



**REPUBLIC OF KENYA**

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

**ELC NO. 24 OF 2018**

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

**-VERSUS-**

**MOHAMED GORE BULALE.....1<sup>ST</sup> DEFENDANT**

**IBRAHIM ABASS GULALE.....2<sup>ND</sup> DEFENDANT**

**BINESA WATO DANKU.....3<sup>RD</sup> DEFENDANT**

**ALI DHAHALANI SALAT WATO.....4<sup>TH</sup> DEFENDANT**

**RULING**

The Applicant/Plaintiff moved this court vide a Notice of Motion under certificate of urgency dated 23<sup>rd</sup> July, 2018 seeking 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 250 metres by 3.5 kilometres situated at Damajalley area, Madogo ward within Tana River County hereinafter referred to as the "suit property" pending hearing and determination of the substantive suit interparties.

(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 an unsurveyed and unregistered community land which the Applicant holds in trust for the residents of Damajalley 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, the suit property has been occupied and used by the local community.

3. That the 3<sup>rd</sup> and 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> and 2<sup>nd</sup> Respondents.

4. That it is trite law that any disposition 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 he continued acts of the Respondents in connection with the suit property if allowed to continue

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 enforcement 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 ancestral land and heritage, source of livelihoods and security which cannot be compensated by the Residents.

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.

### **APPLICANT'S SUMMARY OF FACTS**

The Applicant in the supporting affidavit sworn by County Attorney one Isaiah Ndisi Munje and a supplementary affidavit sworn by the Sub-County Physical Planner one Joseph TolaIpsu stated as follows;

(1) That the property at the heart of this application is an unurveyed and unregistered parcel of land measuring approximately 250 metres by 3.5 kilometres situated at Damajalley area, Madogo ward within Tana River County (the suit property).

(2) 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 3<sup>rd</sup> and 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> and 2<sup>nd</sup> Respondents (Annexed hereto and marked "INM 1" is a copy of a sale agreement dated 14<sup>th</sup> 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 disposes the local community of its land and to defeat the ends of justice.

(6) That the suit property has never belonged to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents in personam and therefore they have no authority to dispose the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents or to any other person and their attempts to dispose of the suit property should be estopped.

(7) 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.

(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 for being unlawfully dispossessed 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.

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

The 1<sup>st</sup> Respondent, acting in person filed a replying affidavit sworn on 18<sup>th</sup> October, 2018 and stated as follows;

(1) 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:-

(2) That in reply to paragraph 3 of the supporting affidavit, the same is erroneous. I brought a portion of land belonging to the Wato family on 14<sup>th</sup> December, 2017. 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 "MG1" is a copy of the location map of the said land).

(3) That before I bought the land, I carried out a due diligence and I ascertained that the sellers had owned the land privately for more than 50 years. Some of their relatives had actually buried in the land.

(4) 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 rather it was privately owned. The deponent does not state the community he is referring to as being the beneficiaries.

(5) That I have been informed by Binesa Wato Danku, information I verily believe to be true, the land has always been in the hands of Wato family, that is the reason they registered a self-help group with the Minister of Gender, Children and Social Development under the name Masshola Farm Self-help to cater for their interests (annexed herein and marked "MG 2" is a copy of the said certificate of registration).

(6) That in reply to paragraphs, the same is mere allegation as no document has been attached to show that there was 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.

(7) 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 vegetables and they will go to waste if an injunction is granted. I have also incurred enormous expenses preparing the land. I urge the court to decline to grant an injunction. (annexed herein and marked "MG3 (a-d)" are pictures of the crops I have planted and copies of the cost incurred).

(8) 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 the trustee, which is strongly denied cannot purport to act for a non-existent beneficiary or owner.

