



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT GARISSA**

**ELC CASE NO 16 OF 2018**

COUNTY GOVERNMENT OF TANA RIVER.....PLAINTIFF

VERSUS

DAKANE SHAKE BOCHA.....1<sup>ST</sup> DEFENDANT

SALADA HARUN YUSUF.....2<sup>ND</sup> DEFENDANT

ABDI NASSIR HIYESA.....3<sup>RD</sup> DEFENDANT

IDRISS HUSSEIN ABAMUKA.....4<sup>TH</sup> DEFENDANT

MADHINA DOKOTA FODHO.....5<sup>TH</sup> DEFENDANT

SADIA HAWA DABALE.....6<sup>TH</sup> DEFENDANT

ADHAN KALICHA BOYUTU.....7<sup>TH</sup> DEFENDANT

IBRAHIM GATHA YUSSUF.....8<sup>TH</sup> DEFENDANT

HUSSEIN YUSSUF WARIYO.....9<sup>TH</sup> DEFENDANT

MUHAMED YUSSUF BUYUTO.....10<sup>TH</sup> DEFENDANT

MOHAMED IBRAHIM ELML.....11<sup>TH</sup> DEFENDANT

**RULING**

**BACKGROUND**

The Applicant vide a Notice of Motion dated 18<sup>th</sup> April, 2018 sought the following orders:-

(1) Spent

(2) The court be pleased to grant a temporary injunction restraining the Respondents jointly and/or severally whether by themselves, their agents, servants, assigns, and/or anyone acting on their behalf whatever from dealing in disposing, erecting or causing to be erected thereon any structures or in any other manner interfering with Local Community's use and quiet possession of all that unsurveyed piece of land measuring approximately 700 metres along River Tana and 4500 metres towards the main road situated at Hagulcho area, hereinafter referred to as the "suit property" pending hearing and determination of the application and/or until the determination of the substantive suit inter partes.

(3) The Officer Commanding Police Station (OCS) Madogo Area Police Station be directed to enforce compliance of these orders.

(4) Any other orders and reliefs the court may deem just, expedient and fit to grant in the circumstances.

**(5) The costs of this application be provided for.**

**GROUND IN SUPPORT OF THE APPLICATION**

1. That the suit property at the heart of this application is an unsurveyed and unregistered Community Land which the Applicant holds in trust for the residents of Hagulcho area within Tana River County; "The Local Community" as per provisions of Section 6 of the Community Land Act.
2. At all material times relevant to this suit property has been occupied and used by the local community.
3. That the 1<sup>st</sup>-10 Respondents have in their joint and several capacity and without the authority of the Applicant purported to illegally and irregularly sell the suit property to the 11<sup>th</sup> Respondent.
4. That on learning of the Respondents actions, the Applicant held several consultative meetings which were attended by the members of the local community and in the said meetings the Applicant cautioned and forbade the Respondents from disposing the suit property.
5. Despite the Applicant's efforts to protect the said suit property, the Respondents have deliberately refused, ignored and/or knowingly defied clear directives issued by the Applicant in a bid to deprive the said local community of its property, and defeat the Applicant's sacrosanct duty to hold the suit property in trust for the local community and to protect the interests of the local community.
6. That it is trite law that any dispositions of unsurveyed and/or unregistered Community Land must be undertaken within the legal confines of the law relating to Community Land and with the full knowledge involvement and approval of among other authorities, the Applicant.
7. The Applicant is concerned that the cautioned acts of the Respondents in connection with the suit property if allowed unabated, will result in the breach of its duty to act diligently and protect the interests of the local community.
8. The Applicant is cognizant of the fact that the acts of the Respondents in connection with the suit property if allowed to continue, will infringe on the local community's right to quiet and peaceful enjoyment of the suit property and it is the duty of the Applicant and the court to ensure that such rights are protected.
9. Unless the Respondents are restrained by the court from disposing of the suit property, the Applicant and the Local Community will suffer irreparable damage, economic loss and injustice by losing their ancestral land and heritage source of livelihoods and security which cannot be compensated by the Respondents.
10. This applicant concerns the local community's right to property as well as the public interest in relation to the protection of the right to property.
11. This application should not wait the determination of the substantive issues of the ownership of the suit property for the foregoing weighty reasons which are ripe for interim consideration by this Honourable Court.

