



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 213 OF 2014
LAMECK JILLO KOMORA.....CHAIRMAN
JOSEPH KOMORA JILO.....TREASURER
LILIAN BAHATI.....SECRETARY
(suing for an on behalf of METHODIST CHURCH OF KENYA,
CHEWANI METHODIST CHURCH).....PLAINTIFF/APPLICANT

=VERSUS=

- 1. THE CHIEF CHEWANI LOCATION**
- 2. MUSTAFA BATWOYA JUMA**
- 3. ISSA HAMARA**
- 4. AKARC HAMARA**
- 5. MCHAWALA JARHA**
- 6. AWADH DOYO DHIDHA**
- 7. ALI DHADHO ODDO**
- 8. ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS**

RULING

Introduction:

1. What is before me is the Plaintiff's Application dated 11th November 2014 seeking for the following orders:

- (a) That upon interpartes hearing this Honourable Court do issue a temporary injunction against the Defendants/Respondents restraining them by themselves, agents, assigns, servants, employees, agents or any other person claiming under them from interfering in any**

manner whatsoever with the Plaintiffs quiet possession and enjoyment of its plot PDP NO. TRD 312/2010/13 in Chewani village within Chewani location, Tana River county pending the final determination of this application and suit.

(b) That the Officer Commanding Station (OCS) Hola police station do provide security and assist in effecting this order.

(c) That the cost of this Application be provided for.

2. The Application is premised on the ground that the Plaintiff is the beneficial and legal owner of land measuring approximately 5 acres and depicted on PDP number 312/2010/13 Chewani village within Chewani Location in Tana River.

The Plaintiff's/Applicants case:

3. According to the Affidavit of the Plaintiff's Chairman, the Plaintiff applied to be allocated land to the then Tana River County Council; that on 18th April 2010, the Clerk to the Council informed the Plaintiff that the Council had allocated it 5 acres of land depicted on PDP number TRD/312/2010/13 and that the Plaintiff was then issued with a letter of allotment by the Council.

4. The Plaintiff's Chairman has deponed that the Plaintiff paid the requisite fees and thereafter the Director of Physical Planning published a notice in Taifa Leo newspaper and the Gazette notice the Part Development Plan in respect to the suit property.

5. It is the Plaintiff's case that PDP number TRD 312/2010/13 was then approved by the Ministry of Lands and the Plaintiff commenced developing the land.

6. However, in February 2010, the 1st Defendant informed the Plaintiff's officials that the land in question belonged to the community.

7. It is the deposition of the Plaintiff's chairman that the Defendants have on numerous occasions threatened the church committee from undertaking any further development on the suit property insisting that the land belonged to Chewani Primary School.

The Defendants/Respondents' case:

8. The 1st Respondent deponed that the suit property is a playground belonging to Chewani Primary School; that the site also hosts Administration Police lines, chief's office, a dispensary and a host of other public utilities and that the community has donated alternative land for purposes of the Plaintiff's construction of a church.

9. According to the 1st Defendant, the PDP attached on the Applicant's Affidavit does not confer any proprietary rights over the disputed land to the Plaintiff and that the orders sought should not be granted because the same will create acrimony within the community.

10. It is the 1st Defendant's deposition that when the PDP in respect to the suit property was circulated, the community raised objections and that it was resolved that the plot should remain vacant.

11. In the affidavit, the 2nd Respondent deponed that before allocating the suit property to the Plaintiff, the council should have consulted with the community first; that the District Commissioner arbitrated over the dispute and recommended that the plot in question should be left vacant and that the letter of allotment and the PDP were acquired by the Plaintiff irregularly.

12. According to the 2nd Respondent, the community of Chewani gave the consent for the construction of a temporary Administration Police Post on the plot in question.

Submissions:

13. The Plaintiff's/Applicant's advocate submitted that the Plaintiff was allocated the suit property after due process was followed and that the Applicant has satisfied the principles set out in the Giella case.

14. The Defendants'/Respondents' counsel submitted that the Primary School is the one with a "Certificate of Title" issued in 1996 since land in Tana River County has not been adjudicated; that the suit property belongs to Chewani Primary School and that a Part Development Plan does not in any way confirm any proprietary rights over the disputed land.

Analysis and findings:

15. The Plaintiff's claim in this matter is that it was allocated the suit property by the then County Council of Tana River.

16. The Plaintiff has annexed on its Affidavit the Application it made to the Council dated 22nd December 2009 requesting to be allocated 30 hectares of land within Chewani/Kiarikungu Ward.

17. The Plaintiff's request was placed before the committee of the Council on 23rd February 2010. On the said date, the Town Planning and Markets Committee resolved to allocate to the Plaintiff 5 acres of land and not the requested 30 acres.

18. The Plaintiff was informed of the Council's resolution by the County Clerk vide a letter dated 18th April 2010. The Plaintiff was then issued with a letter of allotment by the Council.

