



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 74 OF 2019**

**JOHN KIVURE & 7 OTHERS (Suing on their behalf and on behalf of 4201 members of**

**KISHAMBA B GROUP RANCH.....PLAINTIFFS**

**VERSUS**

**1. BENSON MLAMBO MWAKINA,**

**ANTHONY KISHANGA MWASI & FLORENCE MALANDI**

**(suing as defunct Chairman, Secretary and Treasurer respectively of the**

**Executive Committee of KISHAMBA B GROUP RANCH)**

**2. CABINET SECRETARY MINISTRY OF LANDS HOUSING AND PHYSICAL PLANNING**

**3. DIRECTOR OF LAND ADJUDICATION/SETTLEMENT**

**4. COUNTY LAND REGISTRAR – TAITA TAVETA COUNTY**

**5. ATTORNEY GENERAL.....DEFENDANTS**

**AND**

**1. COUNTY GOVERNMENT OF TAITA TAVETA**

**2. DUSTUN KIMBIO & 19 OTHERS.....INTERESTED PARTIES**

**RULING**

1. Coming up for determination is the notice of motion dated 16<sup>th</sup> April 2019 by the Plaintiffs/Applicants seeking for orders of temporary injunction restraining the Defendants/Respondents from demarcating, surveying, alienating, leasing, charging, mortgaging, encumbering, sub-dividing, disposing off, dealing with and/or interfering in any manner with the title to and/or consenting to transferring, registering any transfers or issuing any titles in respect of any sub-division arising from the property known as SAGALLA/KISHAMBA B/1 (SUIT PROPERTY) registered in the name of Kishamba B Group Ranch situate in Voi, Taita Taveta County without the consent of the Government of Taita Taveta, the Plaintiffs and/or contrary to the provisions of the Community Land Act. The application is supported by the affidavit of John Kivure sworn on 15<sup>th</sup> April 2019 and is premised on the grounds that:

**i. The plaintiffs are part of 4209 persons listed in a signed list of members attached to the plaint, a community of and members of a duly registered community known as Kishamba B group Ranch and bona fide owners by customary entitlement of a property known Sagalla/Kishamba B/I (suit property) situate in Voi, Taita Taveta measuring about 10, 684 hectares.**

**ii. At all material times the suit property is unregistered community land whose title is in the name of Kishamba B Group Ranch but held in trust by the Interested Party by reason of Section 6 of the Community Land Act No. 12 of 2016.**

iii. Since the commencement of Community Land Act No. 12 of 2016, the Defendants have by themselves, through their servants or officers failed to register, gazette, survey, demarcate, sub-divide and allocate the suit property to the plaintiffs as required by the said statute but instead resorted to fraudulently, illegally, unlawfully, unprocedurally, discriminately and through corrupt means threatened and been surveying, demarcating, sub-dividing, alienating, transferring and registering portions thereof to some persons within and outside the community hereof without the consent of the plaintiffs, the Interested Party and contrary to the Community Land Act.

iv. The 1<sup>st</sup> Defendant although defunct officials of the Group Ranch are illegally in office and unlawfully dealing in, managing and/or adjudicating over the suit property on behalf of the plaintiffs with the assistance of the Defendants yet they are not Community Land Management Committee for the suit property and have threatened to continue unless restrained by the court.

v. Unless restrained by this court, the plaintiffs have discovered that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants with the assistance of its officers have by letter ref; 12<sup>th</sup> November, 2018 to the 1<sup>st</sup> defendant authorized the latter to deal in the unregistered property by sub-dividing the suit property with intent to allocate to some members of the plaintiffs without a proper register and/or compliance with any provisions of the Community Land Act and/or the consent of the Interested Party and the Plaintiffs will suffer irreparable loss.

vi. Unless this application is granted, the suit hereof will be rendered nugatory.

vii. It is just and fair and within the overriding objective of this court that the Application be granted.

2. In a nutshell, the plaintiffs aver that they are part of 4209 members of a community known as Kishamba B Group Ranch which is duly registered under the Land Group (Representatives) Act Cap 287 Laws of Kenya (repealed) and living, residing and claiming under customary law the suit property. That prior to the enactment of the Community Land Act, the ownership, management and user of the suit property was governed by the 1<sup>st</sup> defendant who have failed to comply with the current law and continue to deal with the suit property contrary to the community Land Act, and in breach of the constitution of the Group Ranch to the prejudice of the plaintiffs. The plaintiffs aver that the 1<sup>st</sup> defendant have and intend to discriminate the plaintiffs in their dealings by using a register which was last updated in 2012.

