Malik & 8 others v Cabinet Secretary Ministry of Interior & National Administration & 6 others; Dima & 2 others (Interested Parties) (As Trustees of Islamic Charity Project) (Environment & Land Petition E015 of 2024) [2024] KEELC 14085 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14085 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION E015 OF 2024

FM NJOROGE, J

DECEMBER 19, 2024

BETWEEN

GINDA WALALI MALIK & 8 OTHERS ..... PETITIONER

AND

CABINET SECRETARY MINISTRY OF INTERIOR & NATIONAL ADMINISTRATION & 6 OTHERS & 6 OTHERS & 6 OTHERS & 6 OTHERS & 6 OTHERS & 6 OTHERS ..... RESPONDENT

AND

SALIM OMAR DIMA & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS ..... INTERESTED PARTY

AS TRUSTEES OF ISLAMIC CHARITY PROJECT

RULING

1. Vide an elaborate petition dated 27/12/2023, the Appellant approached this court claiming encroachment by the 1st and 2nd respondents on a piece of land in Tana River County registered in the name of the interested party as well as a part of the neighbouring unsurveyed and unregistered community land measuring approximately 2000 acres (both also referred to herein after as "the suit lands) and proceeded to erect a fence around those lands. It is claimed that the encroachment began in August 2024, and that the said respondents, alongside the 3rd and 7th respondents, never followed the elaborate steps provided for in the *Land Act* for compulsory acquisition of the land and therefore the 1st and 2nd respondent's actions are unlawful. The petitioners claim to have brought the action on their own behalf and on behalf of the people of the county of Tana River. They sought a declaration that their rights under Articles 10(1) (c), 10(2)(a), (b) (c) and (d) 40(3), 47, 56, 61, and 63 of the *Constitution* of Kenya 2010 have been infringed by the respondents jointly and severally a declaration

that the fenced off land is still an unregistered community land, vacant possession of the two suit lands, and a permanent injunction to restrain the respondents from interfering with the suit lands.

2. Simultaneously with the petition was filed a notice of motion under certificate of urgency dated 10/10/2024, supported by the 1st petitioner's sworn affidavit of even date, which is the subject of this ruling. It seeks orders as follows:

    a. A conservatory order to restrain the 1st and 2nd respondents their and their agents from interfering with the 7th respondent's use ownership and utility of the unregistered community land and the portion that has been fenced off by the 1st and 2nd respondents firstly, pending the inter partes hearing and determination of the application and secondly, pending the hearing and determination of the petition;

    b. Any other order fit in the circumstances of this case;

    c. Costs.

3. When the matter came up before this court on 15th September 2024 this court declined conservatory orders and directed that application be served and responses be filed and guided by its diary set the inter partes hearing for 4/11/2024. On the latter date Mr Binyenya for the applicants informed the court that he had served and filed the AOS. Mr Kihara for the 1st respondent had filed a P.O. only that morning but had not uploaded it on CTS and to the court that amounted to no filing at all. He also prayed that the court should wait his client's response which he was working on. Ms Lutta had not filed her Grounds which she stated were that moment ready for filing. Mr Binyenya, being ready to proceed admitted that the respondents could be granted time as prayed to file responses to their satisfaction but a conservatory order should be put in place as the Proposed preliminary objections yet to be filed were being dealt with. Mr. Komora submitted that his client the 7th respondent was not opposing the motion, but nevertheless sought 7 days to file a response. The proposal by Mr. Binyenya regarding conservatory orders was opposed by Ms Lutta and Mr Kihara. Ms Lutta submitted that there were no facts to support the grant of such orders and Article 50 guaranteed the respondents a right of reply to enable full facts be placed before the court. Ms Halima for the Interested Party stated that she would not be participating in the motion's hearing. The court carefully considered the submissions of the day from counsel as well as the contents of the petition and petitioner's affidavits on record and, not having seen any written response from the respondents who had been given a lengthy period to respond, issued a limited conservatory order restraining all development on the suit land pending hearing inter partes only. The 1st and 2nd respondents' fence around the suit lands, being said to have been already erected, was not to be affected by the conservatory orders, granted the voiced security concerns of the respondents in their counsel's submissions that day. The respondents were allowed time to respond and all parties were to file submissions and hearing would be on 2/12/2024 by way of highlighting of submissions.

The Responses

The 1st Respondent's Response

4. The 1st respondent filed the sworn affidavit of David Koskei the County Commissioner Tana River. He deponed that the suit parcel of land has been in use and occupation of a security organ of the government from the year 2006; that it hosts security installations or infrastructure critical for supporting security organs and multi-agency teams in undertaking swift security interventions in case of an emergency, threats or attacks rising from terrorism, inter-tribal conflicts and disaster response and management, delivery of relief within the counties in the area; that further development of

infrastructure on the land is intended to address rising insecurity in the region and the action has been undertaken in consultation with the community in the area in accordance with the provisions of Section 4 of the *Land Act*. He claimed that the suit land is public land in accordance with Article 62(1) (b) of the *Constitution* and neither is under the administration of the 3rd respondent and neither held in trust by the county governments; that the petitioners have failed to demonstrate that the community that owned the land was putting it into any use. That the land straddles two counties, Tana River and Garissa; that the petition is premature in view of Part VIII of the Community Land Act on procedure for settlement of disputes and ADR should be promoted in accordance with Article 159 of the *Constitution* and therefore the entire petition ought to be struck out; that the infrastructure on the suit lands is not meant to violate any person's rights but to safeguard national security and therefore ensure the rights and fundamental freedoms provided for in the *Constitution* are enjoyed by all persons including the petitioners as per Article 20 of the *Constitution*; that the conservatory orders in place have already hampered security and emergency response efforts in the area which effect was to get worse with the onset of the imminent rains and flash floods.