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

### **3<sup>RD</sup> AND 4<sup>TH</sup> RESPONDENTS SUMMARY OF FACTS.**

The 3<sup>rd</sup> Respondent with instruction from the 4<sup>th</sup> Respondent filed a replying affidavit sworn on 18<sup>th</sup> October, 2018 and deposed as follows;

- 1) That I am the 3<sup>rd</sup> Respondent and have the authority of 4<sup>th</sup> Respondent to swear this affidavit on his behalf.
- 2) That I have read an 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 the suit property has never been nor is it Community Land as the Plaintiff could want this court to believe. This is because the said land is private property belonging to the Wato family.
- 4) That it is my dint of the land being a family land that our said family registered a Self-help group on the 15<sup>th</sup> August, 2013 for purposes of managing the family land among other objectives. (annexed herein and marked "AAW 1" are copies of the said documents).
- 5) That I personally was born and raised in the said land in 1940 by my late father Wato Danku who subsequently passed on and was buried in the said land.
- 6) That the suit property was obtained by my grandfather during the colonial era, way before 1930. He died and is buried in the said land.
- 7) That as is evidenced from the names in the pleadings herein, the Respondents herein are one family who have built homesteads and lived in the same land since birth and we have been farming bananas, pawpaws, watermelons and keeping beehives and that the said land has always had a live perimeter fence around it. (Annexed herein and marked "AAW 2 (a-e)" are copies of photographs of the current status of the land.
- 8) That on the 19<sup>th</sup> December, 2016, I applied for conversion of the land, the subject herein into an agricultural land as can be discerned from the photographs annexed in paragraph 7 above. A copy of letter from the Chief to that effect is annexed hereto as the exhibit marked "AAW 3").
- 9) That I have been granted customary right of occupancy of the suit parcel of land by virtue of having been born and raised on the suit property under Section 14 of the Community Land Act and as such, it is utterly incorrect for the Plaintiff/Applicant to state that the said land falls under Article 63 of the Constitution and Section 6 of the Community Land Act. The Constitution of Kenya, 2010 under Article 61 thereof respects sanctify of proprietary rights and the same cannot be used to deny my family right to sanctify of property.
- 10) That we sat down as a family and agreed to edge out a portion of the said land as described in the sale agreement measuring approximately 400 metres and sell the same in order to help in education of our children and also sustain our livelihoods. The said land is private and we have not been aware of the allegations at paragraph 13, 14 and 15 of the supporting affidavit herein and put the Plaintiff to strict proof thereof.
- 11) That further, the measurement of the said land is discernable from the sale agreement and also at the ground and as such, I am a stranger to the averments at paragraph 12 and 13 of the supporting affidavit herein.

12) That I am advised by our Advocates on record, whose advice we verily believe to be true that if indeed the said land was Community Land, which is denied, the Plaintiff ought to produce a register confirming the same and has also not annexed any proof that the land, the subject of these proceedings is Community Land.

13) That my family has never been issued with any proprietorship legal documents to date despite having been in possession by forefathers for more than 100 years. The Plaintiff herein has not proved that it has been in possession of the said land at any one time and/or given the particulars of the community allegedly denied use of our land and in whose trust, it intends to hold for.

14) That the said parcel is un-adjudicated by the Government and a vast majority of land in Tana River and the Coastal area of Kenya has never been adjudicated and thus we are yet to obtain the title documents. This does not mean that we have no proprietary rights in the said land. We have lived in our secured and fenced land as the Wato family for long.

15) That there are no communities living, farming or grazing on the suit parcels as alleged by the Plaintiff/Applicant.

16) That the Plaintiffs application is totally misguided, misconceived and misplaced as the suit property was passed down to my family by my forefathers. We consequently sold the same to the 4<sup>th</sup> Defendant in order to pay school fees for our children.

17) That the suit parcel has been used for subsistence farming and grazing by my family and it would be against the principles of natural justice to deprive the 1<sup>st</sup> and 2<sup>nd</sup> Defendant of thereof the use of our land who bought the same from me and family and acquired proprietary rights therein.

18) That I have been advised by my Advocates on record that, the application as presented does not meet the test for grant of injunctive relief against us and I pray the same be dismissed with costs.

