



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 37 OF 2021

COUNTY GOVERNMENT OF TAITA TAVETA....PLAINTIFF

VERSUS

1. ISANGAIWICH GROUP RANCH

2. THE DEPUTY COMMISSIONER

MWATATE SUB-COUNTY

3. THE OFFICER COMMANDING

MWATATE POLICE DIVISION (OCPD)

4. THE ATTORNEY GENERAL.....DEFENDANTS

RULING

The first application is dated 23rd February 2021 and is brought under Section 47 (1) (2) of the Community Land Act, Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 51 Rule 1, Order 40 Rule 1 of the Civil Procedure Rules and Regulation 26 (1) – (8) of the Community Land Act, 2017 seeking the following orders;

1. That this application be certified urgent and be heard ex-parte, service thereof being dispensed with in the first instance.
2. That pending the interpartes hearing and determination of this application or until further orders, this honourable court be pleased to issue a temporary injunction restraining the defendants either by themselves, legal representatives, legal counsels, their servants, agents or anyone acting under their authority from charging, selling, leasing or further sub-dividing land formally known as Bura/Isangaishi/18, and later subdivided to Bura/Isangaiwishi/18 and later subdivided to Bura/Isangaiwich/19 and Bura/Isangaiwich/20).
3. That pending the interpartes hearing and determination of this application or until further orders, this honourable court be pleased to issue a temporary injunction restraining the defendants either by themselves, legal representatives, legal counsels, their servants, agents or anyone acting under their authority from evicting communities living and occupying land formally known as Bura/Isangaishi/18, and later subdivided to Bura/Isangaiwich/19 and Bura/Isangaiwich/20/.
4. That pending hearing and determination of the main suit or until further orders, this honourable court be pleased to issue a temporary injunction restraining the defendants either by themselves, legal representatives, legal counsels, their servants, agents or anyone acting under their authority from charging, selling, leasing or further sub-dividing land formally known as Bura/Isangaiwishi/18, and later subdivided to Bura/isangaiwich/19 and Bura/Isangaiwich/20.
5. That pending hearing and determination of the main suit or until further orders, this honourable court be pleased to issue a temporary injunction restraining the defendants either by themselves, legal representatives, legal counsels, their servants, agents or anyone acting under their authority from evicting communities living and occupying land formally known as Bura/Isangaiwishi/18 and later subdivided to Bura/Isangaiwich/19 and Bura/Isangaiwich/20.
6. That costs of this application be provided.

It is based on the grounds that the suit property was registered in the name of the 1st respondent under the repealed Land (Group Representatives) Act Cap. 287 to hold it on behalf of the community residing on the suit property. In 2010 upon promulgation of the current constitution, Article 63 of the Constitution classified as community land all land lawfully registered in the name of the group representatives

under the repealed Land (Group Representatives). That Article 63 of the Constitution also provided that all community land shall be held in trust by County Governments on behalf of the communities for which it is held and such land community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively. The Parliament pursuant to Article 63 of the Constitution, enacted the Community Land. The Act in Section 47 provides that in relation to land held under the Land (Group Representatives) Act, the respective group representatives together with the communities they represent shall be registered as a community in accordance with the provisions of the Act. That Section 47 (3) of the Act provides that land held by group representatives referred to under the Act shall not be sold, leased or converted to private land before it has been registered under this Act. That Section 6 of the Act provides for the role of the county governments including the plaintiff in relation to community land. Section 6 (1) provides that county governments shall hold in trust all unregistered community land on behalf of the communities for which it is held. That Section 7 of the Act provides for the procedure of registration of communities including the group representatives. Section 7 (1) of the Act provides that a community claiming an interest in or right over community land shall be registered in accordance with the provisions of this section. That the Cabinet Secretary for land has pursuant to the provisions of Section 47 of the Act aforesaid, enacted the Community Land Regulations of 2017 (hereinafter “the regulations”). Regulation 13 vests the process of registration of communities and community land in the county to the community land registrar in consultation with the county government. That Regulations 26 of the regulations provides the procedure for registration of land held under group representatives including the suit property. Regulation 26 (3) provides that the registration shall be done within twelve (12) months of the coming into effect of the Regulations. That the 1st Defendant has not been registered as community under the Act and the suit property has also not been registered as a community land under the Act. To this extent, the suit property is unregistered community land within the meaning of Article 63 of the Constitution and therefore vest wholly to the plaintiff. That despite being aware of the provisions of the Act and Regulations aforesaid, unknown to the plaintiff, the 1st defendant has through the Daily Nation Newspaper of 25th June 2020, issued, or caused to be issued, a Notice of Eviction against the communities living on the suit property. That on 12th February, 2021 the 1st defendant issued, or caused to be issued, through their legal counsels to letter to the 2nd and 3rd defendants requiring them to forcefully evict the communities living on the suit property immediately failure of which they will sue the 2nd and 3rd defendants. That the 2nd and 3rd defendants acting on the unlawful demands of the 1st defendant have visited the locus quo and directed the local chiefs and assistant chiefs to inform the communities to forthwith vacate the suit property. That the plaintiff has approached the 2nd and 3rd defendants and have pleaded with them not to effect the intended eviction but have been very categorical that unless they are stopped by this honourable court their land are tied. That in furtherance to their illegal actions, the 1st defendants have subdivided the suit property into two portions namely Land Title Number Bura/Isangaiwch/19 and Bura/Isangaiwch/20 and are in the process of disposing one portion. That the applicant has no other way of stopping the illegalities explained above other than approaching this honourable court. Hence this application. That the applicant as the trustee of the suit property, is apprehensive that unless this honourable court intervenes in the manner sought in the motion/application, the proprietary rights of the community residing on the suit property shall be completely extinguished before the procedure for recognizing their rights under the Act and Regulations is completed. That the large public interests is in favour of preserving the status quo by issuing the orders sought in this application. That in the circumstances, the applicant has established a prima facie case and has shown that it will suffer prejudice, to warrant the grant of the orders sought in this application. That it is in the interest of justice that these orders are granted as prayed.

