



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT GARISSA

CONSTITUTIONAL PETITION NO. E005 OF 2021

IN THE MATTER OF ARTICLE 2(1), 3(1), 10(1)(a) (b) (c) and (d), 22(1), 23(1), 27(1) (2), 28, 36(1) (2) and (3) (a) and (b), 39(1) (2) and (3), 40(1) (3), 47 (1) (2), 56, 61(1) (2), 63(1), 165, 258 and 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 1,2,3(1) (a) and (c), 5(1) (a) (b)(c) and (d)(i) (ii), 7 (1) (a), 7(2) (a) (i) and (v) (c) (e) (f) (g) (h) (i) (m) (n) and (o) OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 2, 3, 4(1), 5(1) AND 7(1) (2)(3) (4) (5) AND (6) OF THE COMMUNITY LAND ACT, NO. 27 OF 2016 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 3(1) (2) (3) (4) (5) (6) (7) AND (8), 4 (1) AND (2), 8 (1) (2) (3) AND (4) OF THE COMMUNITY LAND REGULATIONS, NO. 27 OF 2016 THE LAWS OF KENYA.

BETWEEN

CHEUB ADAN ALL.....1ST PETITIONER

ALI ABDULLAHI ISSACK.....2ND PETITIONER

TAQIDIN HASSAN AFFEY.....3RD PETITIONER

ABDULLAHI ABASS SHEIKH.....4TH PETITIONER

VERSUS

COMMUNITY LAND REGISTRAR, NORTH

EASTERN REGION MANDERA.....1ST RESPONDENT

THE CS, MINISTRY OF LANDS AND

PHYSICAL PLANNING.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

This is an application by way of notice of motion dated 25th day of June, 2021 seeking the following orders;

(1) Spent.

(2) THAT this Honourable Court be pleased to grant a conservatory order staying the decision of the 1st Respondent purporting to cancel the Petitioners' and other members of the Murule Community meeting of 26th May, 2021 at Lafey CDF Hall electing the members of the Murule Community Land Management Committee pending the hearing and determination of this application.

(3) THAT this Honourable Court be pleased to grant a conservatory order staying the decision of the 1st Respondent purporting to cancel the Petitioners' and other members of the Murule Community meeting of 26th May, 2021 at Lafey CDF Hall electing the members of the Community Land Management Committee pending the hearing and determination of the petition herein.

(4) THAT this Honourable Court be pleased to grant a conservatory order restraining the Respondents jointly and severally, their

agents, or any person acting under their behest from carrying on any adjudication process of community land in and within Mandera County pending the hearing and determination of the application herein.

(5) THAT this Honourable Court be pleased to grant a conservatory order restraining the Respondents jointly and severally, their agents, or any person acting under their behest from carrying on any adjudication process of community land in and within Mandera County pending the hearing and determination of the petition herein.

(6) In any event, the costs of the application and the petition be awarded to the Petitioners.

(7) Such other order(s) as this Honourable Court shall deem fit to grant.

The application is premised on the grounds that appear on the face of the said application and the supporting affidavit of CHEUB ADAN ALI together with annexures contained in the supporting affidavit.

The Petitioners/Applicants set out in the application the following grounds in support of the application;

