



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MALINDI ELC CASE NO. 13 OF 2019

SAID SADIKI ABDALLA (Suing on behalf of the Estate

of the late **SWADIKI ABDALLA KOFIK**.....**PLAINTIFF**

VERSUS

1. THE NATIONAL LAND COMMISSION.....**1ST DEFENDANT**

2. THE COUNTY GOVERNMENT OF TANA RIVER.....**2ND DEFENDANT**

RULING

1. By a Complaint dated 1st April 2019 and filed herein on 2nd April 2019, Said Sadiki Abdalla suing on behalf of the Estate of the late Swadiki Abdalla Kofik (the Plaintiff) prays for Judgment to be entered against the National Land Commission (the 1st Defendant) and the County Government of Tana River (the 2nd Defendant) for:

a) A declaration that the Plaintiff, his sister and their late father have been in occupation of the un-adjudicated community land situated at Kipini measuring approximately four acres since 1985 without interruption.

b) A declaration that the said parcel of land forms part of the Estate of the late Swadiki Abdalla Kofid (deceased);

c) A declaration that the 2nd Defendant's decision and intention to take over occupation and possession of the said parcel of land is illegal and unlawful;

d) An order of permanent injunction against the Defendants and their agents restraining them from trespassing, encroaching, constructing or in any other manner dealing with the said plot.

e) An order directed to the 1st Defendant to alienate the plot and process title deed in the name of the Plaintiff.

f) In the alternative and without prejudice to Prayer (e) above, the 2nd Defendant to monetarily compensate the Plaintiff the current monetary value of the suit property;

g) Any other relief the Honourable Court would deem fit to grant in the circumstances; and

h) Costs of and incidental to this suit.

2. Filed contemporaneously with the Complaint is the Plaintiff's Notice of Motion application of even date seeking orders of injunction to restrain the Defendants from developing, occupying, constructing or in any other manner dealing with the said un-adjudicated community land at Kipini measuring four acres.

3. The said application is premised inter alia on the grounds that the 2nd Defendant intends to put up a cold storage facility on the property and has given notice to the Plaintiff and his community of its intention to demolish the structures on the suit property.

4. In response to the said application and the suit, the 1st Defendant has filed a Notice of Preliminary Objection dated 13th May 2019 stating:

1. That the suit is incompetent and fatally defective, as it offends the provisions of Section 30 of the Land Adjudication Act;

2. That the suit has been commenced with the consent in writing of the adjudication officer contrary to the provisions of Section 30 of the Land Adjudication Act (sic).

5. On its part, the 2nd Defendant has through a Replying Affidavit sworn by its Director, Legal Services Isaiah Ndisi Munje objected to the suit and the application on the grounds that the proper manner to deal with such un-adjudicated land is through the procedure set out under Section 13(1) of the Land Adjudication Act and not through the Court. The 2nd Defendant avers that by this suit and the application, this Court is being invited to make orders contrary to the express provisions of the law.

6. In addition, the 2nd Defendant avers that Tana River County has a 76 Km sea front with three main fish landing sites namely Chara, Ozi and Kipini. The Kipini site has been operating as a fish landing site for fishing vessels and has been identified as one of the most promising sites in the area. To improve the livelihoods of the fish folks in the area the 2nd Defendant has embarked on the construction and installation of an ice plant and cold storage in the area.

7. The 2nd Defendant avers that the decision to construct the cold storage unit at Kipini was arrived at after extensive public participation involving the local communities. The disputed parcel of land was subsequently identified by the local community and handed over to the 2nd Defendant for the said purpose. Accordingly, the 2nd Defendant proceeded to fence the property and to commence construction of the Unit.

8. Further and in addition to their Replying Affidavit, the 2nd Defendant has also by a Notice of Preliminary Objection dated 21st June 2019 objected to the hearing of the suit and the application on the grounds that:

1. The suit is fatally defective, incurable and cannot stand in law;

2. This Honourable Court lacks jurisdiction to hear and determine the dispute over un-adjudicated land pursuant to the provisions of the Land Consolidation Act, Cap 283 and Land Adjudication Act, Cap 284 respectively;

3. The suit is bad in law under the doctrine of exhaustion as the Plaintiffs have not exhausted the dispute resolution mechanisms provided under the Land Consolidation Act and the Land Adjudication Act which Acts provide elaborate procedures for redress of any disputes arising from and/or relating to land falling under special areas as the case herein;

4. The Plaintiffs have not in any way followed the elaborate steps provided by the Land Consolidation Act and the Land Adjudication Act respectively;

5. The suit as preferred violates mandatory provisions of law and laid down procedures and cannot sustain the prayers sought;

6. In light of the foregoing, it is clear that the suit herein has been filed prematurely and in any case, without jurisdiction for this reason alone, the suit should be dismissed with costs to the 2nd Respondent.

9. I have perused and considered the Plaintiff's application vis-à-vis the two preliminary objections raised herein by the two Defendants. I have also looked at the submissions and authorities placed before me by the Learned Advocates for the parties.