The 1st respondent submitted that they are a registered group ranch registered under the Land (group representatives) Act Cap 287 (repealed). That currently the 1st respondent has a membership of 1940 individuals. That the 1st respondent is the registered proprietor of all that land known as Plot title Bura/Isangaiwishi/19 and 20 situate within the 1st respondent measuring approximately 5992.2 hectares (14,800 acres) registered in the name of the 1st respondent absolutely and which is known as Isangaiwish Group Ranch. For purpose of this suit, the portion is referred to as the ‘suit property’. That since they were registered on 13th October, 1983, they have remained as a united group ranch with their culture tradition and discipline distinct from other communities around them. Indeed this is a duration of more than 38 years of togetherness. That they are a member based group ranch with a constitution and bylaws. That for the foregoing reasons, the membership of the 1st respondent has always been defined and has never been a general community ranch, a free for all cherry. That 1st respondent is yet to be registered as a group ranch under the community Land Act. That this suit is fatally defective and is founded on wrong interpretation of the Constitution and law. For this reason, their advocates have filed an application for the stay of this suit pending the hearing and determination of the ELC Constitutional Petition No. 14 of 2021. That the applicant has not established a prima facie case with a probability of success.

This court has considered the application and submissions therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of *Giella vs Cassman Brown & Co Ltd 1973 E.A 358* and which are:-

1. *The applicant must show a prima facie case with a probability of success at the trial*
2. *The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,*
3. *If in doubt, the Court will decide the application on a balance of convenience.*

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant’s conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity. The applicant submitted that the 1st Defendant being the registered proprietors of the suit land, have not been registered as community under the Act and the suit property has also not been registered as a community land under the Act. To this extent, the suit property is unregistered community land within the meaning of Article 63 of the Constitution and therefore vest wholly to the plaintiff. That despite being aware of the provisions of the Act and Regulations aforesaid, unknown to the plaintiff, the 1st defendant has through the Daily Nation Newspaper of 25th June 2020, issued, or caused to be issued, a Notice of Eviction against the communities living on the suit property.

In the case of *Kibutiri vs Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR*, the Court held that;

“The conditions for granting a temporary injunction is East Africa are well known and these are: First, the 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 might 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. See also E.A Industries ..Vs..Trufoods (1972) EA 420.”

In the case of Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & another (2019) eKLR where the court in deciding on an injunction application stated;

‘circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts.....’

