



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE NO. 2 OF 2018

MOHAMUD IBRAHIM ALIO.....1ST PLAINTIFF
IBRAHIM MOHAMMED IBRAHIM.....2ND PLAINTIFF
ISMAIL MOHAMUD IBRAHIM.....3RD PLAINTIFF
HASSAN MOHAMMED IBRAHIM.....4TH PLAINTIFF
BARWAKA MOHAMED.....5TH PLAINTIFF
MOHAMED MOHAMUD IBRAHIM.....6TH PLAINTIFF
SAADIA MAALIM ABDI.....7TH PLAINTIFF

VERSUS

MANDERA COUNTY GOVERNMENT.....1ST DEFENDANT
BARRE HASSAN.....2ND DEFENDANT
ALIO HASSAN HUKA.....3RD DEFENDANT
HASSAN EDO.....4TH DEFENDANT
SALAT ISAACK.....5TH DEFENDANT
GEDI ISAACK.....6TH DEFENDANT
ABDULLAHI MOHAMMED.....7TH DEFENDANT

JUDGEMENT

1. The plaintiffs herein instituted this suit through a plaint dated 20th July 2015 claiming to be bonafide owners of parcels No.s 1467 and 1468- Mohammed Ibrahim Alio & Saadia Malim, 1469 and 1470-Ismael Mohammed Ibrahim & Halima Mohammed, 1471 and 1472- Hassan Mohammed & Barakwa Mohammed, 1473 and 1475 – Siyad Hassan & Abdullahi Mohammed, 1467 and 1477- Golo Hussein & Abdullahi Mohammed, 1478 and 1479 – Mohamud Ibrahim & Mohamed Amina Mohamed, 1480 and 1481 – Mohamud Ibrahim & Ubah Mohamed, 1481 and 1483 – Hussein Issack & Abdigan Mohammed, 1848 and 1485- Fatuma Hussein & Fesyal Mohammed, 1487 and 1488- Usama Mohammed & Maalim Mama, 1486- Mohammed Ibrahim Alio.

2. They claim that the 2nd to 7th Defendants unlawfully encroached on the aforesaid parcels in the month of July 2015 by erecting a fence around it despite resistance from them. They equally laid blame to the 1st Defendant by allowing the 3rd parties to lay claim over their parcels of land.

3. It is for these reasons that the plaintiffs pray for judgement against the defendant jointly and severally for;

a. A declaration that plots Nos. 1467, 1486, 1469, 1470, 1471, 1472, 1473, 1475, 1476, 1477, 1478,1479,1480,1481,1482,

1483,1484,1485, 1486, 1487 and 1488 Bulla Jogoo belongs to the plaintiffs and the defendants have no claim therein.

b. A permanent injunction restraining the defendants by themselves, their agents, servants or employees from transferring on, fencing off, entering, selling, alienating, transferring and/or in any way dealing with Plots Nos. 1467, 1486, 1469, 1470, 1471, 1472, 1473, 1475, 1476, 1477, 1478,1479,1480,1481,1482,1483,1484,1485,1486,1487 and 1488 Bulla Jogoo.

c. Costs and interest of the suit.

4. The 1st Defendant initially filed a statement of Defence on 18th April 2018 ostensibly making a denial to the claim. On 15th June 2018 the Firm of Yunis Mohammed & Associates also filed a Defence on behalf of the 1st to 7th Defendants.

5. In their defence the defendants denied the claim made by the plaintiff. They equally averred that under Section 26 of the Land Registration Act certificate of title is held as conclusive evidence of proprietorship which the plaintiff lacks. They put the plaintiffs to strict proof on the payment of rates to the 1st Defendant.

6. The matter proceeded for hearing on 29th July 2021.

Plaintiff's Case

7. **PW1 Mohamud Ibrahim Alio** in examination in chief adopted his statement dated 20th July 2015. It was his testimony that he has been living in the suit premises for more than thirty (30) years. That the aforesaid parcel of land belonged to his clan from the 90's and that he has since then been occupying it by putting up "bomas" and cultivating on the same. It was his testimony that he followed up the plots from the defunct County Council of Mandera. He had a number of plots registered in his name whereas the rest were registered in the name of other family members.

8. He reiterated that the Defendants invaded the suit premises in the year 2015. They tried to resist but the defendants caused them to be arrested. It was also part of his statement that the 1st defendant never repossessed the plots from them nor had their allotment cancelled. That the 1st Defendants action of allowing third parties to lay claim over the plots are illegal and if at all they have allocated the plots to the defendants, then the allocations are fraudulent as the plaintiffs are still the bonafide owners.

