



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 131 OF 2017

JEREMIAH NKINDU BARISA.....PLAINTIFF

JOSEPH MACHAFU KOMORA.....PLAINTIFF

JOSEPH TOLA ALFAYO.....PLAINTIFF

VERSUS

KHALIFA BARHE.....DEFENDANT

FRANCIS BULEMI.....DEFENDANT

KALIF SHAMBARO.....DEFENDANT

ABDI BOCHA.....DEFENDANT

DAUD OMAR.....DEFENDANT

JUDGMENT

1. By their Complaint dated and filed herein on 12th June 2017, Jeremiah Nkindu Barisa, Joseph Machafu Komora and Joseph Tola Alfayo (hereinafter “the Plaintiffs”) pray for an order of permanent injunction restraining the Defendants from selling, alienating, demarcating for themselves or carrying out construction on all that unregistered parcel of land measuring 15 Ha or thereabouts situated at Hola Mission area within Chewani Location and commonly known as the Hola Mission Community Land.

2. In addition, the Plaintiffs crave an order of vacant possession and the eviction of the Defendants from a portion of the land measuring 100 feet by 200 feet within the said property which portion is said to have been sold to the 2nd Defendant. The Plaintiffs also pray to be awarded the costs of this suit.

3. The Prayers arise from the Plaintiffs’ assertion that they are members of the Hola Mission Community which is a distinct group of people drawn from the Pokomo ethnic community and that their members have resided in the suit property from time immemorial. The suit property is presently categorized as Trust Land and is held by the County Government of Tana River in trust for the Plaintiffs and their Community.

4. The Plaintiffs assert that on or about 10th September 2009, their Community applied to the defunct County Council of Tana River for the sub-division of the suit property into 600 residential plots for their

members. That application was allowed and the Plaintiffs paid the requisite fees.

5. However while the Plaintiffs were awaiting the approval of a proposed Part Development Plan and beaconing of individual plots and allocation to the membership, the 1st, 3rd, 4th and 5th Defendants who belong to the Kalaule Community and reside on a different Parcel of land started to encroach onto the property and proceeded to construct two structures thereon.

6. The Plaintiffs aver that the Defendants' actions precipitated a dispute which was later resolved on 24th March 2016 when the National Land Commission recommended a formula for the distribution of the property to various Clans residents in the area.

7. It is the Plaintiffs case that before the sub-division could be done however, the 1st Defendant unilaterally proceeded to sub-divide to himself a portion of the property measuring 100 x 200 feet and on 9th April 2017 sold the same to the 2nd Defendant who entered the same and commenced the construction of a church thereon.

8. The Plaintiffs assert that the said acts of the Defendants are wrongful and that the said activities will ultimately deprive them of the ownership and possession of their land and that as a result, their Community risks losing the suit property.

9. The five Defendants-Khalifa Barhe, Francis Bulemi, Kalif Shambaro, Abdi Bocha and David Omar neither entered appearance nor filed a Statement of Defence in response to the Plaintiffs' assertions herein.

10. At the trial, the Plaintiffs called two witnesses who testified in support of their case.

11. PW1-Jeremiah Nkindu Barisa is the 1st Plaintiff. He testified that they had brought this suit in their capacity as members of the Hola Mission Community who have been residing on the suit property as their ancestral land from time immemorial.

12. PW1 told the Court that their Community applied on 10th September 2009 for the sub-division of the suit property into 600 residential plots for their members which application was approved. Their members then paid the requisite fees and a proposed Part Development Plan was drawn. However as they waited for the Plan's approval and beaconing of the individual plots, the 1st, 3rd, 4th and 5th Defendants who belong to the different Kalaule Community encroached on the land and started building structures thereon.

13. The invasion of the land by the said Defendants resulted into land disputes that were referred to arbitration. On 24th March 2016, the National Land Commission through the Country Land Management Board resolved that the suit property be distributed to the Plaintiff's Hola Mission Community (70%), Malindi Ya Ngwena Community (15%) and to the Defendants' Kalaule Community (10%). 5% of the land was to be reserved for public utility.

