



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 4 OF 2017

HASSAN MAALIM ABDALLAPLAINTIFF

=VERSUS=

COUNTY GOVERNMENT OF MARSABIT.....1ST DEFENDANT

ISSACK MAALIMYUSSUF

Alias DUBOW MAALIM YUSSUF.....2ND DEFENDANT

RULING

1.This suit was filed on 9.1.2017 along with the usual application for injunction. As directions were under way on how the application was to be argued, 2nd defendant filed a preliminary objection on 27.3.2017.

2. On 3.5.2017, the court gave directions for the preliminary objection and the application to be dealt with simultaneously and submissions were to be filed to that effect.

3. It is noted that 1st defendant has so far not participated in the proceedings herein. Plaintiff and 2nd defendant have duly filed submissions in respect of the preliminary objection and the application.

Preliminary objection of 27.3.2017

4. This preliminary objection was filed by 2nd defendant on the following grounds;

(i) That the suit herein is incurably defective, incompetent and bad in law as it is a representative suit as pleaded under paragraph 4 of the plaint and yet no leave was sought at the time of its institution or indicated on the heading of the plaint, the same having been filed for and on behalf of four families and no leave of court was sought in terms of order 1 rule 8 (1) of the Civil Procedure Rules.

(ii) The suit herein identifies no suit property, the plaintiff has shown no registered nor registrable interest on any suit property and is not a community or member of a community residing in the area and is instead burdening the court to identify for them their property rights and community.

(iii) The plaintiff has abandoned ongoing dispute resolution mechanism, under the community Land Act thereby offending sections 39, 40, 41 and 42 of the community land act and has not shown that the said procedures have failed before coming to this court hence this suit is an abuse of the court's process.

(iv) The suit and the application offends all the known principles for the grant of equitable remedy of injunction and in particular does not disclose a prima facie case in so far as it involves a non-established and unknown interest of an unidentified suit property.

(v) The plaintiff's suit and application are an abuse of the court process, a non-starter and incurably defective due to lack of locus standi on the part of the plaintiff.

(vi) The plaintiff has neither common law nor any legal rights in respect of the suit property in respect to which equitable remedy of an injunction can be predicated.

(vii) The suit herein is incurably defective, incompetent and bad in law as the alleged suit property is alleged to be community land and the plaintiff lacks locus standi to sue on behalf of the community and has no authority to represent the community and has failed to indicate if he is a member of the community residing in the area.

5. What is a preliminary objection?

In **Mukisa Biscuit Manufacturing Co. Ltd verses West End Distributors Ltd (1969) E.A 696**, it was stated that **“So far as I am aware of a preliminary objection consist of a point of law which has been pleaded or which arises by clear implication out of pleading, and which if argued as a preliminary point may dispose off the suit**”.

6. In the case of **Anoro verses Mbajja (2005) eKLR, JB Ojwang J (as he then was)** had this to say regarding a preliminary objection; **“I think the principle is abundantly clear. A preliminary objection correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event to be proved through the processes of evidence. Any assertions which claims to be preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principles, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point”**.

7. On ground 1, 5 and 7 it is submitted by 2nd defendant that plaintiff has no locus standi as the suit is filed on behalf of the community yet no notice was given to the members of the community. Plaintiff on the other hand argues that the suit is brought on behalf of four families who have signed an authority on 6.1.2017 giving plaintiff mandate to commence these proceedings.

8. In paragraph 4 of the plaint, it is stated that **“the plaintiff brings the suit on behalf of his own Mumina Maalim Abdalla family and on behalf of three other families i.e. Maalim Hassan Alio, Ahmed Hassano Kale and Maalim Ibrein Hassano families”**.

9. The members of these families have availed the **“Authority to sign”** dated 6.1.2017 (filed on 9.1.2017), authorizing the plaintiff to sign an affidavit and pleadings on their behalf.

10. I am therefore inclined to find that the provisions of order 1 rule 8 of Civil Procedure Code have not been violated by the plaintiff. There in, it is stipulated that; **“Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them”**.

11. The Preliminary Objection fails on ground 1, 5, and 7.

12. In ground 2, it is averred that there is no suit property identified by the plaintiff. True, the plaint doesn't mention the actual suit property. However paragraph 18 of the plaint has given a description of where the land is. It is approximately 300 hectares in Yaballo sub location of Nana location. The land appears to be unregistered.

