



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO. 55 OF 2014**

**1. ABDULLAHI HARET MAALIM**

**2. ABDI AHMED HASSAN**

**3. ISMAIL A. KASSIM**

**4. ADEN MUKHTAR**

**5. BARE FARAH SAHAI.....PLAINTIFFS/APPLICANTS**

**=VERSUS=**

**COUNTY GOVERNMENT OF TANA RIVER.....DEFENDANT/RESPONDENT**

**R U L I N G**

**Introduction:**

1. The Application before me is the one dated 3<sup>rd</sup> March, 2014 by the Plaintiffs seeking for the following orders:

**(a) THAT a temporary injunction order do issue restraining the Defendant, its officers, employees, servants and agents howsoever from trespassing, evicting or interfering with the peaceful possession and enjoyment by the Plaintiffs of their farms, or in any other way dealing with the Plaintiffs' farm known as farm (A), Haret farm PDP No. TRD/594/2001/70, farm (B), Kholole farm PDP NO. TRD/594/2001/70, farm 1, PDP NO. TRD/594/2001/71, farm 2, PDP NO. TRD/594/2001/71 and farm PDP NO. TRD/594/2001/72, all located in Majengo Kinakomba location near Masalani town of Garissa County pending hearing and determination of this suit.**

**(b) The Honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.**

**The Plaintiffs'/Applicants' case**

2. According to the Supporting Affidavit sworn by the 1<sup>st</sup> Plaintiff, the Plaintiffs are the registered

proprietors of the suit properties having been granted the approved development plans from the Ministry of Lands.

3. It is the Plaintiffs' case that they have paid the requisite fees and that they are in actual possession of their respective farms.

4. However, on 3<sup>rd</sup> January 2014, the Defendant wrote to the Plaintiffs demanding that the Plaintiffs stop further developments on the suit property, vacate the land and remove all their properties therefrom.

5. In their Further Affidavit, the Plaintiffs have deponed that it is not true that they have caused any disquiet or tension in the area but have harmoniously co-existed with their neighbours; that they are the ones who have been in possession of the suit properties and not Kinamulunde Women Farmers Association and that they have heavily invested in the suit properties.

### **The Defendant's/Respondent's case**

6. Mr. Omar, the Defendant's Executive Committee Member for Lands, Agriculture, Livestock Development & Fisheries deponed that the letters of allotment annexed on the Plaintiffs' Supporting Affidavit relates to land allocated in Madogo and Sala Locations, which area fall within Madogo Division and not Majengo Kinakombe Location where the suit properties are situated.

7. According to the Defendant's representative, the Plaintiffs have been causing disquiet and tension to the lawful occupants of the parcels of land at Majengo, Kinakomba Location by alleging ownership of the suit property.

8. It is the Defendant's case that there is inconsistency in identifying the plots because one of the letters of allotment refers to the farm as "b" which is as the Part Development Plan while the rest of the allotment letters use "1" and "2" to identify the farms; that the Physical Planner has observed that there are serious inconsistencies in terms of the documentation and that because the suit property is community land, there are procedures of acquisition that the Plaintiffs never followed which include the full council minutes and Town Planning Committee Minutes and as such the said allocation was irregular.

9. According to the Defendant, the legal owner of the suit properties is Kinamulunde Women Farmers Association who were allocated the land by the Defendant vide Minutes of the LDC held on the 20<sup>th</sup> March 2007 for farming and that the Plaintiffs have continued to cause unnecessary dispute and anxiety in the area by claiming that the land is theirs.

10. The Defendant's representative finally deponed that it is Kinamulunde Women Farmers Association who are utilising the land for farming and that the Plaintiffs are not in possession as claimed.

### **Submissions**

11. The Plaintiffs' advocate submitted that the Plaintiffs have exhibited various letters of allotments issued by the Defendant and made payments for the said parcels of land. After the allotment, it was submitted, the Plaintiffs were issued with the approved development plans.

12. Counsel submitted that Article 40 of the Constitution of Kenya protects the Plaintiffs and that the Plaintiffs are free to own any property in any part of Kenya.

13. On the other hand, the Defendants advocate submitted that the suit property is not in the location that the Plaintiffs are claiming and that the Plaintiffs have no claim on the property located in Majengo Kinakomba location. Counsel submitted that the Plaintiffs have not established a prima facie case with chances of success.