14. PW1 told the Court that as they were awaiting for the implementation of those resolutions, the 1st Defendant unilaterally proceeded to apportion to himself part of the land measuring 100 x 200 feet which he proceed on 9th April 2017 to sell to the 2nd Defendant . The 2nd Defendant then commenced construction of a church on the said portion of the land.

15. PW2- Joseph Machafu Komora is the 2nd Plaintiff. He reiterated the testimony of PW1 and urged the Court to grant them the Prayers sought in the Plaintiff.

16. I have considered the pleadings filed herein, the testimony of the Plaintiffs' witnesses and the evidence adduced herein at the trial. I have also considered the Written Submissions filed herein by Mr. Shujaa Learned Counsel for the Plaintiffs.

17. The Plaintiffs case is that the suit property which is presently categorized as Trust Land is their ancestral land which they have owned from time immemorial. They aver that on 10th September 2009, they did as a Community apply to the defunct County Government of Tana River for the sub-division of the suit property into 600 residential plots for allocation to their members. Their application was allowed and they paid the requisite fees for sub-division.

18. However, as they waited for the approval of the Part Development Plan and the beaconing of individual parcels to their members, the 1st, 3rd, 4th and 5th Defendants who are not members of their Community invaded the suit property and started building structures thereon. The Defendants activities precipitated a dispute which was referred to arbitration by the Provincial Administration. The Local Administration resolved that the boundaries then existing between the Plaintiff's community and the 1st, 3rd, 4th and 5th Defendants' Kalaule Community be maintained.

19. The Plaintiffs further told the Court that later on, the dispute was referred to the National Land Commission which resolved on 24th March 2016 that the suit property be sub-divided and distributed among the three communities in the region with the Plaintiff's Hola Mission Community taking 70%, while the Defendants Kalaule Community would have 10%. Another Community –the Malindi Ya Ngwena Community was to have 15% of the suit property while 5% was to be reserved for public utility.

20. It is the Plaintiffs' case that before the sub-division could be done as proposed, the 1st Defendant unilaterally carved off a portion of the suit property measuring 100 x 200 feet which portion he proceeded to sell to the 2nd Defendant. Subsequently the 2nd Defendant commenced the construction of a Church known as the Chemi Chemi Ya Uzima Church on the property.

21. The Plaintiffs assert that the sub-division and the sale of that portion of land before the actual sub-division and demarcation as recommended by the Commission will jeopardise the intended sub-division and will result into a scramble for plots within the suit property and create conflicts and disputes between members of the respective communities.

22. From their admission, the Plaintiffs assert that the suit property is presently caterorised as Trust Land and that accordingly the same is held by the County Government of Tana River in trust for the Plaintiffs and the other members of the Hola Mission Community.

23. A perusal of the material produced by the Plaintiffs in evidence herein point to the fact that the suit property is indeed unregistered community land. That being the case Article 63(3) of the Constitution provides that such land shall be held in trust by the County Government on behalf of the communities for which it is held.

24. As it were, the three Plaintiffs herein filed this suit in their capacity as the Treasurer, Secretary and Chairman respectively of the Hola Mission Community. Filed together with the Plaint is an undated document titled "Authority to Appear, Act, and plead for another. That document is signed on the surface thereof by five other individuals other than the Plaintiffs. The County Government of Tana River in whom the land is vested under the Constitution is not among the Signatories and it was indeed unclear to me if all the members of the said Hola Mission Community had been made aware of and/or had authorized this suit to be filed on their behalf.

25. In my mind, unless and until the allocation process which had begun was completed, I was not persuaded despite the failure of the Defendants to enter appearance herein that the Plaintiffs had demonstrated any private proprietary interests on the suit property capable of enforcement in the manner sought herein.

26. In my considered view, the failure to implead in these proceedings the County Government of Tana River vested with authority and responsibility to deal with the suit property in a manner that serves the best interests of all the communities resident in the area was fatal to the proceedings. As it is the Plaintiffs suit is premature, speculative and without any basis.

27. The same is accordingly dismissed with no order as to costs.

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

J.O. OLOLA

JUDGE