13. Article 63 of the constitution recognize the existence of such land where it is stated that; ***“Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Community land consists of; Land lawfully registered in the name of group representatives under the provisions of any law, Land lawfully transferred to a specific community by any process of law, any other land declared to be community land by an Act of Parliament and land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines, ancestral lands and lands traditionally occupied by hunter gatherer communities or lawfully held as trust land by the county governments”.***

14. The fact that the land is not registered does not imply that no rights and interests can be claimed on such land. After all, even 2nd Respondent knows where this land is. He is also claiming to own the property. The Preliminary Objection fails in ground 2.

15. In ground 3, it is averred that plaintiff has abandoned the dispute resolution mechanisms provided under section 39, 40, 41 and 42 of the community land. Although I have seen some proceedings indicating that the dispute was being resolved in a joint consultative meeting, the nature and extent of the dispute resolution forum is not known to this court. In any event, the community land Act doesn't oust the jurisdiction of the court as enshrined under article 165 of the constitution. The Preliminary Objection fails on this ground.

16. Ground 4 & 6 are in essence a response to the application and do not raise a pure point of law.

17. In Mukisa Biscuit case (Supra) it was stated that ***“The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs, an occasion complete issues.....”***

18. The present preliminary objection is indeed improper in that 2nd defendant is raising issues that clearly invite arguments. I find that the preliminary objection is unmerited. The same is dismissed with costs to plaintiff.

Application dated 6.1.2017

19. In the application dated 6.1.2017, the plaintiff/applicant seeks the following orders; ***“ That this honourable court be pleased to grant an order of temporary injunction restraining the 1st defendant from developing, alienating, selling disposing off, transferring, converting for public purposes, or in any other manner interfering with approximately 300 hectares of land located in Yaballa sub-location, Nana location of Moyale sub-county belonging to the Mumina Maalim Abdulla, Maalim Hassan Alio, Ahmed Hassano Kale and Maalim Ibrein Hassano families pending the hearing and determination of the application and the suit”.***

20. Further, applicant is seeking for ***“ a temporary order of injunction to restrain the 2nd defendant from entering, grazing, utilizing, selling, alienating, cultivating, developing, leasing or in any other manner otherwise interfering with approximately 300 hectares of land located in Yaballa sub-location, Nana location of Moyale sub-county belong to the Mumina Maalim Abdulla, Maalim Haddan Alio, Ahmed Hassano Kale and Maalim Ibrein Hassano families pending the hearing and determination of this application and the suit”.***

21. The grounds in support of the application are;

(a) That the 1st defendant vide a letter dated 9th December 2016 is purporting to confer ownership of the subject parcel of land to one Issack Maalim Yussuf the 2nd defendant herein.

(b) That the subject parcel of land is unregistered communally owned family land which has been in the Mumina Maalim Abdulla, Maalim Hassan Alio, Ahmed Hassano Kale and Maalim Ibrein Hassano families since 1974.

(c) That section 6 (8) of the community land act no 27 of 2016 specifically prohibits a County Government from selling, disposing, transferring, converting for private purposes or in any other manner disposing off any unregistered community land that is holding in trust on behalf of communities for which such land is held.

(d) That the County Government of Marsabit through its Town Administrator purports to act based on a dubious report and recommendation which in part alienates 50 acres of the subject parcel of land for development of public institutions without any form of compensation to the rightful owners.

(e) That the 2nd defendant has made preparations to cultivate and develop the subject property and indeed has taken tractors to the scene with the clear intention of assuming occupation and possession.

(f) That the situation on the ground is extremely fragile and volatile as the 50 members of the 4 families that rightfully own the property will be deprived off their land which they cultivate and use to graze their livestock and this could degenerate to violence should restraining, injunctive and/or preservative orders are not granted herein.

(g) That land is indeed a very emotive and sensitive subject in the region and the actions by the 1st defendant pose a grave threat to peace and tranquility in the area.

(h) That the 2nd defendant is an extremely wealthy individual who exercises immense political clout in the region and this has resulted in him unfairly influencing the 1st defendant's decision making process with the end result being the plaintiff being dispossessed of their lawfully owned land.