9. He produced **letters dated 16th November 2012 from the defunct Mandera County Council stating that the plaintiffs are owners of the suit premises, Bundle of rent receipts, photos of the plots and demand letters as PEXH 1-4.**

10. In cross-examination he told the court that his grandfather is the one who initially owned the land and that he inherited the same from him. He conceded that he did not have the allotment letters but the same is in the process. In re-examination he reiterated that he has been making payment to the County Council and that the letters of allotment are in the process.

11. **PW2 Diriye Haji Hassan, an officer attached to the Ministry of lands Housing and Urban Development deployed as Senior Land Administrator based in Mandera East Sub County** testified that all the land records were destroyed in 2014 including the file in respect of the property in dispute. He could therefore not tell who the owner is and it will depend on the records held by each individual.

12. On being cross-examined by the Court he told the court that they do not have Physical Development Plans for Ramu. That the suit premises is under Community Land Act. There are shops and business in Ramu Town. The County Government of Mandera Collect revenue in terms of rates and rent in Ramu and other towns. They have a register of all shops and businesses.

13. He also testified that after the records in the County land office was burnt they still rely on individual owners to bring them documents. They have not fully reconstructed an official record to identify the owners of the plots. They have however started digitization of the lands record.

Defendants Case

14. The Defendants did not call any witnesses. Both parties closed their cases. On 29th July 2021 the Court directed the plaintiff to file their submissions within 21 days whereas the defendant was to file theirs 21 days upon service.

Submissions

15. On their part, the plaintiff submitted by questioning the records the Defendants used in collecting the land rent. They anchored their claim on the payments and receipt of land rent payment by the 1st Defendant. They also submitted that the fact that the records of the 1st Defendant got burnt in 2014 hindered their issuance of allotment letters. They submitted that the case presents exceptional circumstances and the court ought to be minded of its decision in **Abdi Mohammed Kahiya v Fatuma Haji Kassim**. They also relied on the case of **Mohammed Hassan Galled v Hassan Ibrahim Mohammed [2017] eklr**.

Analysis and Determination

16. I have considered the testimony of the parties, the pleading and the submissions of the parties. I do find that the issues for determination in this matter are; **(a) Who are the bonafide owners of the suit premises? (b) Whether the plaintiff herein warrants the Orders Sought?**

17. The plaintiff's claim and the evidence of the PW2 the land administrator Mander East Sub County reveals that the suit premises herein were community land. The same was allegedly transferred to the plaintiff's herein? Despite their alleged trespass the Defendants have not advanced a claim over the suit premises but cite that as at 2015 the land has not been granted to the plaintiff and therefore put the plaintiff to strict proof. For the court to determine whether the plaintiff is the bonafide owner it has to ascertain a. *Whether the suit premises are Community land?* B. *Whether due procedure was adhered to apportion the land to the plaintiffs.*

18. Article 63(2) states, in so far as community land is concerned, that **community land consists of land lawfully registered in the name of groups representatives under the provisions of any law; land lawfully transferred to a specific community by any process of law; any other land declared to be community land by an Act of Parliament; and land that is lawfully held, managed or used by specific communities, (i) community forests, grazing areas or Shrines (ii) ancestral lands and lands traditionally occupied by hunter gatherers communities or (iii) lawfully held as trust land by the county government.**

19. From the evidence presented by the plaintiff's testimony it is clear that the land herein was land held as trust land by the county government. Pw2 was certain of this fact in his testimony. His testimony has not been uncontroverted. This court therefore finds that the land in dispute is Community land.

20. The next issue is whether due procedure was adhered to apportion the land to the plaintiffs? The plaintiff avers that he has been in occupation of the land since 1980's and that he was issued the same on or about the year 2008. (going by the dates in the receipts.)

21. In **Bahola Mkalindi v Michael Seth Kaseme & 2 others [2013] eKLR** the Court as follows;

“For as long as Trust land remained un-adjudicated and unregistered, it belonged to the local tribes, groups, families and individuals of the area. Once adjudicated and registered, Trust land is transformed into private land. That is what the provisions of Sections 114, 115 and 116 of the repealed Constitution provided.

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.

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.

