



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO . 247 OF 2016

RAPHAEL MENZACHAIRMAN

LENOX M. NGALA.....SECRETARY

JEREMIAH C. KITHI (Suing on behalf of Mibuyu Saba

2nd, 3rd Rows and Adjacent

Areas Squatter Formation Scheme.....PLAINTIFFS/APPLICANTS

=VERSUS=

THE COUNTY EXECUTIVE COMMITTEE MEMBER,

LAND & ENERGY, HOUSING, URBAN DEVELOPMENT

& PHYSICAL PLANNING

JOSEPH KATANA CHARO

RAHAB WILLIAM DANIEL.....DEFENDANTS

RULING

1. Before me is a Notice of Motion Application dated 15th September 2016. The Application is brought by Raphael Menza, Lenox Ngala and Jeremiah Kithi who describe themselves as Chairman, Secretary and member respectively of a Community Based Organisation known as Mibuyu Saba 2nd, 3rd Rows and Adjacent Areas Squatter Formalisation Scheme, on whose behalf, they have brought the suit. The Application prays for Orders: -

(i) THAT the Defendants/and Respondents their servants/agents/employees/hirelings be restrained and barred from having any dealings with the land in Mibuyu Saba Second, (and) Third Rows and Adjacent Squatter Formalisation until the hearing and determination of this application.

2. The Application is supported by an affidavit sworn by Raphael N. Menza on 15th September 2016 and a further one sworn on 9th December 2016. The gist of the application is that the said Mibuyu Saba Community Based Organisation(CBO) has the sole jurisdiction to deal with plots in its area of

jurisdiction. Despite this, the County Government of Kilifi through its County Executive Committee Member in charge of Lands, Energy, Housing, Urban Development and Physical Planning (sued herein as the 1st Defendant) has without any colour of right or power proceeded to allegedly dissolve the CBO's Committee headed by the Plaintiffs herein and have instead appointed another committee headed by the 2nd, 3rd and 4th Defendants to deal with the issue of settlement of residents and/or Plot owners in the CBO's area of jurisdiction. It is further the Plaintiffs' case that the 2nd, 3rd and 4th Defendants are now going round urging residents in the area to open files with them. The said actions of the defendants is likely to lead to a breach of the peace as the residents do not understand why they are being asked to open files when they are now only waiting to have the final process of survey done so that titles can be issued to them.

3. The Application is opposed. In a Replying Affidavit sworn by James Kapanga Ngunzo, the Chief Officer of the 1st Defendant, the County Government of Kilifi contends that the Applicants are not recognized by law as the Certificate they purport to rely on has expired and there is no renewal stamp thereon. It is further the Defendant's case that the Plaintiffs have failed to execute the mandate they claim to have as a result of which it has become necessary for the National Land Commission and the 1st Defendant to intervene and ensure area residents are settled. The Defendants aver that due to conflicts between two groups purporting to be the proper representatives of the area residents, the County Government of Kilifi was compelled to intervene to find a lasting solution after concerns were raised by the community concerning the delayed settlement process.

4. I have carefully gone through the Application for an injunction as well as the Replying Affidavit sworn in objection thereto. I have also studied the rival submissions and authorities filed by counsels for the respective parties. In deciding whether or not to grant the injunction sought the court must be satisfied that the principles set out in *Giella -v-s Cassman Brown (1973) EA 358*, have been met. Accordingly, the first point for consideration by this court is to establish whether or not the Plaintiff has made out a prima facie case with a probability of success.

5. From the pleadings filed herein, the Plaintiffs contend that they have the sole jurisdiction to manage the settlement of plot owners on the Mibiyu Saba 2nd and 3rd Rows and Adjacent Areas Squatter Formation Scheme and that they stand to suffer irreparable loss if the court does not grant the orders sought to restrain the defendants who are hell-bent on interfering with the substantial work which they have done. It is their submission that starting the process all over when the survey had been done and the survey plan approved will mean the Plaintiffs losing in terms of money and time which loss they state, cannot be qualified.

6. The Plaintiffs are a Community Based Organisation duly registered as a self-help Group under the Ministry of Gender, Children and Social Development with effects from 11th August 2004. To their credit they have in their further affidavit annexed a Certificate which has been renewed over the years the last one being 11th May 2016. It is therefore not true that they are a group unrecognized in law as contended by the 1st Defendant. Their application for an injunction herein against the Defendants is based on their belief that they have the sole right to deal with the plots or land in their area of jurisdiction.

7. Arising from the evidence placed before me, it is apparent that the area in contention is a settlement scheme with at least two warring factions seeking to carry out the settlement process. I take note that land in Kenya is classified as public, **community or private**. **With regard to "Community land", Article 63 of the Constitution provides:**

(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community interests

(2) Community land consists of

(a) Land lawfully registered in the name of group representatives under the Provisions of any law;

(b) Land lawfully transferred to a specific community by any process of law;

(c) Any other land declared to be community land by an Act of Parliament; and

(d) Land that is

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

(ii) Ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) Land that is lawfully held as trust land by the County Government, but not including any public land held in trust by the County Government under Article 62(2)

(3) Any unregistered community land is held in trust by county Governments on behalf of the communities for which it is held.

8. In my considered view, the County Government of Kilifi acting through the 1st Defendant or any other organ is the body mandated to manage such settlement schemes and all public land under its jurisdiction as provided by dint of Article 63(2) and (3) of the Constitution. In light of the fact that two warring factions had emerged and stalled the adjudication and settlement process in the area, I think it was perfectly in order for the County Government of Kilifi to intervene through the 1st Defendant in the manner in which it did in furtherance of its constitutional obligation. The 1st Defendant was in my view carrying out the mandate of the County Government in ensuring that there is progress towards settlement of the residents of Mibuyu Saba and I find no basis to issue an injunction against the 1st Defendant or the 2nd, 3rd and 4th Defendants who were appointed to move forward the settlement process. I am not satisfied that the Plaintiffs will suffer any or the alleged loss and damage where the process were to be carried out in the manner proposed by the Defendants.

9. The upshot is that the application dated 15th September 2016 is dismissed. Each Party shall bear their own costs.

Dated, signed and delivered at Malindi this 16th day of June, 2017.

J.O. OLOLA

JUDGE