(i) That no prejudice will be occasioned upon either of the defendants if restraining and/or injunctive orders are granted pending the hearing and determination of this application and suit.

22. The applicant has filed a rather lengthy affidavit dated 6.1.2017. the gist of contents of the said affidavit are that applicant is claiming entitlement to the suit land for himself and for other families namely:

- Maalim Hassan Alio family
- Mumina Hassano Kale family
- Maalim Ibrein Hassano family
- Ali Abdulla Mohamed family
- Habiba Mohamed Ali family
- Dahir Madey Balle family
- Abdikadir Mohammed family
- Ali Adikadir Mohammed family

23. Applicant avers that the suit land comprises of 300 hectares in acreage and they desire to have the land registered on community land.

24. The respondent has equally filed a very lengthy affidavit (dated 7.2.2017). He is claiming ownership of 200 acres or thereabout of the suit land. He has given an account of how he acquired the land. The

respondent avers that he took over the suit land in 1992 and he has been farming on the land to date.

25. Respondent further states that he has fenced the land and tills the same.

Determination

26. I have weighed all the issues raised herein including the submissions of the parties. No doubts, this is a rather acrimonious matter with a turbulent history.

27. I find that this is a case whereby there was an attempt to resolve the dispute through Alternative Dispute Resolution mechanism, and this is evident in paragraph 32 and 33 of the replying affidavit of the 2nd Respondent and paragraph 28, 29, 30, and 31 of the applicant's affidavit. Applicant avers that the decision of the joint consultative meeting was in his favour whereas respondent avers that the report thereof contains falsehood.

28. From the materials so far presented, this court is not able to state with certainty the category under which the land falls. None of the parties have conclusive documents of ownership of the land. The applicant is claiming the land as unregistered community land whereas respondent appears to be claiming the land as private land.

29. I note that the land in question is not clearly identifiable but the parties herein know where it is situated. It is in Yaballa sub-location of Nana location in Moyale sub-county.

30. It is incumbent upon the applicant to adduce evidence to support the contention that the suit land is unregistered community land falling under article 63 of the constitution of Kenya. On the other hand, respondent would require to satisfy the court that his claim falls under article 64 of the constitution. These are certainly not issues that can be determined at the interlocutory stage of the suit.

31. This is a case where by not only is the category of the suit land is unknown to this court, but even the extent of the land is unknown.

32. It is incumbent upon a court of law to consider the effects that orders emanating from the interlocutory stage may have in the final analysis.

33. Further, a court of law ought to issue orders that are capable of being enforced. If this court was to allow the application for injunction especially prayer 4 and 5 (the injunction against 2nd respondent), difficulties would certainly arise in enforcing such orders taking into consideration that the land is vast and not clearly demarcated.

34. I need not re-invent the wheel. In the court of appeal case of **Mbuthia versus Jimba Credit Corporation (1988) eKLR**, the court eruditely elucidated the approach which courts should adapt when handling interlocutory applications. Platt J. had opined as follows; **“the approach in dealing with an application for an injunction is not to decide the issues of fact but rather to weigh up the relevant strength of each sides proposition”**.

35. This is a case whereby the parties have to establish their legal rights first and foremost before invoking the court's protection to the effect that their rights have been infringed. In the circumstances I do not wish to make a determination on disputed facts and issues.

36. This is however a matter whereby 1st respondent was apparently served but failed to make any response yet the input of the county government is very crucial in the determination of the dispute. It will hence be necessary to grant orders to ensure that 1st respondent doesn't alienate the land.

37. Further, I find that this is a dispute where there is a need to explore Alternative Dispute Resolution Mechanism.

38. In the circumstances, I proceed to give the following orders:

1. A temporary order of injunction is issued restraining the 1st respondent from alienating the suit land situated in Yaballa sub-location Nana Location of Moyale Sub-county
2. Pursuant to provision of order 46 rule I parties are directed to explore Alternative Dispute Resolution Mechanism in terms agreeable to all the parties.
3. This order is to be served upon the 1st defendant within 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 11th APRIL, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

F. Gitonga for plaintiff – absent

No appearance for 1st defendant - absent

Adan for 2nd defendants - present

HON. LUCY. N. MBUGUA

ELC JUDGE