



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.73 OF 2019**

**1. DAUDI OMAR BARE**

**2. ABDEREMANI SUGHU GEDI (suing on their behalf and on behalf of 55 other**

**members representing the Wardei Community residing in tana river County).....PLAINTIFFS**

**VERSUS**

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

**RULING**

1. By this Notice of Motion application dated 28<sup>th</sup> August 2019, Daudi Omar Bare and Abderemani Sughu Gedi suing on their behalf and on behalf of 55 other Members said to be representing the Wardei Community residing in Tana River County pray for Orders:-

1.

*2. That leave be granted to the Plaintiffs to bring this suit on behalf of other 55 members of the Wardei Community members who have authorized the institution of this suit and on behalf of any such other interested Wardei Community member(s) who will have notice of the institution of this suit on behalf of the Wardei Community Members in a representative capacity.*

*3. That leave be granted by this Court to give notice of the institution of this suit through an advertisement in a newspaper of wide readership to the members of Wardei Community who have not authorized and signed the authority for the institution of this suit.*

*4. An Order of injunction to issue to restrain the Defendant by itself, its servants, agents(and) employees from encroaching/entering, clearing, alienating and or in any other manner howsoever and whatsoever from dealing with any part of land traditionally and ancestrally occupied, used appropriated and or utilized by Wardei Community ethnic members in Tana River County and in particular in Bulla Secondary Village, Gafur Village, Bulla Wenje Village, Hara village and Horesa Villeges in Tana River County pending the hearing of this application inter partes and thereafter pending the hearing and determination of this application and the suit herein.*

*5. That the costs of this application be paid by the Defendant.*

2. The application which is supported by an Affidavit sworn jointly by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Applicant is premised on the grounds that:-

*i) The Defendant has unconstitutionally, illegally and wrongfully entered into the ancestral and traditional community land of the Wardei Community which the Community for ages uses as grazing grounds for their livestock, and commenced clearing vast acreages of land without any public participation under Section 87 and 115 of the County Government Act and without the authority of the National Land Commission who constitutionally and legally administers the said land on behalf of the Defendant;*

*ii) The actions of clearing vast acreage of Wardei Community land is likely to displace the members who are predominantly pastoralists and their economic mainstay is livestock keeping hence ruining their socio-economic life;*

*iii) The Plaintiffs have through their representatives petitioned the Defendant to stop the said encroachment on their ancestral land but the Defendant has since August 2019 refused to heed to the said Petition and stop the activities.*

*iv) The Defendant's actions have brought tension and the likelihood of ethnic violence and bloodshed between the Wardei Community and the Pokomo Ethnic Community to which the Governor of the Defendant County comes from as the clearance of the land is to the benefit of the Pokomo Community which is predominantly agriculturalists and farmers; and*

*v) Unless the Orders sought herein are granted there is going to be ethnic violence and bloodshed in Tana River County between the Pokomo and the Wardei community members.*

3. The application is opposed. In a Replying Affidavit sworn on its behalf by the Acting County Attorney Isaiah Ndisi Munje, the County Government of Tana River (the Defendant/Respondent) avers that the application and the entire suit is defective on the grounds that:-

*a) They both violate the procedures for identification and registration of Community Land provided under the Community Land Act and Regulations;*

*b) Regulation 12(9) of the Regulations requires that any dispute arising from the process of recognition and adjudication of community land shall be resolved in the first instance through the mechanism provided under the Act and Regulations;*

*c) The Regulations provide for settling disputes through mechanisms such as mediation, arbitration and complaints to adjudication officers; and*

*d) That the Applicants have not exhausted the remedies provided under the said Regulations before instituting these proceedings in Court.*

4. The Defendant further avers that it is in the process of identification of unregistered Community land as a result of which it has been forced to create access roads and plan villages by identifying areas to put up public utilities including schools, hospitals, churches and mosques.

5. The Defendant avers that it has a Constitutional and statutory duty to identify all unregistered community land and in so doing to determine the perimeter boundaries and the Plaintiff cannot use the Court process to stop it from doing what it is legally authorized to do. The Defendant further avers that there has been continuous public education on the process of identification of unregistered community land and that no public participation was needed for this process.

6. The Defendant further asserts that the World Bank and the National Government have enrolled a programme dubbed the Kenya Urban Support Program (KUSPs) which supports the County Government to improve urban infrastructure. In this regard the Defendant invited relevant stakeholders through adverts placed on all the local dailies on 23<sup>rd</sup> October 2018 to participate in the preparation of the Integrated Strategic urban Development Plan for Zubaki, Kalkacha and Dayate Areas which plan was to establish among other things settlement boundaries.

7. The Defendant asserts that pursuant to the notice placed in the Dailies, several public participation meetings were held in the affected areas. These meetings authorized the upgrading of roads in the areas, the drilling of boreholes and early childhood centres and dispensaries among other things. They further assert that the upgrading process does not interfere with the grazing rights of any communities including that of the Plaintiffs.

