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**land and Trust Land**

**2. Dealings in Trust land**

**3. Dealings in**

**Government Land**

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 168 OF 2012**

**BAHOLA MKALINDI.....PLAINTIFF**

**=VERSUS=**

**1. MICHAEL SETH KASEME**

**2. SAMUEL KINGI MWANGI**

**3. COUNTY COUNCL OF TANA RIVER.....DEFENDANTS**

**R U L I N G**

1. The Application before me is the one dated 31<sup>st</sup> October 2012 and filed on 1<sup>st</sup> November 2012. The Application was filed pursuant to the provisions of Order 40 of the Civil Procedure Rules and it seeks for the following orders.

- a. **THAT the Honourable Court be pleased to issue an order of temporary injunction restraining the 1<sup>st</sup> Defendant/Respondent and/or any other agent under the direction of the 1<sup>st</sup> Defendant/Respondent and/or authority from trespassing and/or encroaching onto and/or purporting to lay poles around and/or digging trenches and/or constructing any structure on a portion of land next to the Redeemed Church Hola which property is also adjacent to Laza Primary School and Laza Polytechnic which property belongs to the Plaintiff as the heir of the larger Duko family which is unsurveyed and therefore unregistered pending the hearing and determination of this suit.**
  - b. **THAT the Honourable court be pleased to issue an order of temporary injunction restraining the 2<sup>nd</sup> Defendant from constructing any additional structures on the suit property on the section/portion illegally allocated to the 2<sup>nd</sup> Defendant/Respondent by the 3<sup>rd</sup> Defendant/Respondent pending the hearing and determination of the suit filed herein.**
  - c. **THAT the Honourable Court be further pleased to issue an order of temporary injunction restraining 3<sup>rd</sup> Defendant/Respondent from allocating the Plaintiff's land, the suit property, to unsuspecting third parties and/or members of the public pending the hearing and determination of this suit.**
  - d. **THAT the Defendants be condemned to pay the costs of this application.**
2. The Application is supported by the Plaintiff's Affidavit and on the grounds that on or about August 2012, the 1<sup>st</sup> Defendant commenced illegal development project on the Plaintiff's land; that the purported allocation by the 3<sup>rd</sup> Defendant of the portion of land forming part of the suit property is illegal and that the 2<sup>nd</sup> Defendant has been illegally allocated by the 3<sup>rd</sup> Defendant the Plaintiff's property which portion forms part of the land belonging to the large Duko family.
  3. The Plaintiff has deponed that he is the beneficial owner of the suit property which is unsurveyed and which the Duko family has occupied, lived and farmed since time immemorial.
  4. According to the Plaintiff, the 3<sup>rd</sup> Defendant allocated to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants his portion of land vide a letter dated 6<sup>th</sup> August 2012 and that on the strength of the said letter, the 1<sup>st</sup> Defendant commenced clearing of the indigenous bush on the suit property in readiness for development.
  5. It is the Plaintiff's further deposition that in 1957, his late father, Paul Bahola Duko, let their ancestral land to the colonial administration for various agricultural activities including an irrigation scheme which was the predecessor of the Hola Water Supply Project which project is still on the family land.
  6. The Plaintiff filed a Further Affidavit on 16<sup>th</sup> May 2013 and stated that the suit property is community land; that there are no documents indicating that the suit property was planned as a town and that if there was any plan that was prepared pursuant to the Physical Planning Act affecting the County Council of Tana River, the same did not have any legal authority to dispossess the community of its ancestral rights over the community land.
  7. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their Replying Affidavits on 6<sup>th</sup> November 2012 while the 3<sup>rd</sup> Respondent filed its Replying Affidavit on 20<sup>th</sup> March 2013.
  8. The 1<sup>st</sup> Respondent deponed that the Plaintiff is not the beneficial owner of the land in question; that he acquired the suit property legally and procedurally; that the Plaintiff has not demonstrated how he came to own the land and whether he obtained grant of letters of administration as provided for under the Law of Succession Act.
  9. According to the 1<sup>st</sup> Defendant/Respondent, the said Duko family have their ancestral land which is separated by the road to Hola and to Laza of which the Ministry of Water took part of it; that the land that was allocated to him was government land and it was being utilised by the Ministry of Agriculture as a pilot project and that the land that was allocated to him has never had any vegetation or any structures as it was a sandy/quarry mining site.
  10. The 1<sup>st</sup> Respondent further deponed that the suit property was allocated to him by the resolution of the 3<sup>rd</sup> Respondent whereafter the District Survey Office surveyed the property and issued a beacon certificate.
  11. It was the 1<sup>st</sup> Respondent's deposition that he was subsequently issued with a letter of allotment

