community land shall be held in trust by county governments (read county councils) on behalf of the communities for which it is held.

30) The repealed Constitution, at **sections 115** and **116** classified community land as “Trust land” and vested such land in the county council within whose area of jurisdiction it is situated. Section 115 (2) states that *“Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual.”*

31) The Plaintiff has averred in his Plaint that the suit property is part of his ancestral land and that the same has not been surveyed and is unregistered. Ancestral land, as I understand it, falls within the realm of customary land tenure.

32) Customary Land Tenure refers to unwritten land ownership by certain communities under customary law. In such an arrangement, individuals or groups by virtue of their membership in some social unit of production have guaranteed rights of access to land and other natural resources. Individuals or families thus claim property rights by virtue of their affiliation to the group by employing rules and guidelines which, in the traditional form, are handed down from generation to generation. The group regulates resource use.

33) This customary mode of ownership of land in Kenya is governed by **Article 63** of the Constitution and by the Trust Land Act. Pursuant to the provisions of the Constitution and the Trust Land Act, all land in the rural areas which is neither government land, public land or private land is vested in the county council in trust for the residents living there. Every member of the community, group or family has rights in the ownership of such land. This regime is multifaceted and diverse. It varies by region, ethnicity and even by clan. This system is mainly found in areas that land has not been transformed through adjudication, consolidation and registration.

34) The Constitution (and even the repealed constitution) has sought to marry ancestral land rights and the other land tenure systems thus the provisions of Article of 63.

35) The fundamental question in the current suit therefore is whether a member of a group or community who purports to have inherited a portion of the ancestral land can sue without obtaining the grant of letters of administration of the estate of his late father or the grant of probate of the will of his late father.

36) **Article 63 (4)** states 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 and collectively.”* My understanding of the said provision is that because the members of a community have rights over community land as defined in the Constitution, the said members, either collectively or individually, can and should contest any dealings in community land, which includes ancestral land where they believe that their rights are being, have being or are likely to be infringed.

37) **Article 63 (3)** of the Constitution provides that any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held. In the case of **Mwangagi & 64 others Vs Wote Town Council; KLR (E & L) 616**, Justice Wendo held as follows:

***“If the land in issue is trust land then the applicants who claim to be residents of Kitui and doing business on it would have an interest in what the council does with the land and thus, they have locus standi in the matter.”***

In **Mureithi & 2 others Vs. Attorney General & 4 others KLR (E&L) 707**, Justice Nyamu, as was then, stated as follows:

***“The clan members and their successors were sufficiently aggrieved since they claimed an interest in the parcels of which they alleged was clan and trust land. It was in order that the applicants represented themselves as individuals and the wider clan and they had the required standing to bring the matter to court.”***

**38)** I agree with the above statements by the two Judges and hold that the Plaintiff, being a member of the Duko family and a resident of Tana River County, has the locus Standi to question the allocation of the suit property to the Defendants.

**39)** The interests of a particular community over ancestral land can be pursued either collectively or individually. This is a right which has been conferred on the members of the community by the Constitution and it matters not that a particular member of the community is not directly affected. A member of the community can move the court, drawing the attention of the court to a legal wrong in respect of community land as defined under the Constitution. The law of succession, in such a case, is not applicable.

**40)** The Law of Succession Act, Cap. 160 is concerned with the administration of the estate of deceased persons. The estate of a deceased person has been defined by the Act as property which the deceased person was legally competent to freely dispose of during his lifetime, and in respect of which his interest has not been terminated by his death.

**41)** Whether the Plaintiff’s father could freely dispose of the suit property is neither here nor there. The Plaintiff is not purporting to administer the estate of his late father. All he is saying, as I understand from his Plaint and the Application, is that as a member of the Duko family, he has legitimate rights in the suit property pursuant to the provisions of Article 63 of the Constitution.

**42)** For the above reasons, I dismiss with costs the Defendants’ Notices of Preliminary Objections dated 6<sup>th</sup> November, 2012 and 16<sup>th</sup> November, 2012.

Delivered this **13<sup>th</sup>** day of **December**, 2012.

**O. A. Angote**  
**JUDGE**