### **APPLICANTS FURTHER SUMMARY OF FACTS**

By way of a supplementary affidavit, the Plaintiff/Applicant through its Sub-County Physical Planner, one Joseph TolaIpsu stated as follows;

1) That I have read the 1<sup>st</sup> Respondent's replying affidavit dated 18<sup>th</sup> October, 2018 and filed on 24<sup>th</sup> October, 2018 and wish to respond to it and further supplement the Plaintiffs/Applicants affidavit filed in support of the Notice of Motion application dated 23<sup>rd</sup> July, 2018 and filed on the same date.

2) That for avoidance of doubt, I wish to reiterate the contents of the supporting affidavit dated 20<sup>th</sup> July, 2018 in support of the above mentioned application.

3) That I wish to lay out the following contest t the averments made in the July, 2018 supporting affidavit.

4) The Plaintiff/Applicant's 2<sup>nd</sup> County Integrated Development Plan("CIPD"), April 2018 at paragraphs 1.8.2, 1.8.3, 1.8.4 sets out the following well known facts that:-

4.1.1 Most land owners within the Plaintiffs/Applicants territorial jurisdiction have not title deeds and therefore most of the land is held in trust by the County Government in respect of Community Land.

4.1.2 Not less than 90% of the land within the Plaintiffs/applicants territorial jurisdiction is yet to be adjudicated in accordance with the laws relating to adjudication of land and that the 90% is largely held either as Community Land or Public Land.

4.1.3 Only a small portion of land of about 4.3% of the land within the vast Tana River County has been adjudicated and registered in favour of private persons.

4.1.4 The incidence of landlessness in Tana River County is high at 95-7 per cent.

4.1.5 With regard to Community Land, only a small portion of the Community Land has been adjudicated and registered in favour of the communities residing within Tana River County. The vast majority of the designated Community Land remains unregistered. This lacuna has allowed private investors and unscrupulous dealers to take advantage of the situation by dealing in the unregistered Community Land in the pretext that the same is privately owned. This is unlawful dealing is happening at the expense of the local communities that are duly entitled to the said properties thereby creating potential source of conflict especially for the parcels of land within and around the Tana River County Headquarters, along the Coast line, along the Lamu Port South Sudan Ethiopia Transport, ( LAPSET) corridor and along Tana River/Tana Delta. (Annexed hereto is the copy of the 2<sup>nd</sup> CIPD marked "JTI 1").

4.2 The suit property measures approximately two one six decimal two one seven two one acres (216.21721 acres) an equivalent of about 87.5 Hectares.

4.3 Tana River County enjoys diverse cultures from various ethnic groups including the Pokomo, Orma, Wardei, Somalis, Kalakote, Munyoyaya and Wata.

4.4 The Pokomos, Munyoyaya and Malakote are primarily farmers while the Orma, Wardei and Somalis are mainly livestock keepers. Land is their primary source of livelihood as their source of food, shelter and water, and also grazing their livestock and for spiritual and cultural activities.

4.5 The Munyoyaya Community are mostly smallholders' herders, fish-folks and indigenous communities meaning that access to land is a necessary condition for the achievement of a decent standard of living.

5) That save for the admission by the 1<sup>st</sup> Respondent that he bought the suit property on 14<sup>th</sup> December, 2017, I take great exception to the 1<sup>st</sup> Respondents averments set out in paragraph 3 of the 1<sup>st</sup> Respondents affidavit and I put 1<sup>st</sup> Respondent to strict proof thereof. I take this position based on the following reasons:-

5.1 That the 1<sup>st</sup> Respondent has alleged that the suit property is surveyed. Nothing can be further from the truth. A close scrutiny of the annexed alleged "location/surveyed map" of the suit property is a mere diagrammatic and a sketchy representation of the suit property that has not been authenticated or approved by the Director of Survey. I am advised by the Plaintiffs/Applicants' Advocates on record that Section 2 of the Survey Act, 2010 defines a "plan" to include a map, diagram or aerial photograph approved by the Director of Surveys. I am also advised that Section 32 of the Survey Act, 2010 expressly states that:-