- by the 3<sup>rd</sup> Defendant who also approved the development plan for a Tourism and Environmental Conservation Project Site.
12. The 2<sup>nd</sup> Respondent deponed that the Plaintiff has not demonstrated how he came to own the suit property and whether he took out the letters of administration having admitted that the land in question belonged to his late father.
  13. According to the 2<sup>nd</sup> Respondent, he purchased the suit property from Hassan Barisa Kalime at a sum of Kshs. 250,000; that the said Hassan Barisa Kalime had occupied the suit property for over 15 years; that the said Hassan Barisa Kalime was issued with a letter of allotment by the 3<sup>rd</sup> Respondent on 18<sup>th</sup> May, 1999 before he transferred his interest to him in the land described as PDP/312/95/41.
  14. The 2<sup>nd</sup> Respondent finally deponed that the suit property is surveyed because he was issued with a beacon certificate and a PDP number.
  15. On its part, the 3<sup>rd</sup> Defendant, through its outgoing clerk deponed that the land in question is not trust land; that the suit property is government land as contemplated under the Government Lands Act (repealed).
  16. The 3<sup>rd</sup> Respondent's outgoing clerk stated that Hola Town was planned as a township in 1967 pursuant to the Land Planning Act (repealed) and that during the said planning, the only dispute that arose was between the Town Council of Tana River and the then Irrigation Board.
  17. The 1967 plan was revised thus giving way to the 1976 plan. A new plan was drawn in the year 2006 pursuant to the Physical Planning Act which involved all the stakeholders including the Plaintiff.
  18. The 3<sup>rd</sup> Respondent's outgoing clerk finally deponed that the Plaintiff occupies a larger piece of land on the South and the North of the Hola Water Station; that the Plaintiff's parcel of land was not interfered with by the Council in its 2006 plan and that the Plaintiff forwarded a Part Development Plan to the council in the year 2008 which clearly demarcates and shows the land on which the Plaintiff is in occupation.
  19. The 3<sup>rd</sup> Defendant's outgoing clerk denied that it is the Council which allocated the Plaintiff the plot in question and that the Plaintiff's portion of land was not allocated to anybody.
  20. The parties agreed to dispose of the Application by way of written submissions which I have considered.

### **Locus Standi**

21. I dealt with the issue as to whether the Plaintiff has the locus standi to bring this suit on his own behalf and on behalf of the larger Duko family in my Ruling of 13<sup>th</sup> December 2012.
22. In the said Ruling, I held that because the members of a community have rights over community land and or trust land, the said members, either collectively or individually, can and should contest any dealings in community land, which includes ancestral land. I found as a fact that the Plaintiff had the *locus standi* to bring this suit on his own behalf and as a member of the Duko family.

### **Is the suit property Trust Land or Government Land?**

23. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants have deponed that the suit property was Government land as defined by the repealed Government Land Act and not Trust land as argued by the Plaintiff.
24. This distinction is important because the law regulating any dealings in Trust land is different from the legal regime regulating Government land, especially under the repealed Constitution.
25. Considering that the suit property herein was allocated to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by the 3<sup>rd</sup> Defendant before the repeal of the Constitution and the Government Land Act, I shall confine my Ruling to the provisions of the law as at then.
26. Under the repealed Constitution and the Trust Lands Act, trust lands are neither owned by the Government nor by the County Councils within whose area the land falls under. The County Council simply held such land on behalf of the local inhabitants of the area.
27. For as long as Trust land remained unadjudicated and unregistered, it belonged to the local tribes, groups, families and individuals of the area. Once adjudicated and registered, Trust land is

