



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 167 OF 2018

COUNTY GOVERNMENT OF TANA RIVER.....PLAINTIFF/APPLICANT

VERSUS

1. ALI ADE KIYO

2. OSMAN KIYO ADESO

3. MOHAMED ABALONI TILIFO

4. ADAN SHARIFF AHMED.....DEFENDANTS/RESPONDENTS

RULING

1. By this Notice of Motion application dated 28th August 2018, the County Government of Tana River (the Plaintiff/Applicant) urges this Court to be pleased to issue a temporary order of injunction pending the hearing of this suit restraining the four (4) Defendants/Respondents herein from further selling, leasing, disposing, farming, mining or howsoever interfering with the peaceful use, occupation and possession by the Plaintiff and all communities currently using, occupying and living on all that parcel of land in Mathama area, Saka Location, Madogo Division of Tana River County containing by measurement 395 acres.

2. The Plaintiff further urges this Court to direct the Officer Commanding Station Bura Police Station to enforce those orders of injunction in the event they are granted.

3. The application which is supported by an affidavit sworn by the Plaintiff's Director of Legal Services Isaiah Ndisi Munje is premised on the grounds that:-

a) The said parcel of land is unregistered community land as defined under Article 63(2) of the Constitution and is held by the Plaintiff County Government of behalf of the communities resident in the area;

b) On or about 21st January 2016, the 1st to 3rd Defendants/Respondents entered into a Sale Agreement disposing of the suit property to the 4th Defendant/Respondent herein for Kshs 2,100,000/-;

c) The Plaintiff is the only entity recognised in law with the mandate to deal with unregistered community land and the purported sale is illegal and in violation of the provisions of Sections 6(7) and (8) as well as Section 31 of the Community Land Act; and

d) Unless the Defendants are restrained as sought herein, thousands of rural residents in Mathama area, Saka Location stand to be forcibly removed from their farming and grazing land as a result of which they shall be put to great hardship, and shall suffer irreparable loss and damage.

4. The application is opposed. In two Replying Affidavits sworn by Ali Ade Kiyoo (the 1st Defendant) and Adan Shariff Ahmed (the 4th Defendant) both filed herein on 30th November 2018, the Defendants assert that suit property is not community land as the Plaintiff would want the Court to believe. Instead, the Defendants aver that the said property was private property belonging to the families of the 1st, 2nd and 3rd Defendant before it was sold to the 4th Defendant.

5. The 1st Defendant avers that his forefathers settled in the area longer than they can recall and that the same is not subject to the Community Land Act as the said legislation was passed way after the sale of the land had taken place. Instead the Defendants assert that the suit property is unalienated Government land falling under the management of the National Land Commission.

6. The Defendants further aver that even if the said land was trust land, their customary rights to occupation have never been disputed and those rights and interests were recorded through an informal process in accordance with their native law and custom and each family knows the boundaries of their respective parcels of land.

7. The 1st, 2nd and 3rd Defendants aver that they invoked their customary law following a meeting of the elders of the family and clan where it was agreed that their family be allowed to dispose of the land. They accuse the National Government of failing over the years to formally ascertain all rights and interests of the persons in occupation of the land and to adjudicate the same.

8. I have perused and considered the application and the responses thereto. I have similarly considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

9. The prerequisites for the grant of an interlocutory injunction have been stated times without number having been aptly captured in the off-cited case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358* where it was held that:-

“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 would 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.”

10. The application before me was precipitated by a Sale Agreement executed between the 1st, 2nd and 3rd Defendants as vendors on the one part and the 4th Defendant on the other dated 21st January 2016. The said Agreement which gives the purchase price as Kshs 2,100,000/- describes the suit property as *“all that piece of land situated at Mathama area, Saka Location, Madogo Division within Tana River County, measuring approximately 4kms by 400m or thereabouts.”*

11. It is the Plaintiff’s case that the Defendants have no right to sell and/or purchase the suitland in the manner they did as the same is community land as described under Article 63 of the Constitution and that the purported sale is thus illegal as the Plaintiff is the only entity with the mandate in law to deal with unregistered community land.

12. The Defendants on the other hand aver that the suit property is private ancestral land belonging to the family of the 1st, 2nd and 3rd Defendant. They assert that even though the Government failed to issue them with title documents, their family has used, occupied and developed the land from time immemorial. It is their case that their family and clan elders met and endorsed the sale of the land to the 4th Defendant.

13. As it were, Article 61(2) of the Constitution classifies all land in Kenya as either public, community or private. As to what constitutes private land, Article 64 of the Constitution provides:-

“64. Private land consists of

a) Registered land held by any person under any freehold tenure;

b) Land held by any person under leasehold tenure; and

c) Any other land declared private land under an Act of Parliament.

14. Other than the assertion that the 1st, 2nd and 3rd Defendant’s family had lived on the land for a long period of time, the Defendants did not provide any evidence that the stretch of land extending to more than 4kms was their private land falling within the ambit prescribed under Article 64 of the Constitution as aforesaid.

15. While the 1st, 2nd and 3rd Defendants asserts that the land they sold to the 4th Defendant was their private property, it was difficult to ascertain how they had arrived at the exact extent thereof given their own admission at Paragraph 14 of the 1st Defendant’s Replying Affidavit that the land is unadjudicated and unregistered.

16. Arising from the circumstances herein, this Court was more inclined at this stage to go by the Plaintiff’s contention that the suitland is community land which has not been registered to any person privately and that the same has overtime been owned and used by the communities resident within Tana River County for purposes of farming and grazing their animals.

17. In this respect, Article 63(2) (d) of the Constitution defines community land as land that is:-

i) Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

ii) Ancestral land and land traditionally occupied by hunter-gatherer communities; or

iii) Lawfully held as trust land by the County Government.

18. Article 63(3) of the Constitution provides that *“any unregistered community land shall be held by the County Government on behalf of communities for which it is held”* while Article 64 prohibits the disposition of community land except in the manner provided by legislation

specifying the nature and extent of the rights of the members of each community individually and collectively.

19. Indeed even where it was to be assumed as the Defendants assert that the suit property is unalienated Government land falling under the management of the National Land Commission, one wonders where the Defendants got the right to alienate Government land by way of sale as they have purported to do herein.

20. In the circumstances herein and given the admission by the Defendants that they have attempted to dispose off the land on the presumption that the same is private ancestral land, I am persuaded that the Plaintiff has made out a prima facie case with a probability of success at the trial and further, that unless the orders sought herein are granted, the Defendants may proceed to further alienate the suit land to third parties.

21. In the premises, I am satisfied that the application before me has merit. The same is allowed as prayed with costs.

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

J.O. OLOLA

JUDGE