***"No land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director or of a Government Surveyor authorized in writing by the Director in that behalf or by the affixing of the seal of the Survey of Kenya."***

5.2 That the 1<sup>st</sup> Respondent has further averred that the suit property is in the process of being registered. Other than a mere allegation, the 1<sup>st</sup> Respondent has not provided any documents to show that the registration process is currently underway or that it has even started. This is because the 1<sup>st</sup> Respondent is very well aware that the suit property is not capable of registration as private land in the manner that he wants this court to believe. I wish to state that until such time when the suit property is registered in accordance with the relevant laws, it remains to be an unregistered land which I am advised by the Advocate on record is the position of the law as specified under Section 10 (3) of the Community Land Act, to wit:-

***"For the avoidance of doubt, until any parcel of Community Land has been registered in accordance with this Act, such land shall remain unregistered 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."***

5.3 Therefore the deposition in the July, 2018 supporting affidavit is not erroneous as so alleged by the 1<sup>st</sup> Respondent.

6) That in reply to the allegation contained in paragraph 4 and 5 of 1<sup>st</sup> Respondent's affidavit:-

6.1 The suit property is part of and still is an unregistered Community Land that is held by the Plaintiff/Applicant in trust for the Karara clan of the Munyoyaya Community, a local community of Madogo area within Tana River County.

6.2 Other than a mere allegation, that the 1<sup>st</sup> Respondent conducted the diligence and ascertained that he sellers privately owned the suit property, no document(s) or any evidence whatsoever has been adduced to corroborate his unfounded allegations.

6.3 I am advised by the Plaintiffs/Applicants' Advocate on record that pursuant to Article 6 (2) of the Constitution of Kenya, 2010, Land in Kenya is classified under three categories, that is; public; community or private land. The Constitution has gone further and elaborated what type of land falls under each category. The 1<sup>st</sup> Respondent has alleged that the suit property is a private family property belonging to the Karara clan and has been held as such since time immemorial. However, other than a mere allegation, the 1<sup>st</sup> Respondent has not provided any document to support the allegation. I am further advised that Article 64 of the Constitution of Kenya, 2010, sets out clearly what falls under the category of private land, to wit:-

6.3.1 registered land held by any person under any freehold tenure;

6.3.2 land held by any person under leasehold tenure and

6.3.3 any other land declared private under an Act of Parliament.

The suit property does not fall under any of the above categories of a private land and even if it does, the 1<sup>st</sup> Respondent has nothing to show for it.

6.4 To the best of my knowledge, information and belief, the said ancestral land has since time immemorial to date been held in undivided shares by the said Munyoyaya ethnic community in which the Karara clan hails from.

6.5 I am further advised by the Plaintiff/Applicant's Advocate on record that Section 12 of the Community Land Act,

specifies that Community Land may be held as communal, family, clan land or as reserve land. The fact that part of the vast unregistered community land comprising the suit property is currently occupied and has been occupied say exclusively by the Karara clan does not preclude the suit property from the ambit of what is considered to be Community Land.

7) That in reply to the allegations contained in paragraph 6 of the 1<sup>st</sup> Respondent's replying affidavit, the 1<sup>st</sup> Respondent has annexed a certificate of registration of Masshola Self-help group. However, the annexure does not add any value to the 1<sup>st</sup> Respondent case for reasons that;

7.1 The 1<sup>st</sup> Respondent has not provided any evidence to show that the suit property is registered in the name of Masshola Self-help group.

7.2 I am advised by the Plaintiff/Applicant's Advocate on record that in any event, a self-help group is not a legal entity that has capacity to acquire and hold land in its name;

7.3 If indeed the suit property is registered as private land as alleged by the 1<sup>st</sup> Respondent, then the 1<sup>st</sup> Respondent should have provided a verifiable proof of registration including an authentic title search results from the Ministry of Lands.

7.4 Be it as it may, the 1<sup>st</sup> Respondent has not provided evidence of his membership to the said Self-help group. I wish to state that the setting up of the so called Self-help group is a mis-adventure that has no bearing or relevance to the case at hand. In any case, the fact that the Respondents or certain persons associated or otherwise with the Respondent(s) have created a Self-help group, does not in any way legitimize their illegal dealing in the unregistered Community Land.