**APPLICANTS SUMMARY OF FACTS**

The Applicant in the supporting affidavit sworn by one Isaiah Ndisi Munje who is the County Attorney deposed as follows;

1. THAT I am an advocate of the High Court of Kenya and the County Attorney of the Applicant herein, duly authorized and hence competent to make and swear this affidavit.
2. THAT the property at the heart of this application is an unsurveyed and unregistered parcel of land measuring approximately 700 metres along River Tana and 450 metres towards the main road situated at Hagulcho area, mulanjo Sub-location, Saka Location, Madogo Division within Tana River County ("The Suit Property").
3. THAT I am aware that the suit property is part of and still is an unregistered Community Land held by the Applicant in trust for the Residents of the said locality ("The local community").
4. THAT the suit property is locally known as the Buyotu Bario farm which has since time immemorial been occupied and used by the local community.
5. THAT sometime in early November 2017, the Applicant became aware that there were intentions to dispose of Community Lands within Madogo Ward whereupon it issued the first warning to the Respondents herein deterring the same. (Annexed hereto and marked " INM1" is a true copy of the warning letter dated 2<sup>nd</sup> November, 2017).
6. THAT later in the same month of November 2017, the 1<sup>st</sup> – 10<sup>th</sup> Respondents commenced the process of unlawfully and irregularly disposing of the suit property or parts thereof to the 11<sup>th</sup> Respondent. (Annexed hereto and marked " INM2" is a copy of a sale agreement dated 6<sup>th</sup> November, 2017 entered into by the Respondents).

7. THAT the Applicant, through the Local Administration, held various consultative meetings with the members of the Local Community and forbade the Respondents from disposing the suit property.

8. THAT notwithstanding the warnings and directives issued by the Applicant, the 1<sup>st</sup>-10<sup>th</sup> Respondents have knowingly and deliberately neglected, failed and/or ignored the same and have continued to deal with the suit property with the aim of disposing the suit property to the 11<sup>th</sup> Respondent at the expense of the Local Community.

9. THAT the intended sale constitutes a violation of Local Community's rights and is calculated to disposes the Local Community of its land and to defeat the ends of justice.

10. THAT the suit property has never belonged to the 1<sup>st</sup>-10<sup>th</sup> Respondents in personam and therefore they have no authority to dispose the suit property to the 11<sup>th</sup> Respondent or to any other person and their attempts to dispose of the suit property should be stopped.

11. THAT the Applicant, in consultation with the relevant authorities, is in the process of coming up with a comprehensive adjudication programme of all the unregistered land within its jurisdiction and the continued acts of the Respondents will, unless stopped by a Court of law, frustrate and/or impede these efforts.

12. THAT if this application is not heard on priority basis and the orders sought granted, the Applicant stands to suffer irreparable damage for being in breach of its trust obligations bestowed upon it by the law and the Local Community stands to suffer irreparable damage for unlawfully dispossessed of its entitled land.

13. THAT the Respondents will not be prejudiced in any way if the application herein is allowed.

14. THAT in light of the foregoing, it is only fair and just that the order sought in this application can be granted.

On 5<sup>th</sup> June 2018, the 11<sup>th</sup> Respondent through the firm of Michael Daud & Associates entered appearance and on 12<sup>th</sup> June 2018, 1<sup>st</sup>-10<sup>th</sup> Respondents authorized the 2<sup>nd</sup> Respondent to sign any affidavit and pleadings on their behalf. However, no affidavit nor grounds of opposition was filed in response to the said application.

#### **LEGAL ANALYSIS AND DECISION**

The Applicant in this case is the County Government of Tana River who is seeking to stop any dealing in respect of an unregistered and unsurveyed Local Community Land measuring approximately 700 metres along River Tana and 450 metres towards the main road situated at Hagulcho area, Tana River County otherwise known as the "suit property". The Applicant averred that they hold the suit property in trust for the residents of Hagulcho area as per Section 6 of the Community Land Act and that the 1<sup>st</sup>-10<sup>th</sup> Respondents have in their joint and several capacity and without the authority of the Applicant purported to illegally and irregularly sell the suit property to the 11<sup>th</sup> Respondent.

The Applicant, further contends that on learning of the Respondents actions, she held several consultative meeting which were attended by the members of the Local Community whereby she cautioned and forbade the Respondents from disposing of the suit property.

