



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE NO. 24 OF 2018

COUNTY GOVERNMENT OF TANA RIVER.....PLAINTIFF

VERSUS

MOHAMED GORRE BULALE.....1ST DEFENDANT

IBRAHIM ABBAS GULALE..... 2ND DEFENDANT

BINESA WATO DANKU..... 3RD DEFENDANT

ALI DHAHALANI SALAT WATO..... 4TH DEFENDANT

JUDGEMENT

1. The plaintiff instituted this suit vide a 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 250 meters by 3.5 kilometres situated at Damjalley Area, Madogo ward 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 14th 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 are 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 dated and filed on 20th August 2018 granted authority to the 4th Defendant to sign and plead on behalf of the 1st to 3rd Defendant. A notice of Appointment was filed by the firm of Garane & Somane Advocates on behalf of the defendants on 24th September 2018. The said firm of advocates represented the Defendants during the course of the plaintiff’s application dated 23rd July 2018. A notice of change of advocates was thereafter filed by the firm of faruq kyallo & advocates on 24th February 2021. The defendants did not however file a defence.

3. The matter was set down for pre-trial conference on 30th September 2021 and proceeded for hearing on 26th October 2021. The plaintiff called two (2) witnesses.

4. **PW1 Abubakar Salat Daraja** testified that he is a clan leader of Karara, a sub clan of Munyoyaya Clan. That the suit property herein is a family land belonging to Munyoyaya community. The suit land was sold by the 3rd and 4th Defendant to the 1st and 2nd Defendant. He stated

that the land the 3rd and 4th Defendant purported to sell to the 1st and 2nd Defendant is family land. That the patriarch of the family land was one Chimpa who sired Guyo and Guyo Sired Gammo. He further stated that the 3rd and 4th Defendants belong to the same family but had no authority to sell the family land.

5. He told the court that they live along the Tana River and that they are farmers and herders and rely on the waters of river Tana for their livelihood and that the 3rd and 4th Defendant purported to sell the frontage of the Tana river. The trustees of the community land is the County Government. He stated that when the 3rd and 4th Defendants purported to sell the suit land, they did not have any ownership rights or documents. The 216 acres they purported to sell will prevent the community from accessing the Tana River. That after hearing that the 3rd and 4th Defendants had decided to sell the suit property, they made a complaint to the County Government. That they made a formal complaint as the leaders of Karara, Mandovyu, Ilani, Metta, Nyotu and Bareluma clans.

6. He further testified that they have informed the county Government to register Munyonyaya as a recognizable community under the Community Lands Act. He conceded that they have not been engaging the women and children in their decision making process. He told the court that the issues pertaining to land has resulted in fights between the Munyoyaya and Horma Community. That he therefore urges this court to revoke the sale and the suit property to revert back to the Community.

7. **PW2 Joseph Dola**, the physical planner Tana North Sub County under the Department of Land Administration adopted his statement dated 27/9/2021. He testified that the Governor, Tana River County constituted a task force due to complaints by the Munyoyaya community 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 County.

8. The suit premises herein measure approximately 216.21 acres and is located in Damagale Area, Madogo Ward within Tana River County.

9. He told the Court that the issues pertaining to land within the region of the suit premises is emotive and hostile and they are forced to engage security teams to be able to conduct site visits. That the issues revolve around boundary disputes and failure to inform family members especially the youth, disabled persons, women and children whenever such issues arise.

10. That in Tana River County, there is less than 5% of documented land. The same is due to poverty and high illiteracy levels. He gave an example of four members of a family in a community of thirty (30) members selling family land at the expense of other members of the community. That the dispute escalates not only to the sellers of the family land but to their children resulting to infighting within the community. Together with FAO, they have tried to register the community under the community land act but they have faced a challenge since persons who are not members of the community seek to be added as members.

11. It was his further testimony that as a County Government, they have tried to sensitive the people by engaging security personnel to enforce executive orders against the sale of community land.

12. They have since prepared the County spacial plan, the Geographical information system for mapping of County resources and boundaries. They have also put up a land registry so that they can improve the security of tenure. They also have a village programme where they identify planning units. They plan and allocate land so that the community may benefit. That there is also a land registry located in Hola.

13. He urged the court, as a trustee, for the adjudication process to be effected as there are generations who depend on it. He lastly urged the court to grant the Orders sought by reverting the land back to the trustee so that it can be given back to the community under the Community Land Act.

14. 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.

15. 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

16. 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.

17. **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**

18. 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.”**

19. I have previously considered various cases with the same set of facts and seeking similar remedies in this court (See. *Elc Case No. 16 of 2018 County Government of Tana River versus Dakane Shake Bocha & 10 Others*, *Elc Case No. 25 of 2018 County Government of Tana River versus Mohammed Amin Muhumed & 3 others*). With the enactment of the Community Land Act 2016 the same sought to solve the challenge of land ownership especially within the wider North Eastern region where land is communally owned. Article 63 of the Constitution had foreseen and anticipated this challenge. The Community Land Act provides that the County Government shall be trustees of the Community land and further provides that the same can be devolved to the Community upon such community being registered in accordance with the law. The ownership by individuals has also been dealt with in the Act through the intricate process of setting apart.

20. But therein lies the challenge. *How will the Community members be determined? How shall the Community Land Committee be appointed?* This are challenges to be best dealt with at the County level and I would urge every county government to take up these challenges of identity, mapping, physical planning and setting apart with the involvement of all stakeholders.

21. What is however clear to this court is that Community land cannot be individually owned against the interest of the larger members of the Community and without due procedure being adhered to. Public participation is key. Involvement of vulnerable members of the community is critical. Any sale that does not adhere to the guidelines set out in the Community Land Act and by extension the constitution is therefore illegal and I dare say, Discriminatory.

22. In this case, 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.

23. The plaintiff produced a Sale Agreement depicting the sale of the suit premises by the 3rd and 4th defendants to the 1st and 2nd Defendants which fact is also uncontroverted. By the Defendant failing to file a defence to the plaint, the same remains unchallenged.

24. The suit land herein is vested with the County Government of Tana River, the plaintiff herein. The defendants have not informed the court the progress they took to either convert the land from un-surveyed community land to private property. They have not shown that they engaged the plaintiff herein and indeed the community to grant them the authority to effect such sale.

25. The 3rd and 4th defendants therefore had no right to alienate, dispose of and/or sell to the 1st and 2nd Defendants. The sale was therefore irregular, illegal null and void and the same is hereby revoked/annulled.

26. 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 therefore need to stop any further illegal and irregular disposition of the suit land by the Defendants.

27. 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 to the required standard.

28. 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 and un-surveyed community land held in trust by the plaintiff on behalf of the local community and therefore the Sale Agreement dated 14th December 2017 be and is hereby revoked/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 250 meters by 3.5 kilometres situated at Damjalley Area, Madogo ward 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 are 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 defendant jointly and severally.

DATED, DELIVERED Virtually and SIGNED at GARISSA this 17th day December, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. M/s Nyabuti for the plaintiff
2. Defendants: absent
3. Court Assistant: Ijabo