8) That in response to paragraph 7 of the 1<sup>st</sup> Respondent's replying affidavit, I wish to state that to the best of my knowledge, information and belief, the Plaintiff/Applicant has, in accordance with its statutory mandate, taken steps to commence the adjudication programme, within its jurisdiction targeting unregistered Community Land, including the suit property, for example:-

8.1 On January 25, 2019 vide Kenya Gazette No. 497- Vol.CXX1-No.12, the Governor of Tana River County, His Excellency Dhadho Gaddae Godhana appointed a seven-member task force to investigate illegal and irregular land allocations within his territorial jurisdiction.(Annexed hereto is a copy of the Kenya Gazette of January 25, 2019- Kenya Gazette No. 497- Vol.CXX1-No.12 marked "JTI 2".

8.2 On 2<sup>nd</sup> September, 2019 officially launched its Geographical Information System Laboratory (GIS) to collect and collate data on land within its territorial jurisdiction <https://www.tanariver.go.ke/county-geographic-information-system-lab-laundied-gis-station/>. In this regard, the 1<sup>st</sup> Respondent still has the opportunity of presenting his claim/interest over the suit property to the adjudication team for consideration and/or registration in accordance with the applicable laws.

9) That in response to the allegations in paragraph 8, 9 and 10 of the 1<sup>st</sup> Respondent's affidavit, I wish to state that:-

9.1 While the 1<sup>st</sup> Respondent has annexed blurry photographs purporting to show the investments undertaken on the suit property, I wish to reiterate that the 1<sup>st</sup> Respondent actually confirms that he has trespassed and with every continued stay on the suit property constitutes a fresh claim for trespass by the Plaintiff/Applicant at his peril and further that he is the author of his own misfortune as he engaged in illegal activities on an unregistered Community Land contrary to Section 6 (60 of the Community Land Act as am so advised by the Plaintiff/Applicant's Advocates on record, and therefore such illegal acts should not be protected by this Honourable Court of law.

9.2 Further, a closer look at the annexed receipts, they indicate that the same were paid for during the pendency of the injunction orders issued by this court on 23<sup>rd</sup> July, 2018;

9.3 The said orders expressly prohibited the 1<sup>st</sup> Respondent from dealing in the suit property in any way until the Plaintiff/Applicant's application was heard and determined.

9.4 Therefore the 1<sup>st</sup> Respondent's actions are a blatant contempt of the orders issued by this Honourable court and this court should not be lenient to the contemnor of its orders.

9.5 The Plaintiff/Applicant has neither pleaded averred nor sought to confer upon itself any proprietorship rights over the suit property and thus the 1<sup>st</sup> Respondent's allegations are misplaced. If anything the Plaintiff/Applicant is precisely exercising its mandate within its trusteeship constitutional obligation towards the beneficiaries of the suit property, the Munyoyaya community.

9.6.1 The Munyoyaya community constitutional rights as contained in the Bill of Rights including the right to life, property, social economic rights and the right to enjoyment of their culture will on each passing day continue to be intentionally denied, violated, infringed and threatened.

9.6.2 I am advised by the Plaintiff/Applicants Advocates on record that the Plaintiff/Applicant's constitutional duty as stipulated in the 4<sup>th</sup> schedule of the Constitution of Kenya, 2010 a number of statutes including the County Government Act, 2012 and the Community Land Act, 2016 to engage in effective land adjudication including surveying and mapping of land within its territorial jurisdiction will be frustrated and foiled.

9.6.3 The illegal disposition of unregistered community land if allowed to continue unabated with forestall adjudication process and programmes in the Plaintiff/Applicants territorial jurisdiction.

9.6.4 The Plaintiff/Applicant will be in breach of its statutory trust obligations bestowed upon it by the Community Land Act on behalf of the Munyoyaya community.

