



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.168 OF 2012

CONSOLIDATED WITH PETITION NO. 18 OF 2012

BAHOLA MKALINDI RHIGHO.....PLAINTIFF

VERSUS

1. MICHAEL SETH KASEME.....1ST DEFENDANT

2. SAMUEL KINGI MWANGI.....2ND DEFENDANT

3. COUNTY COUNCIL OF TANA RIVER.....3RD DEFENDANT

IN PETITION NO. 18 OF 2012

PHILIPH SUBILI RHIGHO & OTHERS.....PETITIONERS

HASSAN BARISA KALUME

SAMUEL KINGI MWANGI

THE COUNTY COUNCIL OF TANA RIVER.....RESPONDENTS

RULING

1. I have before me for determination a Notice of Motion application dated 28th February 2019. By the said Motion, the County Council of Tana River (the 3rd Defendant) prays for a Conservatory order to issue restraining the Petitioners and Plaintiff, their servants and/or agents from evicting, demolishing or interfering in any way whatsoever with the public and private amenities particularly Tana River County Headquarters; Tana River County Assembly; Hola District Hospital; Hola Prisons; Schools, Churches, Mosques and Petrol Stations pending the hearing and determination of this application.

2. On the main, the 3rd Defendant urges this Court to interpret the Judgment dated 15th April 2016 and the Ruling dated 28th September 2018 by specifying what part of Hola Town belongs to the Petitioners and the Plaintiff. The 3rd Defendant further wants the Court to interpret the said Judgment and Ruling by specifying what the "15 acres of land or thereabouts" relates to.

3. The application which is supported by an affidavit sworn by the 3rd Defendant's County Attorney Isaiah Ndisi Munje is premised on the grounds that:-

j) On 15th April 2016 the Honourable Justice Angote delivered a Judgment in these consolidated matters and made the following orders:-

a) "...a declaration be and is hereby issued that all parcels of land measuring 15 acres or thereabouts situated at Hola Town in Tana River County near Hola Water Supply Site and Laza Primary School belongs to the Petitioners and the Plaintiff and their family to the exclusion of the 1st, 2nd and 3rd Respondents.

b)an order of vacant possession of the said portion of land and the eviction therefrom of the 1st and 3rd Respondents is

hereby allowed.”

ii) On 21st September 2018, this Court made orders pursuant to the Petitioner’s application dated 1st November 2016 to the effect that all that parcel of land measuring 15 acres or thereabouts situated at Hola Town in Tana River County near Hola Water Supply site and Laza Primary School be delivered into the possession of the Petitioners and the Plaintiff by evicting the 1st and 3rd Respondents....and by removing their structures or buildings therefrom.

iii) That the Judgment and Ruling have caused extreme confusion, panic and unrest among the residents as it is ambiguous as to what the 15 acres or thereabout of the land at Hola constitutes; and

iv) That the Petitioners and the Plaintiff have purported to interpret the “15 acres or thereabout” to constitute the entire Hola Town and have sought to take possession of the entire town including several public and private entities through the use of hired goons who have since been terrorising local residents and thereby posing a serious security threat to the area.

4. The application is opposed. In a Replying Affidavit sworn and filed herein on 5th April 2019, Philip Subili Rhigo (the 1st Petitioner) avers that there is no confusion with regard to the 15 acres of land awarded herein as to warrant the orders sought. The 1st Petitioner avers that Paragraph 8 of the Petition described clearly the Petitioner’s 15 acres of land while Paragraph 14 of the Respondent’s Replying Affidavit to the Plaintiff’s Motion dated 31st October 2012 reveals that the 4th Respondent was without doubt aware of the identity of the 15 acres of land.

5. The 1st Petitioner avers that the allegation that they intend to take possession of the entire Hola Town is misleading. He asserts that all public utilities built inside the 15 acres of land were built on land donated by their family and that the warrant to the Court Bailiff issued pursuant to the Judgment and decree issued herein clearly specifies the parties to be evicted as the 1st and 3rd Respondents.

6. I have perused and considered the application and the response thereto. I have equally perused and considered the detailed submissions and authorities to which I was referred by the Learned Advocates for the parties.

7. The Applicant County Government of Tana River prays for an order that this Court does interpret the Judgment dated 15th April 2016 and the subsequent Ruling rendered herein on 28th September 2018 by specifying which part of Hola Town belongs to the Petitioners and the Plaintiff. The Applicant further urges this Court to specify what is entailed in the “15 acres or thereabouts” granted to the Petitioners and the Plaintiff in both the Judgment and Ruling aforesaid.

8. According to the Applicant, both the Judgment and Ruling have caused extreme confusion, panic and unrest among the residents of Hola Town as both are ambiguous as to what constitutes the 15 acres referred to. The Applicant avers that the Petitioners and the Plaintiff in the consolidated suit have interpreted the same to refer to the entire Hola Town and that they have now sought to take possession of the entire town including several public and private amenities such as the Applicants County Headquarters, its County Assembly, the District Hospital, Prisons and Schools among others.

