



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE NO. 16 OF 2018

COUNTY GOVERNMENT OF TANA RIVER.....PLAINTIFF

VERSUS

DAKANE SHAKE BOCHA.....1ST DEFENDANT

SALADA HARUN YUSUF.....2ND DEFENDANT

ABDI NASSIR HIYESA.....3RD DEFENDANT

IDRISS HUSSEIN ABAMUKA.....4TH DEFENDANT

MADHINA DOKOTA FODHO.....5TH DEFENDANT

SADINA HAWA DABALE.....6TH DEFENDANT

ADHAN KALICHA BUYOTU.....7TH DEFENDANT

IBRAHIM GATHA YUSSUF.....8TH DEFENDANT

HUSSEIN YUSSUF WARIYO.....9TH DEFENDANT

MOHAMMED YUSSUF BUYUTO.....10TH DEFENDANT

MOHAMED IBRAHIM ELMI.....11TH DEFENDANT

JUDGEMENT

1. The plaintiff instituted the suit vide plaint dated 18th April 2018 seeking the following Orders;

a. An interlocutory injunction to restrain the Defendants jointly or severally by themselves, their agents employees and or any other person howsoever from clearing bushes, dealing in, trespassing disposing, entering or causing to be erected thereon any structures, disposing and/or in any other manner interfering with all that piece of un-surveyed land measuring approximately 700 meters along River Tana and 4500 meters towards the main road situated at Hagulcho Area, Madogo, Saka Location within Tana River County (“Suit Property”) pending the hearing and determination of this suit.

b. A declaration that the Suit Property has been and still is an unregistered community land held in trust by the plaintiff on behalf of the local community and therefore the Sale Agreement dated 6th November 2017.

c. A permanent injunction to restrain the Defendants, Jointly and/or severally by themselves, their agents’ employees and or any other person howsoever from clearing bushes, dealing in, trespassing, fencing, transferring, disposing, erecting or causing to be erected thereon any structures, disposing and/or in any other manner interfering with the suit property and any other community land owned by the local community.

d. General damages with interest thereon at prevailing bank rates from the date of the judgement till payment in full.

e. Any other Orders and reliefs the court may deem just expedient and fit to grant.

f. Costs of this suit together with interest thereon at prevailing bank rates from the date of judgement till payment in full.

2. A letter of authority dated 31st May 2018 (filed on 12th June 2018) granted authority to the 2nd Defendant to sign and plead on behalf of the 1st, 3rd to 10th Defendant. The 11th Defendant filed Memorandum of Appearance on 5th June 2018.
3. The defendants did not file their defence. The matter was set down for pre-trial conference on 30th September 2021 and proceeded for hearing on 27th October 2021. The plaintiff called two (2) witnesses.
4. **Pw1 Abdullahi Adhan Ashako** adopted his statement filed on 24th September 2021. It was his testimony that the Munyoyaya local community which comprises of six interdependent clans namely; Karara Clan, Mandoyu clan, Baretuma clan, Metta clan, Nyurtu clan, and Ilani Hirdida clan have lived on the suit property since pre-colonial times. That because of the traditional patriarchal system women and children are often victims of dispossession of land ownership and inheritance as the men dispose of family land and properties without consulting them. That the suit premises herein belong to the Bario family of the Bartuma clan and the larger Munyoyaya Clan who upon the demise of their patriarch i.e. Garri his children and grandchildren have held the aforesaid land for sustenance of their livelihood and economic gain.
5. He testified that the suit premise was illegally and irregularly sold by the 1st to 10th Defendant to the 11th Defendant. He told the court that the land is community land and the defendants had no authority to sell the same. He urged the Court to revert back the land to the members of Munyoyaya Community.
6. **Pw2 Joseph Dola** the physical planner Tana North Sub County under the Department of Land Administration, Tana River County in his statement noted that 90% of the land in Tana River is largely Community Land. That incidence of landlessness is high in Tana River County at 97.5%. That the plaintiff holds the suit premises in trust for the ancestral residents of Hagulcho Area within Tana River County and for the benefit of the local Community known as Munyoyaya Local Community. He also stated that the plaintiff in consultation with the relevant authorities is in the process of coming up with a comprehensive adjudication programme of all unregistered land within its jurisdiction and the continued acts of the defendants will, unless stopped by a court of law, frustrate and/or impede these efforts.
7. He testified that the land was disposed of by the 1st to 10th Defendant and sold to the 11th Defendant. That the sale was illegal and irregular because the land is community land which is unregistered.
8. He further testified that his Governor constituted a task force due to complaints by the people to the ward administrator. The terms of reference were to investigate all unregistered community land which they held in trust for the people of Tana River. He told the court that if that is done the plaintiff will be able to commence the adjudication process and the people will be able to benefit from their ancestral land.
9. He produced the following documents in support of his testimony; **County Development Integral Plan (Exh2), Geographic Information System Laboratory (Exh3), Gazette Notice No. 497 Vol CXXI No. 12 dated 25th January 2019 appointing the 7-member task force (Exh 4) Demand Notice (Exh5)**
10. At the close of the plaintiff's case. This court made directions to the effect that since the Defendant did not participate in the court proceedings despite being served, their case is marked as closed. The court further directed that the plaintiff to file submissions within twenty-one (21) days.

