



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT GARISSA**

**ELC NO. 26 OF 2018**

**COUNTY GOVERNMENT OF TANA RIVER.....PLAINTIFF**

**-VERSUS-**

**FARAH ALI IBRAHIM.....1<sup>ST</sup> DEFENDANT**

**SULEIMAN IMOLE BITACHA.....2<sup>ND</sup> DEFENDANT**

**ABDI KARIM BOCHO.....3<sup>RD</sup> DEFENDANT**

**ASMAN BACHO BITACHA.....4<sup>TH</sup> DEFENDANT**

**RULING**

The Applicant/Plaintiff vide a Notice of Motion dated 23<sup>rd</sup> July, 2018 sought the following orders.

(i) Spent

(ii) 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 200 metres by 1500 metres which land borders River Tana to the East, Mzee Jelle Abdi Ibrahim's farm to the south and Suleman Imole Bitacha farm to the North situated at Faf Bare Village, Mullango Sub-location Saka Location, Madogo Division, Tana North Sub-County within Tana River County hereinafter referred to as the "suit property" pending hearing and determination of this application and/or until the determination of the substantive suit inter-parties.

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

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

(v) The costs of this application be provided for.

**GROUND UPON WHICH THE APPLICATION IS PREMISED**

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 Faf Bare Village 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, the suit property has been occupied and used by the Local Community.

3) That the 2<sup>nd</sup>-4<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 1<sup>st</sup> 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 Act 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 Appellant 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 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 through its County Attorney one Isaiah Ndisi Munje swore an affidavit in support of the application and deposed as follows;

(i) 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.

(ii) That the property at the heart of this application is an unurveyed and unregistered parcel of land measuring approximately 200 metres by 1500 metres which land borders River Tana to the East, Mzee Jelle Abdi Ibrahim's farm to the south and Suleman Imole Bitacha farm to the North situated at Faf Bare Village, Mullango Sub-location Saka Location, Madogo Division, Tana North Sub-County within Tana River County (the "suit property")

(iii) 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").

(iv) That the suit property has since time immemorial been occupied and used by the local community.

(v) That the 2<sup>nd</sup>-4<sup>th</sup> Respondents have commenced the process of unlawfully and irregularly disposing of the suit property or parts thereof to the 1<sup>st</sup> Respondent (Annexed hereto and marked "INM-1" is a copy of a sale agreement dated 12<sup>th</sup> March, 2018 entered into by the Respondents.)

(vi) That the intended sale constitutes a violation of the local community's land rights and is calculated to disposes the local community of its land and to defeat the ends of justice.

(vii) That the suit property has never belonged to the 2<sup>nd</sup>-4<sup>th</sup> Respondents in personam and therefore they have no authority to dispose the suit property to the 1<sup>st</sup> Respondent or to any other person and their attempts to dispose of the suit property should be stopped.

(viii) 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.

(ix) 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 for being unlawfully dispossessed of its entitled land.

(x) That the Respondents will not be prejudiced in any way if the Applicant herein is allowed.

(xi) That in light of the foregoing, it is only fair and just that the orders sought in this Application be granted.

(xii) That I swear this affidavit in support of the application herein.

### **1<sup>ST</sup> RESPONDENT'S SUMMARY OF FACTS**

The 1<sup>st</sup> Respondent filed a replying affidavit in opposition to the Application sworn on 18<sup>th</sup> October, 2018 and deposed as follows;

1. That I am a Respondent herein and I am conversant with the facts of this suit and application and therefore I am competent to swear this affidavit.

2. That I have read the application by the County Government of Tana River and the supporting affidavit by Isaiah Ndisi Munje, the same explained to me by my Counsel on record and wish to reply to the same as follows;

3. That in reply to paragraph 3 of the supporting affidavit, the same is erroneous. I bought a portion of land belonging to the Bitacha family on 12<sup>th</sup> March, 2018. The land in question is surveyed and it was in the process of being registered. The sellers had not finalized the process because of lack of money to process the required consents and payment. (Annexed herein and marked "FAI-1" is a copy of location map of the said land).

4. That before I bought the land, I carried out a due process and I ascertained that the sellers had owned the land privately for more than 80 years. Some of their relatives are actually buried in the land.

5. That in reply to paragraph 4 of the supporting affidavit, the same is vehemently denied, the land had never been occupied by any community but was privately owned.

The deponent does not state the community he is referring to as being the beneficiaries.