9. From the record, the two consolidated suits herein were filed in the year 2012. At Paragraph 7 and 8 of the Petition filed herein on 14th December 2012, the Nine(9) Petitioners state as follows:-

“7. That the Petitioners are members of the family of Mkalindi Righo and belong to the community commonly known in the locality as the Uta Clan within the Pokomo ethnic Community and bring this Petition in their capacity as members of that family on their own behalf and on behalf of other family members.

8. That the Petitioners are the beneficial owners of all that parcel of land measuring 15 acres or thereabouts and situated at Hola Town aforesaid near the Hola Water Supply site and next to Laza Primary School whose boundaries and dimensions are clearly demarcated on the ground.”

10. From the material on record, it was clear to me that the suit property was an unsurveyed and unregistered parcel of land situated within the said Hola Town. Indeed the Plaintiff Bahola Mkalindi Righo states as much at Paragraph 4 of the Plaintiff filed herein on 1st November 2012.

11. Be that as it may, it was clear from a perusal of the pleadings herein that the parties to the dispute were aware of the general confines of the described suitland. Filed contemporaneously with the Plaintiff was an application dated 31st October 2012 seeking orders of injunction against the three (3) Defendants named therein.

12. Responding to the said application, the Applicant herein in a Replying Affidavit sworn on its behalf by its then Town Clerk Mohamed A. Mwatunza leaves no doubt that they were aware of the demarcations of the suitland and that the same is clearly ascertainable on the ground. In this respect the Applicant averred in a rather lengthy Paragraph 14 of the Replying Affidavit as follows:-

“14. That in any event the Plaintiff herein was duly compensated for the removal of the house as well (as) an acre of land in Hola since this is the Plot that was used to construct and does in fact house the current Hola Water Works. In fact the Plaintiff to date occupies a large piece of land on the South and the North of the Hola Water Works Station. The area that the Plaintiff occupies is well demarcated and has many mango trees while the rest is a forest. That the interests of the Plaintiff have been duly noted by the Council in its 2006 plan and both parcels of land have not been interfered by the Council at all despite the fact that they do not have varied ownership documents to-date. We have shown hereunder through Photographs the Plaintiff as well

as the 1st and 2nd Defendants properties as they stand now....”

13. The Applicant then goes ahead in that Replying Affidavit to annex a series of photos showing what is on the land as well as the Maps and Part Development Plans of the area in its endeavour to identify the suit land.
14. The consolidated suits proceeded by way of oral evidence before the Honourable Angote J who having heard the parties determined that the land belonged to the Petitioners and the Plaintiffs. The Learned Judge further ordered that the Petitioners and the Plaintiff be granted vacant possession and that the 1st and 3rd Respondents in the Petition to whom the Applicant herein had allocated the land be evicted from the suitland.
15. Since that Judgment was delivered on 15th April 2016, the Petitioners and the Plaintiffs are yet to be granted vacant possession of the suit premises. That is what prompted them to come to Court by a Notice of Motion application dated 1st November 2016 seeking the removal of the 1st and 3rd Respondents from the suitland and a warrant to issue to the Court Bailiff to give them possession of the land.
16. In their respective responses to the Motion dated 1st November 2016, the 1st and 3rd Respondents as well as the Applicant herein conceded that they were aware of the Judgment of the Court. Indeed the 1st and 3rd Respondents in their responses to the said application urged the Court to refer the matter for a resolution through alternative dispute resolution mechanisms.
17. This Court declined their request and ordered execution to proceed. Some three (3) years after the Judgment was delivered, the Applicant County Government which took part in the trial herein now purports that the terms of the Judgment are ambiguous and that the same have caused confusion.
18. I have perused the proceedings and Judgment herein. It is my considered view that the terms thereof do not leave any doubt as to the identify or extent of the suitland. The description and extent of the suit property is clearly discernible from the pleadings, the evidence placed before the Court and the Judgment as delivered on 15th April 2016. As such there is no latent ambiguity in the Judgment that would require interpretation of this Court.
19. The impending evictions are a process of law and the same are being carried out by a duly appointed Court Bailiff. From the material placed before me, I have not seen anything tending to suggest even remotely that the Court Bailiff has taken steps to evict other persons other than those mentioned in the warrant issued by the Court.
20. Indeed, the claim by the Applicant that the Bailiff intends to evict them and demolish its County Headquarters, the County Assembly, the District Hospital and other public amenities is clearly misplaced and without basis. As the 1st Petitioner avers at paragraph 7 of his Replying Affidavit, they had as long ago as 2nd May 2013 indicated to the Court that they had no issue with the same as their family had willingly donated the land in which those public utilities stand.
21. In the premises, I was not persuaded that there was any merit in the 3rd Defendant's application. The same is dismissed with costs to the Petitioners.

Dated, signed and delivered at Malindi this 6th day of May, 2020.

J.O. OLOLA

JUDGE