It is further alleged that despite her efforts to protect the suit property the Respondents have deliberately refused and/or ignored to heed the advice and went ahead to unlawfully and illegally sell the suit property contrary to the law relating to Community Land without the approval of the Applicant and other relevant authorities. On those grounds, the Applicant seeks injunctive orders in the application.

Section 6 of the Community Land Act No. 27 of 2016 states as follow;

#### **"Role of County Governments**

1. County Governments shall hold in trust all unregistered Community Land on behalf of the communities for which it is held.

2. The respective County Government shall hold in trust for a community any monies payable as compensation for compulsory acquisition of any unregistered Community Land.

3. Upon registration of Community Land, the respective County Government shall promptly release to the community all such monies payable for compulsory acquisition .....

6. (6) Any transaction in relation to unregistered Community Land which the County shall be in accordance with the provisions of this Act and any other applicable law.....

6. (8) A County Government shall not sell, dispose, transfer convert for private purposes or in any other way dispose of any unregistered Community Land that it is holding in trust on behalf of the Communities for which it is held."

The depositions by the Applicant's County Attorney in the supporting affidavit to the effect that the suit property is an unregistered and unsurveyed Community Land held by the Applicant in trust for the residents of Hagulcho area Mulanjo Sub-location, Saka Location, Madogo Division within Tana River County has not been challenged or controverted. The deponent of the supporting affidavit also annexed

a sale agreement the 1<sup>st</sup>-10<sup>th</sup> Respondents of one part and the 11<sup>th</sup> Respondent of the other part showing that the 1<sup>st</sup> – 10<sup>th</sup> Respondents were purporting to sell the suit property to the 11<sup>th</sup> Respondent which is also uncontroverted. By failing to file grounds of opposition or a replying affidavit in response to the said application leaves the same unopposed.

The principles for the grant of interlocutory injunction was set out in the case of **Giella –Vs- Cassman Brown Company Limited (1973) EA 358** where the court set out three grounds as follows;

1. **The Applicant must establish a prima facie case.**
2. **The Applicant must demonstrate that he will suffer irreparable injury which cannot be compensated by any award of damages and**
3. **Where the court is in doubt the court may decide the matter on a balance of convenience.**

The Court of Appeal in the case of **MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS Civil Appeal No. 39 of 2002** defined prima facie as follows;

***“...in Civil Cases it is a case in which on the material presented to the 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.”***

The arguments made by the Applicant to the effect that the subject matter of this application is a parcel of land held by the Applicant in trust for the local inhabitants of Hagulcho area, Mulanjo Sub-location, Saka location, Madogo Division within the County of Tana River pursuant to the provisions of the Community Land Act No. 27 of 2016. I am satisfied that the Applicant has established the first ground of prima facie case.

The second requirement relates to irreparable injury. On that issue, the court in the case of **Marple Brooks Projects Company Limited & Another –Vs- I&M Bank Limited (2019) eKLR** rendered itself and held as follows;

***“The next issue to address is whether the injury visited upon the Applicant should the conservatory orders not be granted could be compensated by way of damages. The principle generally is that where damages would suffice and the Respondent would be in a position to pay them, the court ought not to grant conservatory orders at an interlocutory stage. However, the position taken by Ringera J.A in the case of Kanorero River Farm Ltd and 3 Others v National Bank of Kenya Ltd 2002 2 KLR 207 was that “No party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.”***

My evaluation and analysis of the affidavit evidence by the Applicant which is not controverted demonstrates that unless the orders sought in the application are granted, the Applicant and the people of Hagulcho area Mulanjo Sub-location, Saka Location, Madogo Division within the County of Tana River will suffer irreparable loss. I therefore find the second ground has been established.

Having clearly established the existence of prima facie and likelihood of irreparable injury unless the orders sought are granted, this court has no doubt whatsoever that the application dated 18<sup>th</sup> April 2018 is deserving.

In the upshot, I allow the said application as prayed. The Respondent shall bear the costs of the application jointly and severally.

**Read, delivered and signed in the Open Court this 28<sup>th</sup> day of May, 2021.**

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**E. C Cheronno (Mr.)**

**ELC JUDGE**

**In the presence of:**

1. M/s Nyambute
2. Defendants/Advocate; absent
3. Court Assistant: Ijabo