6. That I have been informed by Asman Bacho Bitacha, information I verily believe to be true, the land has always been in the hands of Batacha family, that is the reason they registered as self-help group with the Minister of Gender, Children and Social Development under the name Qaran Dertu Farm Self Help to cater for their interests (annexed herein and marked "FAI 2" is a copy of the said certificate of registration).

7. That in reply to paragraph 8, the same is mere allegation as no document has been attached to show that there is any programme of adjudication and in any case, if at all the land would be adjudicated, the Land Adjudication Office will be able to ascertain the ownership who definitely is not the County Government.

8. That I will be greatly prejudiced if the order of injunction is granted, I am a farmer, I have greatly invested in the land and I have planted crops and vegetable and they will go to waste if an injunction is granted. I urge the court to decline to grant any injunction. (annexed herein and marked FAI 3" are the pictures of the crops I have planted.

9. That the Applicant has not met the threshold of being granted an injunction. The Applicant has not established its proprietary rights that are being prejudiced. No person has complained being deprived his land, and the County Government who is supposed trustee, which is strongly denied cannot purport to act for a non-existent beneficiary or owner.

10. That it is only fair and just that the court declines to grant the orders applied for.

11. That all that is stated herein is true to the best of my knowledge and information, sources whereof have been disclosed.

#### **PLAINTIFF/APPLICANTS SUBMISSION**

The Plaintiff/Applicant through Advocates on record submitted that the application under consideration meets the threshold of granting an injunction as set out in the celebrated case of **Giella –Vs- Cassman Brown Co. Limited (1973) EA 358** on whether the Applicant has met the first principle of prima facie case with a probability of success, the learned counsels submitted that what this court is required to establish at this stage is to gauge the strength of the Applicants/Plaintiff's case and not to adjudge the main suit since proof is only required at the hearing stage of the main suit. They argued that this being an interlocutory application, this Honourable Court is not required to hold a mini-trial and must not examine the merits of the case closely and that the position of the parties is not to be proved in such a manner as to give a final decision in discharging a prima facie case. They cited the case of MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) KLR 125, NGURUMAN LIMITED –VS- JAN BONDE NIELSEN & 2 OTHERS CA (2014) eKLR, HABIB BANK AG ZURICH –VS- EUGENE MARION ENERGY KENYA LIMITED –VS- MALOBA PETROL STATION LIMITED & 3 OTHERS (2015) eKLR. The Applicant/Plaintiff's counsel also referred to Articles 61 (2) and 63 (2) (d) of the Constitution Section 12 of the Community Land Act and Section 2 of the Survey Act, 2010. The Applicant through their counsel also cited the following additional cases;

(i) American Cyanamid –Vs- Ethicon Limited (1975) AC 396.

(ii) Bahola Mkalindi Rhigo & 9 Others –Vs- Michael Seth Kaseme & 3 Others (2016) eKLR .

(iii) Naftali Ruth Kinyua –Vs- Patrick Thuita Gachure & Another (2015) eKLR.

#### **DEFENDANTS/RESPONDENTS SUBMISSIONS**

The Defendants/Respondents through their counsel on record submitted that cited the celebrated case of **Giella –Vs- Cassman Brown Co. Ltd (1973) EA 358** and submitted that the Plaintiff/Applicant has not produced an inventory of unregistered community land under Regulation 12 of the Community Land Regulations and which would have been proof that the suit property is indeed unregistered community land. In conclusion, the Defendants/Respondent submitted that the Plaintiff/Applicant has not met the threshold for the grant of the orders sought to have the application dismissed with costs.

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

I have considered the Notice of Motion application dated 23<sup>rd</sup> July, 2018 and the affidavit evidence, both in support and in opposition

thereto. I have also considered the submissions, and rival arguments by the counsels for both sides. As correctly put by counsels for the parties, the principles for the grant of an interlocutory injunction can be traced to the celebrated case of **Giella –Vs- Cassman Brown Company Limited (1973) 358** where the following three principles were set out before an Applicant is granted an injunction order;

1. A prima facie case.
2. A party must demonstrate that he/she will suffer irreparable injury which cannot be adequately compensated by an award of damages and
3. Where the court is in doubt, the court may decide on a balance of convenience.

The Applicant in his case has stated that the subject of the application herein is an unsurveyed and unregistered piece of land which is part of and still is an unregistered community land.

