



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 162 OF 2018**

**COUNTY GOVERNMENT OF TANA RIVER.....PLAINTIFF/APPLICANT**

**VERSUS**

**MUSA KARANI RHEBU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**HASSAN MOHAMED ADAN.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**OMAR ALI AIDID.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By the Notice of Motion application dated and filed herein on 15<sup>th</sup> August 2018, the County Government of Tana River (the Plaintiff/Applicant) prays for an order of injunction to issue restraining the three Defendants Musa Karani Rhebu, Hassan Mohamed Adan and Omar Ali Aidid from further selling, disposing, leasing or howsoever interfering with the peaceful use and occupation of all that parcel of land situated in Saka Location, Mulanjo Sub-Location in Bura within Tana River County containing by measurements 3Km in length, and 400 m in width, pending the hearing and determination of this suit.

2. The application which is supported by an affidavit sworn by the County's Director of Legal Services Isaiah Ndisi Munje is based on the grounds inter alia that:-

***a) On 13<sup>th</sup> March 2017, the Defendants entered into a Sale Agreement disposing of the said parcel of land for Kshs 1,550,000/-;***

***b) The said parcel of land is unregistered community land held as such by the Applicant County Government on behalf of the communities resident in the County and the purported sale is illegal and in violation of the provisions of Sections 6(7) and (8) and Section 31 of the Community Land Act;***

***c) Pursuant to the purported Sale the Defendants have demanded that the communities living, farming, grazing on the land do forthwith vacate the same; and***

***d) Unless the Defendants are so restrained, thousands of rural residents at Saka Location shall be put to great hardship and will suffer irreparable loss,***

3. The application is opposed. In a Replying Affidavit sworn by the 1<sup>st</sup> Defendant Musa Karani Rhebu filed herein on 24<sup>th</sup> September 2018, the Defendants aver that the suit property is not community land as stated by the Plaintiff. On the contrary, the said property is private land belonging to the Rhebu family.

4. The Defendants aver that the suit property initially belonged to their grandfather and that they have built their homesteads and lived on the land since they were born and have been using the same for farming activities with a perimeter wall around it.

5. I have considered the application and the response thereto. I have equally considered the Written Submissions filed herein by the Learned Advocates for the parties.

6. 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.”***

7. The application before me was precipitated by a Sale Agreement dated 13<sup>th</sup> March 2017 between the 1<sup>st</sup> Defendant who is said to have executed the Agreements on behalf of the 2<sup>nd</sup> Defendant.

8. That Agreement which gives the purchase price as Kshs 1,550,000/- describes the 1<sup>st</sup> Defendant and the land sold as follows:-

***“The Vendor is the owner of unregistered piece of land located at Saka Location , Mulanjo Sub-Location in Bura County containing by measurement 3Km (in) length, width of 400 meters(river side) borders Tana River on the North, and is surrounded all other sides by land belonging to the Vendors except on the South where it borders the Balambala Madogo road. The land is unregistered.”***

9. 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.

10. The Defendants on the other hand retort that the suit property is private ancestral land belonging to the 1<sup>st</sup> Defendant’s Rhebu family. The 1<sup>st</sup> Defendants assert that even though they have not been issued with documents of title, their family has used, occupied and developed the land for more than 100 years. The family sat down and sold their land to enable them pay school fees for their children and to sustain their livelihoods.

11. 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.***

12. Other than the assertion that the 1<sup>st</sup> Defendants’ family had lived on the area for a long period of time, the Defendants did not provide any evidence that the long stretch of land they sold, running into Kilometres was private land falling within the ambit prescribed under Article 64 of the Constitution as cited above.

13. While the 1<sup>st</sup> Defendant asserted that the vast parcel of land was their private property, it was difficult to ascertain how they had arrived at the exact extent thereof given their own admission at Paragraph 12 of the Replying Affidavit that the land is un-adjudicated and unregistered.

14. Given the circumstances herein, this Court was more persuaded by the Plaintiff’s contention that the suit land is community land which has not been registered to any person privately and that the same has overtime been owned and used by the Community resident within Tana River County for purposes of farming and grazing their animals.

15. In this regard Article 63(2) (d) 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.***

16. 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.

17. In the circumstances herein and given the admission by the Respondents that they have attempted to dispose of the 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 Respondents may proceed to further alienate the suit land to third parties.

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

**Dated, signed and delivered at Malindi this 30<sup>th</sup> day of January, 2020.**

**J.O. OLOLA**

**JUDGE**