19. A Part Development Plan number TRD/312/10/13 "for proposed site for Chewani Methodist Church" was then published in the Taifa Leo newspaper of 18th June, 2010 and in Gazette notice number 7038 of 18th June 2010.

20. Other than the publication of PDP number TRD/312/10/13 in the Gazette, the said PDP was also circulated to different institutions within the County for their comments.

21. The County Government and the District Commissioner, vide their letters dated 12th June 2012 did not have any objection to the proposed site for "Chewani Church-Hola."

22. The PDP that was approved by the Ministry of Lands on 23rd September 2012 has been annexed on the Plaintiff's Affidavit.

23. On the other hand, the Defendants' case is that the land in question is a playground for Chewani Primary School.

24. According to the Defendants, the Community had decided that the property should be set aside for the construction of an Administration Police Post and the Chief's Offices and that the Community did object to the allocation of the land to the Plaintiff when PDP number TRD/312/10/13 was circulated.

25. The Defendants annexed on their affidavit the Minutes of the "Locational Development Committee held on 4th February, 1996, the sketch map showing the position of the suit property and Chewani Primary School and the letter of the District Commissioner dated 23rd June 2010.

26. The Plaintiff was allocated the suit property, which is Trust land before the promulgation of the current Constitution.

27. For this court to determine if indeed the Plaintiff followed due process before the said allocation, the applicable law to be considered is the repealed Constitution and the Trust Land Act, Cap 288.

Unfortunately, none of the advocates addressed me on this aspect.

28. Section 115 of the repealed Constitution allowed Parliament to enact a law to empower County Councils to set apart an area of Trust land vested in that County Council for a purpose that is likely to benefit the people that ordinarily reside in that area or any other area of Trust land.

29. According to the said Section, the setting apart of Trust land was to be in accordance with an Act of Parliament, which, in this case is the Trust Land Act.

30. The procedure that should be followed while setting apart Trust land pursuant to the provisions of Section 117 of the repealed Constitution is provided for in Section 13 of the Trust Land Act.

31. Before the Council could set apart Trust Land, it had to notify the Chairman of the relevant Divisional Board (which used to be known as the District Development Committee) whereafter the Board would meet to consider the proposal.

32. The recommendation of the Board was supposed to be considered by the Council. The proposal to set apart the land would not be taken to have been approved by the Council except by a resolution passed by a majority of all the members of the Council.

33. However, where the setting apart is not sanctioned by the Board, the resolution to set apart such land by the Council was to be passed by three quarters of all the members of the Council.

34. It is only after the Council approves a proposal to set apart land in accordance with the law that a notice of the setting apart of the land is published in the Gazette.

35. Section 13(2)(a) of the Trust Land Act is clear that it was the responsibility of the Council to bring the proposal to set apart the land to the notice of the people of the area concerned, and to inform them of the day and time of the meeting of the Divisional Board at which the proposal was to be considered.

36. That is the procedure that the then County Council of Tana River was supposed to have followed before it allocated the suit property to the Plaintiff on 23rd February, 2010.

37. There is no evidence before this court to show that the proposal to set apart the land for the purpose of putting up a church and other developments was ever considered by the District Development Committee or the Divisional Board before the Council allocated the suit property to the Plaintiff.

38. There is also no evidence before this court to show that the resolution of the Town Planning and Markets Committee was ever placed before the full Council for adoption pursuant to the provisions of Section 13(2)(d) of the Trust Land Act.

39. The law is clear that the residents of the area were supposed to be involved in the deliberation of allocating the suit property before the gazettment of the PDP.

40. The evidence before this court shows that before the PDP in respect to the suit property was published in the Gazette on 18th June, 2010, the 1st Defendant had written to the Council on 16th March, 2010 and 22nd April 2010 objecting to the allocation of the land to the Plaintiff.

41. The Defendants have also annexed the Minutes of 8th April 2010 showing that certain members of the Committee objected to the allocation of the suit property to the Plaintiff. The resolution of that meeting was communicated to the Council by the District Commissioner in his letter dated 23rd June 2010.

42. No evidence was placed before this court to show that the concerns of the people who opposed the setting apart of the suit land were deliberated upon by the Council or the Divisional Board as required under the law. The District Physical Planner just went ahead to publish in the Gazette notice of 18th June

2010 PDP number TRD/312/10/13 and had it approved by the Minister for Lands on 23rd September 2012.

43. In the circumstances, and considering that the land in question is Trust land as defined in the repealed Constitution, I find and hold that the Plaintiff has not established, prima facie, that due process was followed in the setting apart of the suit property. The involvement of the local community, the full council and the Divisional Board was paramount before the land could be allocated to the Plaintiff.

44. Having failed to establish a prima facie case with chances of success, I dismiss the Plaintiff's Application dated 11th November 2014 with costs.

Dated and delivered in Malindi this 5th day of **June**, 2015.

O. A. Angote

Judge