The 1st respondent submitted that they are the registered proprietor of all that land known as Plot title Bura/Isangaiwish/19 and 20 measuring approximately 5992.2 hectares (14,800 acres) registered in the name of the 1st respondent absolutely and which is known as Isangaiwish Group Ranch. That since they were registered on 13th October, 1983, they have remained as a united group ranch with their culture tradition and discipline distinct from other communities around them. Indeed this is a duration of more than 38 years of togetherness. That they are a member based group ranch with a constitution and bylaws. That for the foregoing reasons, the membership of the 1st respondent has always been defined and has never been a general community ranch. That 1st respondent is yet to be registered as a group ranch under the community Land Act. I find that the applicant has established a prima facie case as there appears to be a dispute between the parties as to the ownership of the suit land. The 1st respondent has issued eviction orders to people living on the suit land hence the need for interim orders to avoid irreparable loss

In the case of **Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others (2015) eKLR** stated as follows;

“In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

In the case of Ochola Kamili Holdings Ltd vs Guardian Bank Ltd [2018] Eklr, stated that;

“The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person’s conduct with respect to the matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are meant to preserve the subject matter Not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was obtained. No court would allow its orders to be used to defeat the ends of justice”.

For these reasons I find that the application dated 23rd February 2021 is merited and I grant the following orders;

1. That pending hearing and determination of the main suit or until further orders, this honourable court issues a temporary injunction restraining the defendants either by themselves, legal representatives, legal counsels, their servants, agents or anyone acting under their authority from evicting communities living and occupying land formally known as Bura/Isangaiwishi/18 and later subdivided to Bura/Isangaiwisch/19 and Bura/Isangaiwisch/20

2. Costs to be in the cause.

The second application by the 1st defendant is dated 16th March 2021 and is brought under Section 6, 1A, 1B and 3A of the Civil Procedure Act, 2010 and Article 159 (2) of the Constitution of Kenya seeking the following orders;

1. That this application be certified urgent and service of the motion be dispensed with at the first instance.

2. That the honourable court be pleased to issue an order of stay of proceedings pending the hearing and determination of ELC Constitutional Petition No. 14 of 2021.

3. That costs of the application be provided for.

It is based on the grounds that while this suit was pending hearing and determination the 1st defendant/applicant has filed ELC Constitutional Petition No. 14 of 2021 raising the substantive constitutional issues for determination. The petition seeks for a declaration that the membership of the petitioner set out in schedule A of the petition shall constitute the only membership of the ISANGAIWISHI GROUP to be constituted under section 47 of the TCLA by the 8th respondent to own, manage and control the plot title number Bura/Isangaiwishi/19 & 20. A declaration that pending the registration of the new entity under Section 47 of the TCLA and Section 8 of the Land Act, the current

officials of the petitioner have the authority to manage, control and protect the assets of the petitioner including plot title number Bura/Isangaiwishi/19 & 20 and the interests thereof. A declaration that the decision to donate 1000 acres of the plot title number Bura/Isangaiwishi/19 and 20 by the petitioner done on 4th July 2014 was lawful among other prayers. That the determination of the prayers in the petition will lead to a determination of the most of the issues raised in this suit in relation to the interpretation of the constitution. That the procedure of hearing a disposal of the Constitutional Petition as against that of hearing and determining an ordinary suit originated by way of a plaint is quicker. For this reason, the court should give direction for the petition to be heard first.

The plaintiff/respondent submitted that the prayers sought therein (stay of these proceedings pending the outcome of the Constitutional Petition No. 14 of 2021) are subject to this court's discretion and not available as a matter of right. That the law on stay of proceedings is well captured in Section 6 of the Civil Procedure Act, 201 which bars the court from presiding over a dispute whose matter in issue is directly and substantially in issue before another court of competent jurisdiction. That on the applicant's own admission, Mombasa Petition No. 14 of 2021 was filed on 15th March 2021 while this suit was filed on 24th February, 2021. This was well during pendency of this suit. It goes without saying that prior to filing go the petition, the defendants were well aware of this suit and the issues raised therein. That the petition by all measures, is sub-judice this suit and should be struck out and/or stayed pending hearing and determination of this suit. That the this honourable court to dismiss the 1st defendant's application dated 6th March 2021 with costs and instead stay petition No. 14 of 2020 until final determination of this suit.

I have considered this application and submissions therein. It is not disputed that Mombasa Petition No. 14 of 2021 was filed on 15th March 2021 while this suit was filed on 24th February, 2021. This was during pendency of this suit. The parties are the same except for additional defendants. I see no reason why this case should be stayed. Indeed the 1st respondent would have raised their claim in this matter and or consolidate the same if they so wished. This application is not merited and is dismissed. Costs to be in the cause. .

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH OCTOBER 2021.

N.A. MATHEKA

JUDGE