9.6.5 The Munyoyaya Community stands to lose the land; the suit property which is its main source of livelihood.

9.6.6 Generational, inter-generational and intra-generational rights to property are at risk.

9.6.7 The illegal disposition of unregistered community land if allowed to continue unabated may create tension and insecurity within the local community due to clashes over arable land which has been witnessed in the past. This will most certainly lead to loss of lives, displacement of people and livestock and destruction of property.

10. That I respectfully submit that the Plaintiff's application is warranted for the reasons set out in the July, 2018 supporting affidavit and as supplemented by this affidavit.

11. That I urge this court to deem the averments in paragraphs 5,6 and 7 in the July, 2018 supporting affidavit as having been admitted by the 1<sup>st</sup> Respondent as there has been no response and further the averments have not been rebutted.

12. That for the avoidance of doubt, unless otherwise specifically admitted, any allegation not addressed or answered in this affidavit in response to the 1<sup>st</sup> Respondent's affidavit are expressly denied.

### **PLANTIFF/APPLICANTS SUBMISSIONS**

The Applicant through the firm of CNN Advocates LLP filed written submissions dated 10<sup>th</sup> March, 2021 and raised the following issues;

(a) Whether the suit property is a private land or an unregistered community land.

(b) Whether a right has been and/or continues to be infringed to warrant an injunction to restrain the Respondents from clearing bushes, dealing in, trespassing, fencing, transferring, disposing, erecting or causing to be erected thereon any structures or any other manner interfering with local community's use and quiet possession of the suit property.

The learned counsel cited the following case law and authorities in support of the application; -

(1) The Constitution of Kenya, 2010.

(2) The Community Land Act, 2016

(3) Order 40 CPR

(4) *Giella –Vs- Cassman Brown Co. Ltd (1973) 358*

(5) *Nguruman Limited –Vs- Jan Bonde Nielsen & 2 Others (2014) e KLR*

### **RESPONDENTS SUBMISSIONS**

The Respondents did not file written submissions.

### **LEGAL ANALYSIS AND DECISION**

I have considered the Notice of Motion dated 23<sup>rd</sup> July, 2018, the supplementary affidavit and the annexures thereto. I have also considered the replying affidavit by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents together with the annexures thereto. I have equally considered the submissions by the Applicant and the applicable law.

Applicant's application is basically seeking an interlocutory injunction which is an equitable relief. The principles for the grant of interlocutory injunction were set out in the locus classicus case of ***Giella –Vs- Cassman Brown (1973) EA 358*** and later restated in the case of ***Nguruman Limited –Vs- Jan Bonde Nielsen & 2 Others (2014) e KLR***. The three principles are as follows;

1. That the Applicant must establish a prima facie case.

2. The Applicant must demonstrate that he will suffer irreparable injury which cannot be compensated by an award of damages.

3. Where the court is in doubt, it may decide the matter on a balance of convenience.

The Court of Appeal in the Nguruman Case (Supra) put the three principles into perspective and stated as follows;

**“.....the Applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction.....speculative injury will not do, there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury that is injury that is actual, substantial and demonstrable, injury that cannot, “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”**

Again in the case of **American Cyanamid Co. –Vs- Ethicon Ltd (1975) 2 WLR 316**, the court held as follows;

**“The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial..... The governing principle is that the court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial....”**

Now turning to the facts of this case, the Plaintiff/Applicant is the County Government of Tana River. According to the Applicant, the subject matter of the application is an unsurveyed and unregistered parcel of land held by her in trust for the residents of the Local Community. The Applicant also deposed that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have commenced the process of unlawfully and irregularly disposing off the suit property or parts thereof to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. A copy of a sale agreement dated 14<sup>th</sup> December, 2017 was annexed and marked “INM 1”.

The 1<sup>st</sup> Respondent in his replying affidavit sworn on 18<sup>th</sup> October, 2018 admitted having purchased a portion of the suit property and stated that before purchasing the same, he carried out due diligence and ascertained that the sellers had owned the land privately for more than 50 years where some of their relatives were buried. The 3<sup>rd</sup> Respondent in his replying affidavit sworn the same date also admitted selling the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents to help in education of their children and also sustain in their livelihood. In addition, the 3<sup>rd</sup> Respondent denied that the suit property is a Community Land but admitted that the land is neither registered nor surveyed.