- transformed into private land. That is what the provisions of Sections 114, 115 and 116 of the repealed Constitution provided.
28. Indeed, Section 115(2) of the repealed Constitution provided that Trust land could only be dealt with in accordance with the African Customary Law vested in any tribe, group, family or individual.
  29. The Constitution also provided that the only way Trust land could be legally removed from the purview of communal ownership of the people was through adjudication and registration or setting apart.
  30. Adjudication and registration of Trust land removed the particular land from the purview of community ownership and placed it under individual ownership while *setting apart* removed the Trust land from the dominion of community ownership and placed it under the dominion of public ownership.
  31. Trust land could only be allocated legally pursuant to the provisions of the Constitution, the Trust Land Act and the Land Adjudication Act.
  32. The repealed Constitution, at section 115(4) mandated Parliament to make provisions under an Act of Parliament with respect to the administration of Trust land by a County Council.
  33. Consequently, Parliament enacted the Trust Land Act, the Local Government Act (repealed) and the Town Planning Act which was repealed and replaced with the Physical Planning Act in 1996. These statutes, amongst others, allowed County Councils to deal and administer Trust land on behalf of the residents of their respective areas.
  34. Section 117(1) of the repealed Constitution allowed, through an Act of Parliament, County Councils to *set apart* any area of Trust land vested in a County Council for use and occupation by a public body; or for purpose of the prospecting for or for the extraction of minerals or by any person for a purpose which in the opinion of the County Council is likely to benefit the person ordinarily resident in that area or any other area of Trust land vested in that County Council either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof.
  35. Where an area of Trust land has been set apart by the County Council for the purposes that I have enumerated above, section 117(2) of the repealed Constitution provided that any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.
  36. However, under section 117 (4) of the repealed Constitution, the setting apart of Trust land shall be of no effect unless the prompt payment of full compensation of any resident of the land set apart who under the African customary law has a right to occupy any part or is in some other way prejudicially affected by the setting apart.
  37. Trust land could also be set apart for Government purpose. Under Section 118(1) of the repealed Constitution, if the president was satisfied that the use and occupation of an area of Trust land was required for the purpose of the Government of Kenya or for a body corporate or for the purpose of the prospecting for or the extraction of minerals, such land would be *set apart* accordingly and was vested in the Government of Kenya or such other person or authority.
  38. If Trust land is *set apart* for the purpose of the Government, the Government was required to make prompt payment of full compensation if the setting apart extinguished any estate, interest or right in or over the land that would have been vested in any person or authority.
  39. Other than Trust land which has been set apart for government purpose, the Government also had land which was not Trust land. This was land which was not within the "Special areas" as specified in the Trust Land Act and which was on 31<sup>st</sup> May 1963 vested in the Trust Land Boards.
  40. Government land is the land that was vested in the Government of Kenya by dint of sections 204 and 205 of the Constitution that was contained in Schedule 2 of the Kenya Independence Order in council, 1963 and Sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act 1964.
  41. The enactment of the Government Lands Act, Cap 280 replaced the 1915 Crown Lands Ordinance.
  42. The Government Lands Act was enacted to make further and better provisions for regulating the leasing and other depositions of Government Land. Under this Act, it is only the President who could sign documents granting title although he would delegate these powers to the Commissioner of Lands.

43. Unalienated Government land was not Trust land in that it was not vested in local communities and it was not held in trust for them by a County Council.
44. Under section 3 of the Government Land Act, it is only the President who was allowed to make grants or disposition over unalienated Government land.
45. It is the Commissioner of Lands, on behalf of the President, who used to allocate unalienated Government land to the person whose application for the allocation of such would have been approved by the President.
46. Once the approved candidate for the land had been selected, and an approved part development plan (PDP) by the Director of Physical Planning is issued, an offer was made to the person by the Government. The offer is what came to be known as a letter of allotment which used to be signed by the Commissioner of Lands.
47. Unlike Trust land, the County Councils had no role to play at all in the allocation of unalienated Government land. They could not even purport to administer such land on behalf of the Government. I therefore do not understand why the Defendants would say that the purported land that was allocated to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by the 3<sup>rd</sup> Defendant was Government land and not Trust land.
48. The 3<sup>rd</sup> Defendant could not allocate Government Land. The 3<sup>rd</sup> Defendant at paragraph 4 of its Replying Affidavit, deponed as follows:

***“That the suit land in fact and in law is a Government land as contemplated under the Government Lands Act (now Repealed).”***

49. If in deed the land that was allocated to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by the 3<sup>rd</sup> Defendant was Government land as deponed by the Defendants themselves, and submitted by the 3<sup>rd</sup> Defendant's advocate, then the said allocation was, prima facie, null and void *ab initio*.
50. I say so because according to the 1<sup>st</sup> Defendant's deposition, he was issued with a letter of allotment on 17<sup>th</sup> January 2012 by the 3<sup>rd</sup> Defendant. The said letter of allotment was annexed on the 1<sup>st</sup> Defendant's Affidavit as “SMK-3a.” The land was not allocated to him or to the 2<sup>nd</sup> Defendant by the President or the Commissioner of Lands notwithstanding the fact that they have deponed that the land in question was Government land.
51. Where portions of unalienated Government land falls within townships, it is the Commissioner of Lands, pursuant to Section 9 of the Government Lands Act, Cap 280 who was required to divide such plots and grant leases for any term not exceeding 100 years. The County Council or Municipal Councils could not deal with such plots notwithstanding the fact that the land fell within their jurisdictions.
52. The 3<sup>rd</sup> defendant explained at length the process that the development of the plan for Hola town went through. The Defendant annexed copies of the 1967, 1976 and 2006 development plan for Hola town.
53. The Director of Physical Planning is mandated under the Physical Planning Act, 1996 (and under the repealed Land Planning Act) to prepare regional physical development plans in respect to Government land, Trust land and Private land for the proper physical development of such land.
54. Section 16 of the Physical Planning Act, 1996 states as follows;

***“A regional physical development plan may be prepared by the Director with reference to any government land, trust land or private land within the area of authority of a County Council for the purpose of improving the land and providing for the proper physical development of such land, and securing suitable provisions for transportation, public purpose, utilities and services, commercial, industrial, residential and recreational areas, including parks, open spaces and reserves and also the making of suitable provision for the use of land for building or other purpose.”***

55. The regional physical development plan must be published in the Gazzette and in such other manner as he deems expedient to the effect that the plan is open for inspection at the place or places and the time specified in the notice.
56. That is what the 3<sup>rd</sup> Defendant did in respect to the development plan for Hola town.

