



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO 25 OF 2018

COUNTY GOVERNMENT OF TANA RIVER.....PLAINTIFF

VERSUS

MOHAMED AMIN MUHUMED.....1ST DEFENDANT

DOKOTA FODHO ABADIBHA.....2ND DEFENDANT

BUNDID FODHO ABADIBHA.....3RD DEFENDANT

OMAR DOKOTA FODHO.....4TH DEFENDANT

RULING

BACKGROUND

The Applicant vide a Notice of Motion dated 23rd July, 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 whatsoever from clearing bushes, dealing in, trespassing, fencing, transferring, 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 820 metres along River Tana by 3.5 kilometres to the road which land borders Shure Abadela on the West, Tana River in the North, Aden Roba in the East and a road in the South situated at Malka Mansa, Madogo Saka Location within Tana River County herein after referred to as the "Suit property" pending hearing and determination of this application and/or until the determination of the substantive suit inter-partes.

3. The Officer Commanding Police Station (O.C.S) 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 unsurveyed and unregistered Community Land which the Applicant holds in trust for the residents of Malka Mansa village within Tana River, the "Local Community" as per provisions of Section 6 of the Community Land Act.

2. All material times relevant to this suit, the suit property has been occupied and used by the Local Community.

3. That the 2nd-4th 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 1st Respondent.

4. 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.
5. The Applicant is concerned that the continued 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.
6. 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.
7. 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.
8. This application concerns the Local Community's right to property as well as the public interest in relation to the protection of the right to property.
9. This application should not wait the determination of the substantive issue of ownership of the suit property for the foregoing weighty reasons which are ripe for interim consideration by this Honourable Court.

APPLICANT'S SUMMARY OF FACTS

The Applicant through the County Attorney one Mr. Isaiah Ndisi Munye deponed as follows;

1. THAT the property at the heart of this application is unsurveyed and unregistered parcel of land measuring approximately 820 metres along River Tana by 3.5 kilometres to the road which land borders Shure Abadela on the West, Tana River in the North, Aden Roba in the East and a road in the South situated at Malka Mansa, Madogo, Saka location within Tana River County (the "suit property").
2. 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")
3. THAT the suit property has since time immemorial been occupied and used by the Local Community.
4. THAT the 2nd-4th Respondents have commenced the process of unlawfully and irregularly disposing of the suit property or parts thereof to the 1st Respondent (annexed hereto and marked "INM1" is a copy of a sale agreement dated 5th December, 2017 entered into by the Respondents.)
5. THAT the intended sale constitutes a violation of the Local Community's land rights and is calculated to dispose the Local Community of its land and to defeat the ends of justice.
6. THAT the suit property has never belonged to the 2nd-4th Respondents in personam and therefore they have no authority to dispose the suit property to the 1st Respondent or to any other person and their attempts to dispose of the suit property should be estopped.
7. THAT the Applicant, in 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 the Court of law, frustrate and/or impede these efforts.
8. THAT if this application is not heard on a 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 being unlawfully disposed of its entitled land.
9. THAT the Respondents will not be prejudiced in any way if the application herein is allowed.
10. THAT in light of the foregoing, it is only fair and just that the orders sought in this application be granted.

On 24th September, 2018, the 1st Defendant entered appearance through the firm of Michael Daud & Associates Advocates while the 2nd and 3rd Respondents authorized the 4th Defendant/Respondent to sign any affidavit and pleadings on their behalf. Despite entering appearance to the summons issued in respect of this suit, the Defendants/Respondents failed to file any response to the application herein or defence to the Plaintiff's suit.

LEGAL ANALYSIS AND DECISION

I have considered the Notice of Motion, the grounds in support of the application and the supporting affidavit. I have also considered the plaint and the annexures thereto. The nature of the reliefs sought by the Applicant is an injunction under Order 40 of the Civil Procedure Act Cap 21 Laws of Kenya. It is now settled that an application for injunction can be granted where the Applicant has established the threshold

as set out in the locus classicus case of Giella –Vs- Cassman Brown Co. Ltd (1973) EA 358 where at page 360, Spry V.P held as follows;

“.....First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which could not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

From the affidavit evidence which is not controverted, the Applicant has stated that the subject matter of this suit is a Community Land which has been occupied and used by the Local Community and the 2nd-4th Respondents have no authority whatsoever to transact or deal with the same in any way. The Applicant further contends that they are the only entity mandated in law to hold Community Land in trust for the Local Community and the inhabitants and that they are obligated to protect the rights and interests of the Local Community in accordance with the law. Those depositions given on oath have not been controverted. As such, I am satisfied that they have established the first ground. The Applicant has also stated that if the 2nd-4th Respondent are not stopped from going ahead with the purported sale transaction, the Applicant and by extension the Local Community will suffer irreparable loss as they will have lost their ancestral land and heritage which is a source of livelihood and security. Those depositions have not also been denied or challenged by way of a replying affidavit. I am also satisfied that the Applicant has shown that he will suffer irreparable damage which cannot be compensated by damages unless the application is allowed. Even if this court was in doubt, the balance of convenience tilts in allowing the application as the same is unopposed.

The upshot of my finding is that the Notice of Motion dated 23rd July, 2018 is merited and the same is allowed as prayed. The costs of the application shall be borne by the Respondents.

Read, delivered and signed in the Open Court this 28th day of May, 2021.

E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. M/s Nyambuti for Plaintiff/Applicant
2. Respondents; absent
3. Ijabo: Court Assistant