



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 172 OF 2018

COUNTY GOVERNMENT OF TANA RIVER.....PLAINTIFF

VERSUS

ALI BUBU DABALE.....1ST DEFENDANT

AHMED BUBU DABALE.....2ND DEFENDANT

MAHAD NDAMEA BUBU.....3RD DEFENDANT

AHMED MOHAMED HASSAN.....4TH DEFENDANT

ADAN BULLE HASSAN.....5TH DEFENDANT

ABDIAZIZ MOHAMED SHIRE.....6TH DEFENDANT

RULING

1. By the Notice of Motion dated 30th August 2018, the County Government of Tana River (the Plaintiff) urges this Court to be pleased to issue a temporary injunction pending the hearing and determination of this suit restraining the six (6) Defendants herein from further selling, disposing, leasing or howsoever interfering with the peaceful use, occupation and possession by the Plaintiff and all the communities currently using, occupying and living on all that parcel of land situated in Malkamasa Village, Mulanjo Sub-Location, Saka Location, Madogo Division within Tana River County measuring approximately 72.42 acres.

2. The Plaintiff further urges that this Court to direct the Officer Commanding Station Bura Police Station to enforce those orders of injunction in the event they are granted.

3. The application which is supported by two affidavits sworn by the Plaintiff's Director of Legal Services Isaiah Ndisi Munje is premised on the grounds that:

a) The said parcel of land is unregistered Community Land as defined under Article 63(2) of the Constitution and is held by the Plaintiff County Government on behalf of the Communities resident in the area;

b) On or about 9th August 2018, the Defendants herein entered into a Sale Agreement disposing off the suit property to third parties for Kshs 1,700,000/-;

c) The Plaintiff is the only entity recognised in law with the mandate to deal with unregistered Community Land and the purported sale is illegal and in violation of the provisions of Sections 6(7) and (8) as well as Section 31 of the Community Land Act;

d) Unless the Defendants are restrained as sought herein, thousands of rural residents at Mathama Location stand to be forcibly removed from their farming and grazing land as a result of which they shall be put to great hardship and shall suffer irreparable loss and damage.

4. The application is opposed. In a Replying Affidavit sworn by the 2nd Defendant Ahmed Bubu Dabale on his own behalf and on behalf of the 1st and 3rd Defendants and filed herein on 29th November 2018, the said Defendant assert that the suit property is not unregistered

community land but is land that is registered in the name of 1st Defendant Ali Bubu Dabale.

5. The 1st, 2nd and 3rd Defendants further aver that the suit property has been their family property for generations and that it was passed down from their forefathers and the inhabitants of the area are aware that the land belongs to the family. They further state that they have all along occupied the suit property and used it for agricultural purposes.

6. The Defendants assert that they had a meeting of the whole family where it was unanimously agreed that they sell off part of the land to enable them send their children to school and to provide for their families. It was thereafter that they met the 4th, 5th and 6th Defendants who were willing to buy the land.

7. In another Replying Affidavit sworn by the 6th Defendant Abdiaziz Mohamed Shire on his own behalf and on behalf of the 4th and 5th Defendants, he confirms that the suit property belonged to the family of the 1st, 2nd and 3rd Defendants and that on or about 9th August 2018, he together with the 4th and 5th Defendants did enter into an agreement with the 1st, 2nd and 3rd Defendants to purchase the same.

8. The 4th, 5th and 6th Defendants aver that contrary to the Plaintiff's assertions, the suit property had been surveyed and was registered in the 1st Defendant's name. At the time of entering the agreement, it was agreed that the Vendors would go to the Government to receive documentation of the family property so that upon transfer, the same would pass to the 4th, 5th and 6th Defendants.

9. I have carefully considered the application and the response thereto. I have equally considered the written submissions filed herein by Mr. Bwire, Learned Counsel for the Plaintiff and Mr. Lakhicha, Learned Counsel for the Defendants.

10. The prerequisites for the grant of interlocutory injunctions have been stated times without number having been aptly captured in the often-cited case of *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358* where it was held that:-

“First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

11. The application before me was precipitated by a Sale Agreement dated 9th August 2018 between the 1st, 2nd and 3rd Defendants as the Vendors on the one hand and the 4th, 5th and 6th Defendant on the other hand as the Purchasers.