57. However, the preparation of a regional physical development plan has nothing to do with the allocation of land to individuals. The Plan is only used to guide the planning authority of a particular area on how to develop, lease and allocate land in the region. The regional physical development plan is used, to put it differently, for planning, re-planning or reconstructing the whole or part of the area comprised in the plan, and for controlling the order, nature and direction of development in such order.
58. While allocating land in an area which has a regional physical development plan, regard must be given to the law that governs the different land tenure systems. This is so because a regional physical development plan encompasses all the three land tenure systems, that is, trust land, government land and private land.
59. It is therefore not helpful for the 3<sup>rd</sup> Defendant to state that the Plaintiff did not raise an objection during the preparation of the 2006 development plan for Hola town because the said plan was not an instrument for the allocation of the land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.
60. As I stated in this Ruling, where trust land is set apart during the preparation of the regional development plan for a particular purpose, and such land was under the use and control of a resident or community of the area who had a right to occupy any part of the land under the African customary law, such a resident or community was entitled to prompt and full compensation.
61. I also stated in this Ruling that Trust land could be set aside by a County Council for use and occupation by any person for a purpose which in the opinion of that County Council is likely to benefit the people ordinarily residing in that area or by the revenue to be derived from rent in respect thereof. The Local Government Act (repealed) mandated the councils, through their full council meetings, to make allocation of Trust land which had been *set apart*, with compensation to the affected parties.
62. It is during the full council meeting that it would have been apparent, relying on the available records, whether the property was available for *setting apart* and allocating it to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or whether it belonged to the larger Duko family.
63. The 3<sup>rd</sup> Defendant's outgoing clerk cannot at this stage argue that the land belonging to the Plaintiff is distinct from the suit property without annexing the Minutes of the full Council meeting.
64. The 1<sup>st</sup> Defendant annexed on his Supporting Affidavit a letter from the 3<sup>rd</sup> Defendant dated 15<sup>th</sup> November 1998. The said letter was forwarding to him the resolution of "*agendum (G) for a meeting of the Education and Social Service Committee held at the Council's Social Hall on 4th November 1998 at 3.00 pm*".
65. The said "*agendum (G)*" was not annexed on the Affidavit and it is not clear what the minutes were all about and the resolutions thereof.
66. The 1<sup>st</sup> Defendant did not annex the Minutes of the 3<sup>rd</sup> Defendant's full council meeting to show that the property in dispute was ever allocated to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The council's letter of allotment reference number 17/1/12 is of no evidentiary value, *prima facie*, in the absence of the minutes of the full council meeting.
67. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants deponed that the suit property is surveyed and that it is known as TRD/312/2008/20B and TRD/312/95/41 HOLA respectively. The Defendants annexed copies of the beacon certificates signed by an unnamed surveyor and approved plans which were not approved by the Director of Physical Planning.
68. The property is obviously not surveyed. The numbers that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are relying on are part development plan numbers which must have been assigned by the District Physical Planner for ease of reference.
69. It is only after the approval of a part development plan by the Director of Physical Planning that a cadastral survey would have been carried out by a licenced surveyor or by the department of survey in the Ministry of Lands.
70. A parcel of land can only be said to have been surveyed after the survey plan has been approved by the Director of Survey who would then allocate it a land reference number. This is more so in cases where a letter of allotment has been issued by the Commissioner of Lands or the local authorities.
71. In view of the fact that the land in question, *prima facie*, is a Trust land, and in the absence of the Minutes of the full council meeting approving the allocation of the same to the 1<sup>st</sup> and 2<sup>nd</sup>

Defendants, and the fact that that the Defendants have deponed that the suit property is government land, which, prima facie, is not the case, I find that the Plaintiff has established a prima facie case with chances of success.

72.I also find and hold that unless injunctive orders are issued, the Plaintiff is likely to suffer irreparable injury because the construction of the purported tourism and environmental conservation project will change the use of the land to the detriment of the Plaintiff.

73.For the above reasons, I allow the Plaintiff's Application dated 31<sup>st</sup> October, 2012 as drawn.

Dated and Delivered in Malindi this 27<sup>th</sup> day of **September**, 2013

**O. A. Angote**

**Judge**