



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 146 OF 2017

LEMMY SANGA MWANGOME & KEA KAZUNGU KADENGE

(Suing on behalf of 100 Members of Mwakeha Community,

Kadzinuni, Vipingo, Kilifi County).....PLAINTIFFS

AND

1. THE DISTRICT LAND REGISTRAR, KILIFI COUNTY

2. THE DISTRICT SURVEYOR, KILIFI COUNTY

3. THE CHAIRMAN ADJUDICATION COMMITTEE

4. THE NATIONAL LAND COMMISSION.....DEFENDANTS

RULING

1. On 3rd July 2017, the Plaintiffs Lemmy Sanga Mwangombe and Lea Kazungu Kadenge suing on behalf of 100 Others, filed this suit seeking an order compelling the 1st, 2nd and 3rd Defendants to re-do the survey and conduct a proper adjudication exercise in the Plaintiffs' Kadzinuni Area, Vipingo within Kilifi County. In addition, the Plaintiffs sought an order compelling the 4th Defendant to recognise and enter in their records the Plaintiffs' Mwakeha Community as the rightful owners of the parcel of land in which they now live.

2. Filed contemporaneously with the Complaint was a Notice of Motion application dated and filed the same day, seeking the same orders and urging that all the Defendants be condemned to pay the Plaintiffs' costs. The Motion which is supported by an affidavit sworn by Lemmy Sanga Mwangome is premised on the grounds:

a) That the Plaintiffs' Mwakeha Community are about to be completely dispossessed of their land following a survey and an adjudication exercise conducted by the 1st, 2nd and 3rd Defendants in December 2016; and

b) That unless a compelling order and/or declaration is immediately issued, the Plaintiffs Community stands to suffer irreparable loss and damage arising directly from the defendant's actions.

3. The said Lemmy Sanga Mwangome deposes in the short Supporting Affidavit to the application as follows:-

1. That I have been authorized together with the 2nd Plaintiff herein, Kea Kazungu Kadenge to file this suit on behalf of our community, Mwakeha Community. Annexed herewith and marked "L-1" is a copy of our Community resolution/authority.

2. That our community has been living in our ancestral land situated at Kadzinuni area, Vipingo, Kilifi County ever since time immemorial to-date but sometime in the month of December 2016, the 1st, 2nd and 3rd Defendants herein conducted a survey and adjudication exercise in our area following which our community is about to be completely dispossessed of our ancestral land anytime from now.

3. That unless this Honourable Court urgently hears our plea herein and considers our pleadings filed in Court, our community stands to suffer irreparable loss and damage following the actions of the 1st, 2nd and 3rd Defendants.

4. That our community did attempt to hold several discussions and negotiations with the 1st, 2nd and 3rd Defendants herein sometime in the months of January and February 2017 but all our efforts to amicably resolve this matter fell on deaf ears thereby necessitating our resolve to move this Honourable Court for the appropriate orders. Annexed herewith and marked in a bundle as “L-2” are copies of correspondences as well as the deed plan for our area.

5. That in the circumstances, I do verily believe that it is only fair and in the interest of justice and fairness that this Honourable Court do consider our prayers herein and do proceed to grant the appropriate orders and/or directions in this matter urgently as against the 1st Defendant, the 2nd Defendant and the 3rd Defendant herein.

6. What is stated above is true to the best of my knowledge and information save where otherwise stated.

4. In a Replying Affidavit filed herein on 1st November 2017 and sworn by David Kiama Njoroge, the District Surveyor Kilifi, the 1st, 2nd and 3rd Defendants respond that the Plaintiff’s claim is misplaced, misconceived and without basis. The Defendants admit that the Ministry of Land, Housing and Physical Planning carried out a survey and demarcation exercise on LR No. 8471/2 which land was formerly and until 20th September 2001, private property owned by Vipingo Plantations Ltd.

5. The Respondents aver that on the said 20th September 2001, the private owners surrendered back the land to the Government of Kenya upon which the Government sought a reservation of the land for purposes of creation of a settlement scheme in order to settle squatters within the area.