12. The said Agreement which gives the purchase price as Kshs 1,700,000/- describes the land sold as follows:-

“1. The property sold is all that piece of land No. TRCG/SAKA/2018/07 farm in Malkamasa Village, Mullanjo Sub-Location, Saka Location, Madogo Division, Tana North Sub County, Tana River County along the Madogo Saka Road measuring approximately seventy- three Decimal Four Two(73.42) Ha which borders River Tana to the East Omar Hussein to the South, Ali Bubu to the West and Elmi to the North.

2. The interest sold is –Freehold.”

13. It is the Plaintiff's case that the Defendants have no right to sell and/or purchase the suitland as the same is community land as described under Article 63 of the Constitution and that the purported sale is thus illegal as it is the only entity with the mandate in law to deal with unregistered community land.

14. The Defendants on the other hand collectively retort that the suit property is private land registered as such in the name of the 1st Defendant. The 1st, 2nd and 3rd Defendants asset that even though they have not been issued with documents of title, their family has used, occupied and developed the land for generations. It is further their case that they rightfully sold the land to the 4th, 5th and 6th Defendants to enable them pay school fees for their children and to sustain their livelihoods.

15. As it were, Article 61(2) of the Constitution classifies all land in Kenya as either Public, Community or Private. As to what constitutes private land, Article 64 of the Constitution provides:-

“64. Private land consists of

a) Registered land held by any person under any freehold tenure;

b) Land held by any person under leasehold tenure; and

c) Any other land declared private land under an Act of Parliament.

16. According the Defendants herein, contrary to the Plaintiff's assertions, the suit property is private land registered in the name of the 1st Defendant. The Defendants go ahead and identify the suit property as Parcel No. TRCG/SAKA/2018/07.

17. From the material placed before me, it is evident that the Defendants procured that reference from a Letter dated 3rd May 2018 addressed

to the 1st Defendant by the Plaintiff's County Secretary and annexed to the 1st, 2nd and 3rd Defendants Replying Affidavit as annexure "ABD-3. A perusal of the letter reveals that it was meant to facilitate the 1st Defendant to pay for an application for a plot of land with the Plaintiff County Government.

18. With respect, the said letter is not evidence of registration of the land. The purported parcel number given to the property is clearly a reference of a file used by the Tana River County Government revenue department to receive payment. The County Government does not register land in this Country and the reference to the said letter as evidence of registration is misleading and unhelpful to the Defendants' case.

19. Indeed while the 1st, 2nd and 3rd Defendants asserted that they had lived in the area for a long period of time, the Defendants did not provide any evidence that the portion of the land they sold measuring 73.42 Ha was private land falling within the ambit prescribed under Article 64 of the Constitution as cited above.

20. Indeed while the Defendants purported that the land was surveyed and registered, it was clear to me that the Survey referred to was the one that was done by a Surveyor who accompanied the 4th, 5th and 6th Defendants when they went to buy the property. It was thus unclear to me how the Defendants had ascertained the exact extent of the parcel of land they claimed to belong to the 1st, 2nd and 3rd Defendants.

21. Given the circumstances herein, this Court was more inclined at this stage to go by the Plaintiff's contention that the suitland is community land which has not been registered to any person privately and that the same has overtime been owned and used by the Communities resident within Tana River County for purposes of farming and grazing their animals.

22. In this regard Article 63(2) of the Constitution defines Community Land as land that is:-

- i) Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;*
- ii) Ancestral land and land traditionally occupied by hunter-gatherer communities; or*
- iii) Lawfully held as trust land by the County Government.*

23. 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 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.

24. In the circumstances herein and given the admission by the Respondents that they have attempted to dispose off the portion of the land measuring 73.42 Ha on the presumption that the same is their private and/or ancestral land, I am persuaded that the Plaintiff has made out a prima facie case with a probability of success at the trial and that unless the orders sought herein are granted, the Defendants may proceed to further alienate the suitland to third parties.

25. In the circumstances I am satisfied that the application before me has merit. The same is allowed with costs.

Dated, signed and delivered at Malindi this 30th day of January, 2020.

J.O. OLOLA

JUDGE