10. As I understood it, the 1st Defendant's Preliminary Objection attacks the suit as defective and incompetent on the basis that the same was commenced without the consent in writing of the Land Adjudication Officer as provided under Section 30 (1) of the Land Adjudication Act, Cap 284 of the Laws of Kenya. The said Section provides as follows:

“Except with the consent in writing of the adjudication officer, no person shall institute, and no Court shall entertain, any civil proceedings concerning an interest in land in an adjudication Section until the adjudication register for that adjudication section has become final in all respects under Section 29(3) of this Act.”

11. The more wordy Objection by the 2nd Defendant does not zero in on any particular provision but a proper perusal thereof reveals that the six grounds thereof relate to the same thing- that the suit offends the provisions of the Land Adjudication Act above and these of the Land Consolidated Act, Cap 283 of the Laws of Kenya. The latter Act has a similar provision to the above Section 30(1) of the Land Adjudication Act at its Section 8(1) where it provides inter alia as follows:

“.....no person shall institute and no Court whatsoever shall take cognizance of, or proceed with any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the adjudication officer to the institution or continuance of such proceedings has been given.”

12. As it were, other than filing the Notice of Preliminary Objection, the 1st Defendant has not filed any other pleading or document herein. On its part, the 2nd Defendant to its credit has filed a lengthy Replying Affidavit in which it details the processes it went through with the community in Kipini before a decision was made to build the impugned cold Storage Unit in the area. What is lacking in that Affidavit by its Director Legal Services is when, if at all, the land in dispute became an adjudication area.

13. My reading of both Caps 283 and 284 of the Laws of Kenya informs me that while the two Acts of Parliament operate separately, both statutes are only applicable to an area or section duly declared and gazetted as such by the Minister. In that respect, Section 2(1) of the Land Consolidation Act (Cap 283) provides as follows:

“Whenever at the request of a Local Authority it appears expedient to the Minister that the ascertainment of rights and interests in, and the consolidation of, and the registration of title to, any area of Trust land (other than land to which the Land Adjudication Act applies) should be carried out, the Minister may, by order direct that this Act shall apply to such area of Trust land as is specified in the Order, and upon publication of such order this Act shall apply to such area accordingly.”

14. Similarly, the Land Adjudication Act (Cap 284) provides at Section 3(1) thereof as follows:

“The Minister may by order apply this Act to any area of Trust land if:

a) The County Council in whom the land is vested so requests; and

b) The Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered; and

c) The Land Consolidation Act does not apply to the area.

15. In the matter before me, the Defendants despite their protracted preliminary objections have not placed anything before me to demonstrate that the suit premises and or the area in which it falls has been gazetted as such an adjudication area or section and that therefore either of the two statutes is applicable.

16. In the circumstances, I did not find any basis for the submission that the Plaintiff needed the consent of the Land Adjudication Officer prior to the commencement of this suit. At any rate and contrary to the Defendants’ submissions, I did not think that the provisions of Section 8(1) of Cap 383 and Section 30(1) of Cap 284 oust the jurisdiction of this Court. All that the two sections do is to stop parties from rushing to Court on any and every disagreement in the adjudication process until such a time that the process is complete. Accordingly, the two Preliminary Objections are without basis and I have no hesitation in discussing the same.

17. Turning to the Plaintiff’s application for injunction, it is his case that the area on which the 2nd Defendant County Government intends to construct the cooling plant is their family’s ancestral land which land they have occupied for the past 45 years. He avers that the land was initially occupied by his now deceased father and he is now apprehensive that he stands to be evicted together with his sister and other fishermen from the land if the construction of the Plant is allowed to go on.

18. As the Court of Appeal stated in *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR*:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

a) Establish his case only at a prima facie level;

b) Demonstrate irreparable injury if a temporary injunction is not granted, and

c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

19. Emphasizing on the requirements for proof of a prima facie case, the Court of Appeal in *Nguruman (Supra)* went on to state thus:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

20. From his own supporting affidavit, the Plaintiff does not dispute that the suit premises falls within what is known as Community land. It is the Plaintiff’s own submission that the entire land within Kipini area is indeed unregistered community land falling under the control of the 2nd Defendant County Government. Article 63 (3) of the Constitution provides in respect of such land as follows:

“Any unregistered community land shall be held in trust by County Governments on behalf of the communities for which it is held.”

21. In regard to any alienation of such unregistered Community land, Section 92 (d) of the Land Act provides that:

“Community land may be converted to either private or public land in accordance with the law relating to community land enacted pursuant to Article 63(5) of the Constitution.”

22. Having admitted that the land in contention is such unregistered community land, I think it was incumbent upon the Plaintiff, given the above provisions of the law, to explain how he or his deceased father had acquired private proprietary interests on the same. Otherwise, the

suit property being communal land can only be owned communally.

23. From the 2nd Defendants Replying Affidavit, they contend that the suit property was offered to them by the community living in the area following a series of meetings. The Plaintiff has not disputed at this stage that any such meetings were held and that the land was identified and offered by his community.

24. In the premises, I am not satisfied that the Plaintiff has demonstrated a clear and unmistakable right or interest to the property in contention. Accordingly, I do not find any merit in the application. The same is dismissed.

25. The costs of both the Objections and the Plaintiff's application shall be in the cause.

Dated, signed and delivered at Malindi this 18th day of September, 2020.

J.O. OLOLA

JUDGE