1. The Petitioners are members of the Murule Community which is among the three major Somali sub-tribe residing in Mandera County.
2. The Petitioners having the intention to register their community as provided for under Section 7 of the Community Land Act notified the Mandera Community Land Registrar in Form CLA1 on 18th May, 2021.
3. Upon receipt of the notification, the 1st Respondent invited all members of the Murule Community (herein after referred to as "the community), vide a letter dated 19th May, 2021 with communal interest to a public meeting on 26th May, 2021 at Lafey CDF Hall for the purpose of electing the members of the Community Land Management Committee.
4. The 1st Respondent through a letter dated 19th May, 2021 appointed Lafey Sub-County Commissioner as per Regulation 3 (7) of the Community Land Regulations 2017 to preside over the elections of the Murule Community Land Management Committee.
5. The elections were carried out in accordance with Section 7 (5) of the Community Land Act 2016 and fifteen members among them the Petitioners were elected to be members of the Community Land Management Committee.
6. The Lafey Sub-County Commissioner went ahead and presided over the meeting on 26th May, 2021 at 10.00 am as scheduled.
7. Consequently, the duly elected members of the Community Land Management Committee met immediately thereafter and elected four members from among themselves to be Executive Officers.
8. The Lafey Sub-County Commissioner reported the election results to the 1st Respondent as required by Regulation 3 (7) of the Community Land Regulations 2017.
9. The members of the Community further met on the 26th May, 2021 and resolved to adopt the proposed rules and regulations of the Community and directed that the Community Land Management Committee applies for registration at the Registrar as per regulation 8 (1) (2) and (3) of the Community Land Regulations, 2017.
10. The Community Land Management Committee prepared all necessary documents for registration of the community pursuant to the concluded successful elections.
11. To their utter shock and disbelief, they were unable to lodge the said registration as their attention was brought to a notice from the 1st Respondent purporting to cancel their meeting of 26th May, 2021 at Lafey CDF Hall for the purpose of electing the members of the Community Land Management Committee.
12. The Petitioners came to learn that the Community Land Registrar unilaterally issued a public notice via a national daily newspaper on 26th May, 2021 purporting to cancel the community meeting of 26th May, 2021.

13. It is worth noting that at the time of the elections, the purported notice cancelling the election had not reached the Petitioners, the community or the presiding officer, noting that the earliest time possible of the newspaper getting to them is after two days of publication.

14. There exists no communication or notice to the Lafey Sub-County Commissioner cancelling the meeting or revoking the Lafey Sub-County Commissioner's appointment to preside over the meeting.

15. The Petitioners have at all material times never been made aware through proper service of the existence of any notice purporting to cancel their meeting or 26th May, 2021.

16. A detailed scrutiny of the Community Land Regulations, 2017 vis a vis powers and/or Community Land Registrar issuing a cancellation of meetings denote that there exists none.

The supporting affidavit and the annexures thereto set out and outlines the facts in support of the application for injunction against the Respondents. In brief, the Petitioners/Applicants lodged the application for the recognition of the Murule Community and interest of claim on community land to the 1st Respondent who subsequently published a notice in a newspaper of nationwide circulation inviting community members to a meeting on 26th May, 2021 at Lafey CDF Hall to elect members to the Community Land Management Committee as required in Section 7 of the Community Land Act and Section 3 of the Community Land Regulations, 2017.

The Petitioners/Applicants contend that on the said 26th May, 2021, the members of the community met and resolved to adopt the proposed rules and regulations of the Community Land Management Committee applies for registration at the registrar as per regulation 8(1) (2) and (3) of the Community Land Regulations, 2017.

The Petitioners further stated that the elections of the Murule Community Land Management Committee were conducted by Lafey Sub-County Commissioner who was appointed by the 1st Respondent vide a letter dated 19th May, 2021 pursuant to regulation 3(7) of the Community Land Regulations, 2017.

The Petitioners/Applicants contend that upon successfully conducting the said elections, the Lafey Sub-County Commissioner reported the election results to the 1st Respondent as required by regulation 3 (7) of the Community Land Regulations, 2017.

In a replying affidavit sworn by one Joel M. Mwinzi who works for the 1st Respondent as the Community Land Registrar, Garissa, Mandera and Wajir Counties the Respondents admit that indeed the Petitioners made an application for recognition of Murule Community and interest of claim on community land vide a letter dated 18/5/2021.

The Respondents further contend that on 19th May, 2021, members of the Murule Community were invited for a meeting on 26/5/2021 for purposes of electing members of the community Land Management Committee.

The said notice is the first step in identification of the community pursuant to Section 7 of the Community Land Act No. 27 of 2016. Following the publication of the Notice on 19th May, 2021, the 1st Respondent stated that they received a letter from the County Government of Mandera dated 21st May, 2021 objecting to the invitation to elect members of the Murule Community to the Community Land Management Committee. He annexed a copy of the letter as JMM1.