3. In opposing the application, the 1<sup>st</sup> defendant filed a notice of preliminary objection and grounds of opposition dated 24<sup>th</sup> July 2019. It is the 1<sup>st</sup> defendant's contention that the entire suit is bad in law *ab intio*, fatally and incurably defective for want of leave to file suit in representative capacity and for want of written authority contrary to the provisions of Order 1 Rule 1, 18, 12, 13(2) (b), (c) and (d) of the Civil Procedure Rules. The 1<sup>st</sup> defendant wants the entire suit struck out with costs.

4. The application is also opposed by the 2<sup>nd</sup> Interested Parties who filed a replying affidavit sworn by Gadiel Mwanjele Kilaghai on 26<sup>th</sup> August 2019 in which he deposes that the applicants are ex-officials of the Group Ranch and therefore lack capacity to file the suit on behalf of the Group Ranch members. That the provisions of the community Land Act does not apply as members resolved to subdivide and dissolve the group ranch. There is also a replying affidavit sworn by Benson Mlambo Mwakima on 18<sup>th</sup> October, 2019. He deposes inter alia, that he is the Chairman of Kishamba B Group Ranch and that the plaintiffs have no authority from the membership of the Group Ranch to file the suit herein. That the ranch is only actualizing members resolutions passed on 19<sup>th</sup> December, 2014 and confirmed on 15<sup>th</sup> May 2015 in an Annual General Meeting of the Group Ranch. He contends that the application is vitiated by material and deliberate falsehood and misrepresentation.

5. The application was canvassed by way of written submission. The plaintiffs filed their submissions on 24<sup>th</sup> September, 2019 while the 1<sup>st</sup> defendant filed theirs on 6<sup>th</sup> November, 2019.

6. I have considered the submissions rendered in support and against the application and the preliminary objection raised. I will first deal with the preliminary objection. The first issue to determine is whether the plaintiffs had proper locus to institute the instant suit as a representative suit.

7. It is clear and apparent from the plaint that the plaintiffs instituted the present suit on their own behalf and on behalf of 4201 members of Kishamba B Group Ranch. In the plaint, the plaintiffs have annexed a letter of authority signed only by the 8 named plaintiffs. They have also annexed a schedule of a list of names some titled "members petition list" who purportedly authorized the plaintiffs to file the representative suit on their behalf. In the said list, there are signatures appended against some names but no signatures are appended on others.

8. The question to ask is whether this is a representative suit. order 1 Rule 8 of the Civil Procedure Rules provides:

**"One person may sue or defend on behalf of all in same interest**

**1. Where numerous persons have the same interest in any proceedings, the proceedings, may be commenced, and unless the court otherwise orders, by or against any one or more of them as representing all or as representing all except one or more of them.**

**2. The parties shall in such cases give a notice of the suit to all such persons either by personal service, or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.**

**3. Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to court to be made a party to such suit.”**

9. Order 1 Rule 8 is quite clear that for a representative suit there has to be notice to all those affected by either personal service or by way of public advertisement, as the court may direct. This requirement is mandatory. No order as required in Order 1 rule 1 was obtained and no such notice was issued. The pleadings indicate that the affected members are 4200 meaning that the plaintiffs ought to have moved the court for an order to advertise the notice which has not been done. From the material on record, it is clear that the list of persons that the plaintiffs presented as having authorized the bringing of the suit on their behalf is not authentic. It is clear that only the 8 plaintiffs signed the Letter of authority. It is also clear that even the list attached which is alleged to be a list of members who authorized the suit, not all of the named persons appended their signatures. The list suggests that the plaintiffs may just have listed down names from the list of the Group Ranch, inserted identification numbers and telephone numbers. It is instructive to note that not all the names have the identification and telephone numbers. From the material before court, I am not satisfied that the list appended was authenticated.

10. Whereas the plaintiffs need not have obtained leave of court in order to bring the suit, what they required to do was to issue a notice to all interested parties of their intention to sue on their behalf. The reason for the notice is so that the interested parties are bound by the eventual decree of the court. In my view, the plaintiffs have not complied with the provisions of Order 1 Rule 8. No sufficient evidence of authority to represent the members of Kishamba B Group Ranch has been given. The preliminary objection raised is upheld in that regard.

11. In the result, the application and the entire suit are hereby struck out with costs to the 1<sup>st</sup> defendant.

Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 26<sup>th</sup> day of February 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Mrs. Makuto holding brief for Litoro for plaintiff/applicant

Shimaka holding for Ms. Omollo for 2<sup>nd</sup> Interested Party

Mrs. Waswa holding brief Makuto for AG for 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants and holding brief for Mbako for 1<sup>st</sup> Interested Party

Ms. Sharrif for 1<sup>st</sup> Defendnat

Yumna Court Assistant

**C.K. YANO**

**JUDGE**