



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 25 OF 2018

COUNTY GOVERNMENT OF TANA RIVER.....PLAINTIFF

VERSUS

MOHAMMED AMIN MUHUMED.....1ST DEFENDANT

DOKOTA FODHO ABADIBHA.....2ND DEFENDANT

BUNDID FODHO ABADIBHA.....3RD DEFENDANT

OMAR DOKOTA FODHO.....4TH DEFENDANT

JUDGEMENT

1. The plaintiff instituted this suit vide a plaint dated 23rd July 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 820 meters along river Tana by 3.5 kilometers to the road which land borders Shure Abadela on the west, Tana River in the north, Aden Roba in the east and a road in the South situated at Malika Mansa, 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 5th December, 2017 be revoked.

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 until the land adjudication programme is commenced and completed and the respective community land title documents is issued.

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 16th August 2018 (filed on 20th August 2018) was authorizing the 4th Defendant to sign and plead on behalf of the 2nd and 3rd Defendants. The 1st Defendant filed Memorandum of Appearance on 24th September 2018.

3. The 2nd to 4th 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 Abdullah Athan Ashako** adopted his statement filed on 24th September 2021. He testified that he is a clan leader of Barefuma Clan. 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.

5. That the suit land was sold by the 2nd and 4th defendant to the 1st Defendant. He told the court that the defendants had no authority to enter into a sale agreement for the Sale of the land. That the suit land is clan land owned for the benefit of the entire family and not the purported sellers. He also told the court that Fodho family reside in the aforesaid land. That women and children were not involved in the decision making process. He prayed that the sale be set aside and the land be returned to the family. That in the future if there is need for disposal of the land the women and children ought to be involved.

6. **Pw2 Joseph Dola** was the physical planner, Tana North Sub County under the Department of Land Administration, Tana River County who testified that they received complaints from members of the public about illegal and irregular allocation of land in Saka location. That this made the governor of Tana River to investigate the same. That he appointed a seven-member task force to investigate the same. That the task force came up with some of the findings to the effect that there were disputes related to boundary and family involvement in decision making. He told the court that the disposed lands were un-surveyed.

7. He further told the court that the steps they have now undertaken as a County government include investment in geographical information system to help protect the territorial boundaries, maximize the use of land as a factor of production and proper planning of land use. That they also have a land registry in place. That they have invested in County spacial plan which explains the development agenda of the county in terms of special organization and settlement patterns, economic developments and models and maximization of land use as a resource. That they have also made an initiative of county integrated development plan to protect the territorial jurisdiction and help to promote highest and best use of land as a resource.

8. It was his further testimony that the subject matter of land in issue falls within the category of unregistered Community Land. He prayed this court to grant justice to the members of Munyoyaya Community so that they can conduct land adjudication for the benefit of the people.

9. Lastly he stated that there was an executive order issued by his excellency the Governor in 2019, where the chiefs had been ordered not to witness or facilitate the illegal transactions.

10. 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)**

11. 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.

12. 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. She submitted that vide **Section 18 of the Community Land Act** a certificate of title is the document that connotes conclusive evidence of proprietorship. It was her further submission that the suit property is part of scarce arable land. Intergenerational 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.

13. I have considered the evidence as laid out by the plaintiff and the written submissions in support thereof. The main issue for determination in this case relates to the sale of unregistered community land and whether the defendants had authority and capacity to effect such sale.

14. 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**

15. **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.”

16. 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 comprising of the Fodha Family, Mbalambala Division, Saka Location, Madogo Division within Tana River County has not been challenged or controverted.

17. The plaintiff produced a Sale Agreement depicting that the 2nd and 3rd Defendant sold part of the suit premises to the 1st Defendant which fact is also uncontroverted. By the Defendant failing to file a defence to the plaint, the Plaintiff’s claim remains unopposed.

18. The suit land herein is vested with the County Government of Tana River. The defendants therefore had no right to alienate, dispose of and/or sell to the 1st Defendant or any other person(s) whatsoever. The sale was therefore irregular and illegal. The same is hereby revoked.

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

20. The plaintiff has also prayed for general damages. It has however not demonstrated the nature of the general damages sought nor addressed itself 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 5th December, 2017 is null and void and the same be 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 with all that piece of unsurveyed land measuring approximately 820 meters along river Tana by 3.5 kilometers to the road which land borders Shure Abadela on the west, Tana River in the north, Aden Roba in the east and a road in the South situated at Malika Mansa, 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 in accordance with the law.

(c) Costs of this suit together with interest thereon at court rates to 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