Article 61 (2) of the Constitution of Kenya, 2010, classifies land in Kenya as either being public, community or private. Article 64 of the same Constitution defines private land as follows;

**“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.”**

Article 63 (2) of the Constitution defines Community Land to include;

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

Also Section 12 of the Community Land Act, 2016 provides as follows;

**“12 Classes of holding Community Land. Community land maybe 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 3<sup>rd</sup> and 4<sup>th</sup> Respondents in their replying affidavit have alleged that the suit property is surveyed and went ahead and annexed a sketch plan/drawing. The alleged location/surveyed map is not authenticated or approved by the Director of Survey as contemplated under Section 2 of the Survey Act, 2010. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents had alleged that the suit property is in the process of being registered. However, the Respondents have not indicated under which law the registration process is to be undertaken.

In my analysis and evaluation of the affidavit evidence and the applicable law, it is clear that the suit property is a community land governed

under the Community Land Act, 2016. It is also clear in my mind that unregistered community land is subject to Section 10 (3) of the Community Land Act 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 unregistered 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.”***

Having found that the suit property is a community land held by the Plaintiff/Applicant herein in trust for the local community including the 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein as was held in the case **of BAHOLA MKALINDI RHIGHO & 9 OTHERS –VS- MICHAEL SETH KASEME & 3 OTHERS (2016) e KLR** where at page 86-89, the court held as follows;

“86. For as long as Trust Land remained unadjudicated and unregistered, it belonged to the local tribes, groups, families and individuals of the area (emphasis ours). Once adjudicated and registered, trust land was transformed into private. That is what the provisions of Section 114, 115 and 116 of the repealed Constitution provided;

***87. Indeed, Section 115 (2) of the repealed Constitution provided that Trust Land could only be dealt with in accordance with the African Customary Law vested in any tribe, group, family or individual.....***

***88. The Constitution also provided that the only way Trust Land could be legally removed from the purview of communal ownership of the people was through adjudication and registration or setting apart.***

***89. Adjudication and registration of trust land removed the particular land from the purview of community ownership and placed it under individual ownership.”***

I totally agree with the holding in the above decision. In view of my finding that the suit property is a community land, I am satisfied that the Applicant has established prima facie case with overwhelming chances of success at the main trial.

On the second issue, the Applicant has stated that they will have failed in their constitutional and statutory obligation/duty to protect her constituency who will not only lose their right to livelihood but also social, economic and cultural right over the suit land. The Applicant further stated that the illegal disposition of unregistered community land if allowed to continue unabated will forestall the ongoing adjudication processes and programmes. She went further and stated that the Munyoyaya community who are the beneficiaries of the suit land derive their livelihood on farming and that the suit property is not only a generational but is also inter-generational as well as intra-generational. Being the case, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have no proprietary rights over the suit property other than the right to occupy and work on the land. I absolutely agree with the submissions by the Applicant that she will not only be prejudiced as a trustee by the actions of the Respondents but the Munyoyaya community whom they hold the suit property in trust will also suffer irreparable loss if the subject parcel of land is interfered with. I am also satisfied that the threshold for the second principle has been established.

Having satisfied that the first two principles have been demonstrated, I find no reason to go into the third principle.

The upshot of my finding is that the Notice of Motion dated 23<sup>rd</sup> July, 2018 is merited and the same is hereby allowed as prayed. The interim orders issued in the first instance is hereby confirmed pending the hearing and determination of this suit. The Respondents shall bear the costs of the application jointly and severally. It is so ordered.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT THIS 2ND DAY OF JULY, 2021**

.....

**E. C. Cheronu (Mr.)**

**ELC JUDGE**

**In the presence of:**

1. M/s Nyambuti

2. Fardowsa; Court Assistant