Adjudication and registration of Trust land removed the particular land from the purview of community ownership and placed it under individual ownership while *setting apart* removed the Trust land from the dominion of community ownership and placed it under the dominion of public ownership.

Trust land could only be allocated legally pursuant to the provisions of the Constitution, the Trust Land Act and the Land Adjudication Act...

22. The court went further and stated;

“where trust land is set apart during the preparation of the regional development plan for a particular purpose, and such land was under the use and control of a resident or community of the area who had a right to occupy any part of the land under the African customary law, such a resident or community was entitled to prompt and full compensation....”

23. In **Re Funzi Island Dev. Ltd & 2 others [2004] eKLR** the court citing the provisions of the Old Constitution held as follows;

Section 117 (c) of the Constitution which allows setting a part land for use and occupation by any person or persons for purposes which in the opinion of that County council is likely to benefit the person ordinarily resident in that area or any other area of Trust Land vested it that County Council either by reasons of the use to which the area so set apart is to be put or by reasons of revenue to be derived from rent in respect thereof. Sub-section 4 thereof

“No setting apart in pursuance of this Section shall have effect unless provision is made by the law under which the setting apart takes place for prompt payment of full compensation to any resident of the land so set apart.”

24. The setting apart of trust land is an intricate process. It involves;

- (a) the holding of a Council Meeting where it would become apparent whether the property is available for setting apart.
- (b) Preparation of Physical Development Plan (See Section 16 of the Physical Planning Act).
- (c) Gazettment of the Plan.
- (d) Approval of the same by the Director of Physical Planning.
- (e) Cadastral Survey by a licensed Surveyor.
- (f) Approval of the District Surveyor and allocation of a Land Reference Number.

25. The plaintiff has proffered evidence that he has been paying rental income for the suit premises. The same is against plot Numbers allegedly issued by the 2nd Defendant. The 2nd Defendant has not denied this claim or its issuance. Whereas the plaintiff has not provided evidence of the Council Meeting (minutes), the Physical Development plan and the Cadastral Survey, and since the defendants have not denied having issued the same to the plaintiffs, this Honourable court is left with no otherwise but to accept that the defendants issued the same to the plaintiffs.

26. It is equally not in dispute that the plaintiff was the *first in occupation* of the suit premises. This much has not been controverted. The 2nd to 5th Defendant only entered the suit premises in the year 2015, the same was still occupied by the plaintiff. The plaintiff has legitimate expectation that at the end, and following due process he shall be issued title to the suit premises. The 2nd to 5th Defendant have not presented any evidence to prove entitlement of the suit land. Despite the fact that the Plaintiff lacks title to the suit premises this court find that the plaintiff has proved that he is the bona fide owner. This can be gleaned from plot numbers issued and the receipt for rent payment. In the end, I do find that the plaintiff is bona fide owner of the suit land.

27. *On whether the plaintiff warrants the Orders Sought;* The *first* prayer sought is a declaration that the suit premises belong to the plaintiff. The court has already answered this in the affirmative. The *second* prayer is a permanent injunction restraining the defendants by themselves, their agents, servants or employees from trespassing on, fencing off, entering, selling, alienating, transferring and or in any way dealing with the suit premises. It has already been shown that the Defendants have no claim to the suit premises. Having held that the plaintiffs are the bonafide owners of the suit premises, they are therefore entitled to the prayers for permanent injunction as sought. The *third* issue is on costs; costs follow the event. In this case the plaintiffs have proved their case against the Defendants to the required standard and are therefore entitled to costs of the suit.

28. This court therefore makes the following Orders;

a. A declaration be and is hereby issued that plots Nos. 1467, 1486, 1469, 1470, 1471, 1472, 1473, 1475, 1476, 1477, 1478,1479,1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487 and 1488 Bulla Jogoo belongs to the plaintiffs and the defendants have no claim therein.

b. A permanent injunction is hereby issued restraining the defendants by themselves, their agents, servants or employees from transferring on, fencing off, entering, selling, alienating, transferring and/or in any way dealing with Plots Nos. 1467, 1486, 1469, 1470, 1471, 1472, 1473, 1475, 1476, 1477, 1478,1479,1480,1481,1482,1483,1484,1485,1486,1487 and 1488 Bulla Jogoo.

c. Costs and interest at court rates to be borne by the Defendants.

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. Mr. Langat for Defendant
2. MR. Kamindo holding brief for Ayieko for Plaintiff
3. Fardowsa: Court Assistant