Section 63 (2) (d) of the Constitution of Kenya 2010 defines Community Land as follows;

**“Land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines and ancestral lands.”**

Again Section 12 of the Community Land Act No. 27 of 2016 defines Community Land as follows;

*“Classes of holding community land*

*Community land may be held;*

- (a) As communal land*
- (b) As family or clan land,*
- (c) As reserve land, or*
- (d) In any other category of land recognized under this Act or other written law.*

The Defendants/Respondents have denied that the suit property is a community land and further denied that the same is unregistered land and unsurveyed as well.

To buttress the issue, the Respondents annexed what is described as “location/surveyed map” of the suit property. They have also alleged that the suit property is in the process of being registered. The Respondents also annexed a certificate of registration of Qarari Dertu Farm Self Help Group and a letter dated 15<sup>th</sup> September, 2018 from an alleged Clan Elder purportedly confirming that the farm is a private owned property belonging to the Bayata Bitacha family.

I agree with counsel for the Applicant that the “Location/Surveyed Map” annexed to the replying affidavit is a mere sketch map of the suit property that has no evidentiary value as the same is not authenticated or approved by the Director of Survey as contemplated under Section 2 of the Survey Act, 2010. The Respondent has not also provided any documents to show that the registration process is currently underway or that it has even started. As regarding the certificate of Registration of Qarari Dertu Farm Self Help and a letter dated 15<sup>th</sup> September, 2018 from an alleged Clan Elder, it is my view that the documents have no evidentiary value capable of being protected in law under Article 40 of the Constitution, 2010 or any other statute.

The occupation and use of the suit property by the 2<sup>nd</sup>-4<sup>th</sup> Respondents for many years does not automatically qualify the suit property as private land. The mere occupation of an unregistered community land or any portion thereof does not crystallize as private proprietorship claims and neither does it grant any community member thereof a better title to the use, occupation, or even disposal of the same at the expense of other Community, family, or clan members. As long as trust land remain unsurveyed and unregistered, the same belongs to the community in undivided share as was succinctly put in the case of **BAHOLA MKALINDI RHIGHO & 9 OTHERS –VS- MICHAEL SETH KASEME & 3 OTHERS (2016) eKLR** where the court held as follows;

*“86 For as long as Trust Land remained adjudicated and unregistered, it belonged to the local tribes, groups, families and individuals of the area” (underline mine)*

On whether the Applicant has established a prima facie case to warrant the grant of the orders sought, it is important to look at the obligation of the Applicant in respect to Community Land under Section 10 (3) of the Community Land Act No. 27 of 2016 which provides as follows;

*“10(3) for the avoidance of doubt, until any parcel of community land has been registered in accordance with this Act, such land shall remain community land and shall, subject to this Act, be held in trust by the County Government on behalf of the communities for which it is held pursuant to Article 63(3) of the Constitution.”*

It is clear from the provisions of the law that the suit property which is an unsurveyed and unregistered community land shall be held by the

Applicant on behalf of the communities for which it is held in accordance with the Constitution of Kenya, 2010. That therefore answers the first question whether the Applicant has established a prima facie case is in the affirmative.

As regards the second principle, the subject of the application under consideration is a community land belonging to Munyoyaya Community. It is an ancestral land which has been occupied and used over a long period of time and the community is using the same for their livelihood. It is a parcel of land where the community has buried their ancestors. In short, the suit land is like no other. The Applicant has alleged that unless the orders sought are allowed and the disposal of the suit land continue unabated, the adjudication process and programmes will forestall and the Munyoyaya Community stands to lose the suit land which is a source of livelihood and ancestral land used as cultural sites, etc. Those averments have not been controverted. I agree with the Applicant that the suit property which is a community land is an ancestral land which is passed from generation to generation and if the alleged actions by the 2<sup>nd</sup>-4<sup>th</sup> Defendants/ Respondent are not stopped, the Applicant and the Munyoyaya Community landrights which is their birthright will not be adequately compensated by an award of damages.

On the second principle, I am also satisfied that the Applicant has established the same. Even if I was to decide this application on the third principle, the balance of convenience still tilts in favour of granting the orders sought.

The upshot of my analysis is that the Notice of Motion dated 23<sup>rd</sup> July, 2018 is merited and the same is hereby allowed. Consequently, the interim orders issued on 23/7/2018 are hereby confirmed pending hearing and determination of this suit. The costs of the application shall be borne by the Respondents jointly and severally. It is so ordered.

**READ, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 30TH DAY OF JULY, 2021**

.....

**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:**

1. Roble for Defendants/Respondents
2. Nyabuli for Plaintiff/Applicant
3. Fardowsa; Court Assistant.