11. In its submissions, the plaintiff restated the facts set out during the trial. He urged the court to take judicial notice of the appointment of an adjudication officer Gazette Notice No. 529 – Vol. CXXII- No.22 dated 29th January 2021 and the setting up of Hola Land Registry. The plaintiff cited the provisions of **Article 63 (2) of the Constitution and Section 12 of the Community Land Act** to support the averment that the suit premises is community land. He opined that vide **Section 18 of the Community Land Act** a certificate of title is the document that connotes conclusive evidence of proprietorship. It was its further submission that the suit property is part of scarce arable land. Generational and intergeneration rights to the property are also at risk. That the loss cannot be quantified and be adequately compensated by an award of damages. He relied on the following cited authorities; **Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR, Bahola Mkalindi Rhigo & 9 Others v Micheal Seth Kaseme & 3 others [2016] eKLR, Nguruman Limited v Jan Blonde Nielsen & 2 Others CA 2014 eKLR, American Cyanamid Co. v Ethicon Ltd (1975) 2 WLR 316.**

Analysis and Determination

12. I have considered the plaintiff's evidence and the submissions filed in support thereof. The main issue in this case relates to the sale of unregistered community land and whether the defendants had authority and capacity to effect such sale.
13. **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 thereof 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. See; **County Government of Tana River v Binesa Wato Danko & 3 others [2020] eKLR**
14. Section 6 of the Community Land Act No. 27 of 2016 states as follow;

“Role of County Governments

1. **County Governments shall hold in trust all unregistered Community Land on behalf of the communities for which it is held.**

2. The respective County Government shall hold in trust for a community any monies payable as compensation for compulsory acquisition of any unregistered Community Land.

3. Upon registration of Community Land, the respective County Government shall promptly release to the community all such monies payable for compulsory acquisition

6. (6) Any transaction in relation to unregistered Community Land which the County shall be in accordance with the provisions of this Act and any other applicable law.....

6. (8) A County Government shall not sell, dispose, transfer convert for private purposes or in any other way dispose of any unregistered Community Land that it is holding in trust on behalf of the Communities for which it is held.”

15. The testimony of the plaintiff’s witnesses is to the effect that the suit property is an unregistered and un-surveyed Community Land held by the plaintiff in trust for the residents of Munyoyaya Community within Tana River County has not been challenged or controverted.

16. The plaintiff produced a Sale Agreement depicting the sale of the suit premises to the 11th Defendant which fact is also uncontroverted. By the Defendant failing to file a defence to the plaint, the same remains unopposed.

17. The suit land is vested with the County Government of Tana River, the plaintiff herein who hold the same in trust for the communities and/or residents living in those parcels of land or utilizing them for grazing, farming, fishing or any other collective activities. The defendants have not informed the court the progress they took to either convert the land from un-surveyed community land to private property.

18. The defendants therefore had no right to alienate, dispose of and/or sell to the 11th Defendant or any other person(s) whatsoever and whosoever. The sale was therefore irregular and illegal. The same is therefore liable to be revoked.

19. There is also the impending fear that the Defendants may proceed to further alienate the suit premises without authority from the plaintiff. The actions of the Defendant presuppose this notion. The fear is legitimate. There is need to stop the disposition of the land by the Defendants.

20. The plaintiff has also prayed for general damages. While the plaintiff categorized the nature of the general damages sought in the plaint during the hearing, the witnesses did not address themselves to the particulars thereof. This claim has therefore not been proved.

21. In the end this, court finds that the plaintiff has proved its case against the Defendants and hereby issues the following Orders;

(a) A declaration is hereby issued that the Suit Property has been and still is an unregistered community land held in trust by the plaintiff on behalf of the local community and therefore the Sale Agreement dated 6th November 2017 is null and void and is hereby annulled.

(b) A permanent injunction be and is hereby issued restraining the Defendants, Jointly and/or severally by themselves, their agents employees and or any other person howsoever from clearing bushes, dealing in, trespassing, fencing, transferring, disposing, erecting or causing to be erected thereon any structures, disposing and/or in any other manner interfering with all that piece of un-surveyed land measuring approximately 700 meters along River Tana and 4500 meters towards the main road situated at Hagulcho Area, Madogo, Saka Location within Tana River County and any other community land owned by the local community until the land adjudication programme is commenced and completed and the respective community land title documents is issued.

(c) Costs of this suit together with interest thereon at court rates from the date of judgement till payment in full shall be borne by the defendants jointly and severally.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 26TH DAY NOVEMBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. NYABUTI FOR PLAINTIFF

2. DEFENDANTS/ADVOCATE; ABSENT

3. FARDOWSA: COURT ASSISTANT