8. In addition to the Replying Affidavit, the Defendant filed a Notice of Preliminary Objection dated 17<sup>th</sup> September 2019 urging the Court to strike out the application and the suit on the grounds that:-

*1. The application and (the) suit violate the procedures for identification and registration of community land provided in the Community Land Act and Community Land Regulations.*

*2. This Honourable Court lacks jurisdiction to entertain hear and determine the Applicants application and/or suit both dated 28<sup>th</sup> August 2019 in view of Sections 39, 40, 41 and 42 of the Community Land Act.*

9. On the 18<sup>th</sup> September 2019 both parties agreed to allow Prayers Nos. 2 and 3 of the application. Subsequently what remains for consideration before me is the prayer on the grant of an order of injunction as well as the issues raised in the Preliminary Objection which was argued as part of the Defendant's response. In this regard, I have considered the Plaintiffs' application and the response thereto by the Defendant. I have equally considered the written and oral submissions made before me by the Learned Advocates for the parties as well as the authorities to which they referred me.

10. According to the Plaintiffs, the Defendant County Government has unconstitutionally, illegally and wrongfully entered into their ancestral and traditional community land. As a result, members of the Wardei Community to which the Plaintiffs belong are now deprived of grazing land for their livestock and are likely to be displaced after the Defendant commenced clearing vast swathes thereof for its own purposes.

11. The Defendant does not deny entering the land concerned. It however asserts that it is doing so pursuant to a Constitutional and statutory authority which requires it to identify all unregistered community land and to determine the perimeter boundaries thereof. It is further the Defendant's case that it is presently carrying out a Programme aimed at improved urban infrastructure within its area of jurisdiction. This Programme which is being carried out in the affected area jointly with the National Government with the Support of the World Bank has been according to the Defendant, undertaken after the involvement of all concerned stakeholders and has not interfered with the grazing rights of any community residing within Tana River.

12. According to the Plaintiffs the land in question is occupied by the Wardei Community members. It is further their case that the land in dispute is held on behalf of their community by the Defendant in trust for the residents of the areas known as Bulla Secondary, Gafur, Bulla Wenje, Hara and Hororesa Villages in Tana River County. It is further their case that their community members have been using the unregistered community land for decades.

13. As it were Article 63(2) of the Constitution provides as follows:-

***“Community land consists of land that is-***

***(i) Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines.***

***(ii) Ancestral land and lands traditionally occupied by hunter-gatherer communities.***

***(iii) Lawfully held as trust land by the County Governments.***

***but not including any public land held in trust by the County Government under Article 62(2).***

14. Article 63(4) of the Constitution further provides that “Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

15. From the material placed before me, the land in question was however not clearly identifiable even though both the Plaintiffs and the Defendant appeared to know where the land lies within Tana River County. In order for this court to be able to ascertain in which category of land the disputed area of land falls, I think it was incumbent upon the Applicants to adduce evidence to support their contention that the suit land is unregistered community land falling under Article 63 of the Constitution of Kenya.

16. As it were this is a case whereby not only is the category of the suitland unknown but even the extent of the land in dispute is unknown. A Court of law ought to issue orders that are capable of being enforced. If this Court was to allow the application for injunction as sought under Prayer No. 4, difficulties would certainly arise in enforcing such orders taking into consideration that the land is vast and not clearly demarcated.

17. While the Plaintiffs claim that their Wardei Community was being unjustifiably targeted with a view to giving advantage to the rival Pokomo Community, I did not find any substance in their allegations. The material before me points to a project being carried out by the County Government in a number of areas within Tana River County and not just the areas occupied by the Plaintiffs’ community and there was absolutely no evidence placed before me to indicate that one community was being targeted and/or that another was being favoured by the Defendant County Government.

18. Besides while the Plaintiffs contended that the Project was being carried out without public participation, it was clear to me that by an advertisement placed in the local Dailies by the Defendant on 23<sup>rd</sup> October 2018(annexture INM 1 of the Replying Affidavit) notice had been given to all area residents and stakeholders to give their views or suggestions to the Defendants. The Plaintiffs did not deny that pursuant to the said notice, the Defendant held several meetings in Dayate, Kalkacha and Zubaki where the on-going projects received public approval.

19. Given that the Defendant has since commenced the said Projects with the assistance of the National Government and donors, I am persuaded that the Defendant and the greater people of Tana River stand to suffer greater prejudice if the Projects were to be stalled with the possibility of vast sums of Public funds already spent on the Projects going to waste.

20. In the circumstances, I did not find any merit in the Plaintiff’s application. The same is dismissed with no order as to costs.

**Dated, signed and delivered at Malindi this 5<sup>th</sup> day of December, 2019.**

**J.O. OLOLA**

**JUDGE**