6. It is further the Respondents’ case that in the process of establishing community boundaries and identifying the persons to benefit from the project, it was realised that the village occupied by the Plaintiffs was not falling within the surrendered property. Upon exploration, it was established that the Plaintiff’s village falls within Plot No. 8427/1 which is private property registered under Vipingo Plantations Ltd, a private property.

7. The Respondents aver that the said position was explained to the Plaintiffs and the alleged claim that their village was left out deliberately without any explanation is untrue and the application is therefore without basis.

8. I have considered the application dated 3rd July 2017 and the response thereto. I have equally perused and considered the written submissions filed herein by the Learned Advocates for the parties.

9. The Motion before me is expressed to be brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules as well as Sections 1A, 1B and 3A of the Civil Procedure Act. From the tone of the pleadings herein, it is apparent that the Plaintiffs seek an order of injunction to restrain the Defendants from dispossessing the Plaintiffs of their community land.

10. The Defendants however deny that the land in question, being LR No. 8471/2 belongs to the Plaintiff’s community and/or that they are about to be dispossessed thereof.

11. In both the Complaint and the Motion before me, the Plaintiffs despite bringing themselves within the purview of orders of injunction instead seek declaratory reliefs in regard to their entitlement to what they consider their community land.

12. As Aburili, J stated in *Bitange Ndemo –vs- Director of Public Prosecutions & 4 Others (2016) eKLR*:-

“90. A declaration is a formal statement by the Court pronouncing upon the existence or non-existence of a legal Constitutional state of affairs. It declares what the legal position is and what are the rights of the parties. It does not contain an order which can be enforced against the respondents, as it only declares what is the legal position. It is not a coercive remedy, and can be carefully couched or tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that those public authorities comply with the law.

91. However a declaration can also be used to pronounce upon the legality of a future situation and in that way the occurrence of illegal action is avoided. In Bass –vs- Permanent Trustees Company Ltd(1999) 161 ALR 399 at Paragraph 89, Kirby J held that:-

“The Declarations development” is one of the most important and beneficial adventures in the administration of justice during this century.”

13. In regard to the need to establish locus in such cases, the Court of Appeal in *Johana Nyokwoyo Buti –vs- Walter Rasugu Omariba & Others Civil Appeal No. 182 of 2006* observed as follows:-

“A declaration or declaratory Judgment is an order of the Court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force-that is, it does not require anyone to do anything. It is available both in private and public law save in judicial review jurisdiction at the moment. The rule gives general power to the Court to give a declaratory Judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter.”

14. The matter before me is expressed to be brought by the two Plaintiffs on behalf of 100 members of the Mwamkweha Community of Kadzinuni Area, Vipingo in Kilifi County. It was the Plaintiffs’ claim that the Defendants have carried out a survey of the area and an

adjudication process that left out the portion occupied by the Plaintiffs village without offering any explanation whatsoever to the Plaintiffs.

15. As it were the two Plaintiffs have neither exhibited their interest in the surveyed area nor the adjudication process other than the claim that it left out their village. I did not understand it that the Defendants had a general statutory and or legal duty to carry out a survey and adjudication of all parcels of land and that they had either discriminated the Plaintiffs and/or failed or neglected undertaking any such responsibilities imposed upon them by any law. As it turned out while the suit is brought on behalf of 100 members of the said Mwamkweha Community none of the said 100 members are named herein nor have they shown how they stand to suffer the alleged irreparable damage and loss if the orders sought herein are not granted.

16. The claim is therefore made on behalf of members of a community whose membership is not named and whose entitlement to the said land has not been demonstrated. While the two Plaintiffs want themselves and their community registered as the rightful owners of the parcel of land they live in, nothing was placed before me to show that the said community lives within the alleged area and that they are entitled thereto.

17. At any rate, the Plaintiffs did not contest the Defendants' contention that the land they seek is already registered in the name of a third party-Vipingo Plantations Ltd, which party is not a party in these proceedings.

18. Arising from the foregoing, I did not find any merit in the Plaintiffs' application dated 3rd July 2017. The same is dismissed.

Dated, signed and delivered at Malindi this 14th day of March, 2019.

J.O. OLOLA

JUDGE