



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 161 OF 2018

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

VERSUS

- 1. OSMAN KIYO ADESO.....1ST DEFENDANT/RESPONDENT**
- 2. BABO BULA ADESO.....2ND DEFENDANT/RESPONDENT**
- 3. ABALONI TILIFO.....3RD DEFENDANT/RESPONDENT**
- 4. ISSACK BABO BULA ADESO.....4TH DEFENDANT/RESPONDENT**
- 5. IBRAHIM ABALONI TILIFO.....5TH DEFENDANT/RESPONDENT**
- 6. MOHAMED ABALONI TILIFO.....6TH DEFENDANT/RESPONDENT**
- 7. SALIM HAJI OMAR.....7TH DEFENDANT/TRESPONDENT**

RULING

1. By this Notice of Motion application dated and filed herein on 15th August 2018, the County Government of Tana River (the Plaintiff/Applicant) urges this Court to be pleased to issue a temporary injunction pending the hearing and determination of this suit restraining the seven (7) Defendants/Respondents herein from further selling, disposing, leasing or howsoever interfering with the peaceful use, occupation and possession by the Plaintiff and all communities currently using, occupying and living on all that parcel of land in Saka Location, Mulanjo Sub-Location in Bura within Tana River County containing by measurement 156.0 Ha.

2. The Plaintiff further urges 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 an affidavit 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 16th November 2017, the Defendants/Respondents 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 recognized 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; and

d) Unless the Defendants are restrained as sought herein, thousands of rural residents at Saka 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 6th Defendant/Respondent Mohamed Abaloni Tilifo on his behalf and

on behalf of all the Defendants and filed herein on 12th September 2018, the Defendants assert that the suit property is not Community land as the Plaintiff would want this Court to believe. Instead the Defendants aver that the said property is private property belonging to their Adeso family.

5. The 6th Defendant avers that he was born on the suit property in 1955 and that his father the late Abaluni Tilifo passed away and was buried on the suit property. He further avers that the Defendants herein are one family who have built homesteads and lived in the said land since birth and have been farming bananas, paw paws, watermelons and keeping beehives on the land on which they have a perimeter fence.

6. The Defendants further assert that they have been granted customary rights of occupancy of the suit property under Section 14 of the Community Land Act and that it is therefore utterly incorrect for the Plaintiff to state that the land falls under Article 63 of the Constitution and Section 6 of the Community Land Act.

7. The Defendants state that they sat down as a family and agreed to edge out a portion of the said land to sell in order to help in educating their children and to sustain their livelihoods. It is their case that the suit property like a vast majority of land in the Coastal area unadjudicated by the Government and thus they are yet to obtain their title documents thereto.

8. The Defendants further deny that there are any communities living, farming or grazing on the suitland. They also deny colluding with the Police to arrest the residents of the area and term the Plaintiff's application as one that is totally misguided, misconceived and misplaced.

9. 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.

10. The prerequisites for the grant of interlocutory injunction have been stated times without number having been aptly captured in the off-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 16th November 2017 between the 1st to 6th Defendants as the Vendors on the one hand and the 7th Defendant on the other as the Purchaser.

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

“The Vendors are the owners of all unregistered piece of land in Saka Location, Mulanjo Sub-location containing by measurement 156.0 Hectares. The land is unregistered. The land boarders (Tana) River in the South, Road to Balambala to the North, Yusuf Hassan’s Farm to the West and Wedo Abadiba Guyo to the East.”

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 retort that the suit property is private ancestral land belonging to the 1st to 6th Defendants' Adeso family. The 1st to 6th Defendants assert that even though they have not been issued with documents of title, their family has used, occupied and developed the land long before 1955 when the 6th Defendant was born. They aver that their family sat down and sold the land to enable them pay school fees to 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. Other than the assertion that the 1st to 6th 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, consisting of 156 Ha was private land falling within the ambit prescribed under Article 64 of the Constitution as cited above.

17. While the 1st to 6th Defendants asserted that the vast parcel of land they purported to sell to the 7th Defendant 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.

18. Given the circumstances herein, this Court was inclined at this stage to go 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 residents within Tana River County for purposes of farming and grazing their animals.

19. 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.

20. 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.

21. In the circumstances herein and given the admission by the Respondents that they have attempted to dispose off the land on the presumption that the same is their 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 Respondents may proceed to further alienate the suit land to third parties.

22. 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