14. The Defendant's counsel further submitted that since the Plaintiffs' parcels of land do not lie in Majengo Kinakomba location, the Plaintiffs will not suffer irreparable damage if the orders of injunction

are not granted.

## **Analysis and findings**

15. The Plaintiffs have annexed on their Affidavit the letters of allotment that were granted to them by the Defendant's predecessor, the County Council of Tana River.

16. The 1<sup>st</sup> Plaintiff was issued with a letter of allotment in respect of land measuring approximately 4.85 Ha at Madogo. At the top of the said letter of allotment is a number referred to as TRD/594/2001/72. The 2<sup>nd</sup> Plaintiff was allocated land measuring 4.75 Ha while the 3<sup>rd</sup> Plaintiff was also allocated land measuring 4.75 Ha. The remaining Plaintiffs were allocated land measuring 4.58 Ha each in an area called Sala.

17. The Plaintiffs have also annexed on their affidavit the Part Development Plans of the land that they say they were allocated. The PDP numbers have been indicated on their respective letters of allotment.

18. The Defendant's contention is that the Plaintiffs were allocated land in Madogo and Sala area as indicated in their respective letters of allotment and not in Majengo as indicated in the approved Part Development Plans.

19. According to the Defendant's Affidavit, Madogo and Sala locations fall within Madogo Division. The Defendant's representative does not however state whether Majengo, as indicated in the PDPs also falls in Madogo Division or whether it is a Division on its own

20. It is therefore not clear, from the Defendant's Affidavit, the proximity of these areas to each other considering that a PDP may indicate an area covering several locations or even Divisions.

21. If indeed the Plaintiffs were allocated land by the Defendant's predecessor in an area which is different from what is captured in the PDPs', then it was incumbent for the Defendant, as the custodian of the maps, including Development Plans of the County Government of Tana River, to produce them to show to this court where Madogo, Sala and Majengo areas are in relation to the suit property.

22. All the Plaintiffs are stating is that they took possession of the land that was allocated to them by the then County Council of Tana River and that they have developed the same. If indeed the land that they were given is different from the suit property, it is the Defendant to prove that fact by producing the relevant documents and not the Plaintiffs who are laymen and who do not keep the official documents of the County Government.

23. It is strange that the Physical Planner of the County could not point out exactly where the Plaintiffs land is if they were given letters of allotment which do not tally with the approved PDPs that they are holding. If the Physical Planner cannot solve the puzzle as to which land is where within the County, then who would? This is what the Physical Planner states in his letter annexed on the Replying Affidavit.

**“It is therefore very difficult to know who the real owner of the farm is. The land being community land, there are procedures of acquisition and the parties who claim the land have not presented the most crucial documents which include Full Council Meetings Minutes, Town Planning Committee Minutes and Sub DDC Minutes”.**

24. It is common knowledge that the Defendant's predecessor could allocate Trust Land or community land pursuant to the provisions of the repealed Constitution and the Trust Land Act.

25. The Defendant has not denied that indeed the letters of allotment and the PDPs' that the Plaintiffs are holding were issued by its predecessor and the same are not forgeries. It is for the Defendant therefore to explain the circumstances under which those letters of allotment and the PDPs were issued to the Plaintiffs being the custodians of the records and certainly not the Plaintiffs.

26. In their letter dated 3<sup>rd</sup> January 2014, the Defendant acknowledged that the Plaintiffs are the ones in possession of the suit property. In the said letter, the Defendant asked the Plaintiffs to stop any further developments on the land at Majengo, Kinakomba location and vacate the said land within 7 days. No evidence has been placed before me to show that the Plaintiffs are not in possession. The Defendant's letter of 3<sup>rd</sup> January, 2014 shows the contrary.

27. Indeed, no evidence has been produced to show that the County Council of Tana River allocated the suit properties to Kinamulunde Women Farmers Association.

28. In the circumstances, I find and hold that the Plaintiffs have established a prima facie case with chances of success. It is the Plaintiffs who are in possession of the land and they are likely to suffer irreparably if the injunctive order is not granted.

29. For the reasons I have given above, I allow the Application dated 3<sup>rd</sup> March 2014 as prayed.

Dated and delivered in Malindi this 12<sup>th</sup> day of **September**, 2014.

**O. A. Angote**

**Judge**