Some of the reasons given by the County Government of Mandera for the objection is that they are the custodian of all unregistered community land within that County pursuant to Article 63(3) of the Constitution and Section 6 of the Community Land Act, 2016.

The 1st Respondent also stated that the County Government of Mandera had previously through a letter dated 23rd April, 2019 submitted to the Ministry an inventory of all unregistered community land in compliance with regulation 18 of the Community Land Regulations, 2017. A copy of the said letter was annexed and marked "JMM2".

After carefully reviewing the inventory issued by the County Government of Mandera of all unregistered community land, he realized that the land referred to in the application by the Petitioners/Applicants as Mandera Ramu Elwak is not listed as part of unregistered community land. The land referred to as Mandera Ramu Elwak is unknown to the County Government of Mandera who is the custodian of all unregistered community land.

The objection by the County Government of Mandera according to him made the authenticity of the Community and the Petitioners herein doubtful.

The 1st Respondent also stated that the letter also alluded to the inter-clan conflict that has taken place between neighbouring communities on matters of land disputes and the same is being resolved through an on-going arbitration process spearheaded by the National Cohesion and Integration Commission (NCIC) and supported by other agencies. He annexed a copy of the resolution of the arbitration between the Garre and the Murule communities.

The 1st Respondent further deposed that the notice prompted the filing of a petition in the High Court at Garissa being Petition No. E005 of 2021 Ali Hussein Maalim and 5 others –Vs- Cs, Land County Government of Mandera and the Hon. Attorney General. A copy of the said petition is annexed and marked JMM4.

The 1st Respondent also deposed that the petition alludes to the existence of several ethnic groups in Mandera County and that there was no

public participation prior to the issuance of the notice in accordance with the law among other reasons. It is also deponed that after reviewing the letter from the County Government of Mandera, they made a decision to cancel the purported meeting of 26th May, 2021 and that the community Land Registrar has the mandate to cancel the meeting at any time so long as there are sufficient reasons to do so.

ANALYSIS AND DETERMINATION

I have considered the substance of the petition and the Notice of Motion for conservatory orders dated 25th June, 2021. I have also considered the rival submissions and the legal as well as the Constitutional framework on the environment and the local and comparative jurisprudence applicable.

The guiding principles upon which Kenyan courts make findings on interlocutory applications for a conservatory order within the framework of Article 23 of the Constitution of Kenya 2010 are now settled. In such an application, the court is not called upon to make conclusive findings of fact or law on the dispute under consideration but the jurisdiction of the court at that stage is limited to determining whether the Applicant has made out a prima facie case to warrant the grant of the orders. Secondly, the court is also required to evaluate and analyze whether the conservatory orders if not granted will cause the Applicant to suffer prejudice. Finally, the court should always bear in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court as was held by the Supreme Court of Kenya in the case of **GATIRAU PETER MUNYA VS DICKSON MWENDA KITHINJI & 2 OTHERS (2014) e KLR.**

“Conservatory orders” bear a more decided public law connotation; for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory orders, therefore are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case, or “high probability of success” in the Applicants case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the Constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”

Applying the principles set out in the above decision which is binding on me, I agree with the submissions by the Honourable Attorney General that the Petitioners/Applicants Constitutional rights which are alleged to have been violated are presumptive community rights which are yet to crystallize. They are constitutional rights that only accrue once a community has been registered. For now, those rights have not crystallized yet and the application in my view is premature and therefore unarguable as no registered community right capable of being recognized and protected in law has been violated. For all the reasons stated hereinabove, I find the Notice of Motion dated 25th day of June, 2021 lacking merit and the same is hereby dismissed. Costs shall be in the cause. It is so ordered.

READ, DELIVERED VIRTUALLY AND SIGNED IN GARISSA THIS 1ST DAY OF OCTOBER, 2021.

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E. C. CHERONO (MR.)

ELC JUDGE

In the presence of;

1. Mr. Ondari holding brief Idow for Petitioner.
2. Respondent/Advocate: Absent
3. Fardowsa; Court Assistant.