The 3rd Respondents' Response.

5. The 3rd respondent file a notice of preliminary objection and grounds of opposition both dated 30/11/2024. The grounds relied on are that the applicants lack locus standi; alternative dispute resolution mechanisms have not been first exploited; and that the land is public land under Article 62(2) (a) and (b).

The 4th 5th and 6th Respondents' Response.

6. The 4th 5th and 6th respondents also filed their preliminary objection dated 6/11/2024. The gist of the preliminary objection is that: this court lacks jurisdiction in the matter; the petitioners lack locus standi; the applicants have gone against the avoidance doctrine and ADR as a remedy to the dispute has not been explored and should be resorted to in the matter in view of Article 159, Sections 39,40, and 41 of the CLA 2016, and Regulation 25(1) of the *CLA Regulations.*

The 7th Respondent's Response.

7. The 7th respondent never file any response.

Submissions

8. The applicants filed two sets of submissions. The 1st respondent, the 3rd, 4th, 5th, 6th and 7th respondents filed one set each. These submissions were briefly highlighted by counsel for the parties on 5/12/2024. All the submissions followed closely along the lines taken by the application, the grounds of objection, the preliminary objections and the replying affidavits.

Determination.

9. The issues for determination are as follows:

    a. Should the preliminary objections be upheld?

    b. Should conservatory orders issue as prayed?

    c. Who ought to bear the costs of the application and the objections?

10. The preliminary objections raised by the 3rd respondent and the 4th 5th and 6th respondents raised the following issues:

a. Whether this court has jurisdiction to hear and determine the matter?

b. Whether the applicants have locus standi;

c. Whether the suit contravenes the doctrine of avoidance exhaustion;

11. Naturally this court requires to address the issue of jurisdiction first. As held in many cases before, without jurisdiction this court would have to down its tools. Though the issue has been raised in their grounds of opposition and preliminary objection, I have sought the elaboration of this ground of objection in all the submissions filed by the respondents and found none. In the circumstances this jurisdiction of this court is thus not in serious doubt. In any event the matter herein concerns land. Part of it is said to be in private hands. The other part is claimed by the applicants to be unregistered community land held in trust by the County Government of Tana River for the communities subject to Article 63 of the *Constitution*.

12. Article 162(2) (b) and 162 (3) provide as follows:

> "(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
>
> (a) .....; and
>
> (b) the environment and the use and occupation of, and title to, land.
>
> (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)."

13. The *Environment and Land Court Act* was enacted pursuant to the provisions of the above article. Section 13(2) of that *Act* provides as follows:

> "(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
>
> (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> (b) relating to compulsory acquisition of land;
>
> (c) relating to land administration and management;
>
> (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
>
> (e) any other dispute relating to environment and land.
>
> (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
>
> (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(f) restitution;

(g) declaration; or

(h) costs.

14. In this court's view one does not need go further than the provisions of the provisions of Article 162 of the *Constitution* 2010 and Section 13(2) of the Environment and *Land Act* to decipher that this court has jurisdiction in the matter. Whether the land turns out to be private, public or community land, the court's jurisdiction in respect of disputes arising in regard to all those three categories of land is expressly provided for under Section 13(2) (d). This court thus is possessed of jurisdiction in this matter.

15. As to whether the applicants have locus standi it was argued by the 4th 5th and 6th respondents that the issue is approached in a dichotomous manner: whether the land is unregistered community land or public land the petitioners still lack locus standi. Relying on the definition of locus standi in *Daykio Plantations Ltd Vs National Bank of Kenya* 2019 eKLR, the respondents stated that firstly, Section 6(1) of the Community Land Act states that Community land is to be held by the County Government in trust for the community; that the county government, according to the decision in *Patrick Mukono Kisilu T/A Mutomo Kandae Agencies v County Government of Kitui* 2021 eKLR a county government is a body corporate having capacity to sue and be sued. Secondly, that there is an affidavit by David Koskei, contents outlined herein before, which states that the land is public land under Article 62(1)(b) in which case if it were the correct position the lands would not be community land as claimed by the petitioners. Thirdly it is claimed by the respondents that the petitioners have not been in occupation and use of the suit land since 2006 when the 1st respondent began utilizing the same and thus, within the meaning of locus given in the dicta of the court in *Khelef Khalifa El Busaidy v Commissioner of Lands & 2 Others* 2002 eKLR, they lack any interest in the land. The respondents also relied on the decision in *Julian Adoyo Ongunga & Another Vs Francis Kiberenge Bondeva* 2016 eKLR to buttress that without interest the petitioners can not maintain the present suit.

16. Of course while determining locus, only the first of those points matter and the rest will be for consideration later while examining the merits of the conservatory orders if this ruling is to reach that point.

17. I agree that there is a requirement that claimants do establish locus standi especially when challenged in proceedings. In this petition however, the court notes that the descriptive part of the petition states that the petitioners are residing in Tana River County. I have already observed that in the event the land is unregistered community land held in trust for the communities in Tana River it may be an issue to be considered at the main petition, in determining whether they have an interest in the land as to whether the petitioners are part of any community in that county. It is a weighty matter that they have disclosed that they reside in Tana River and that they claim that the County Government concerned holds the

land in trust for the communities there. Furthermore, Article 22 provides that every person has a right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied violated infringed or is threatened which is what this court understands the petitioners to be doing in the present petition. It is further provided in Article 22(2) as follows:

> " In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
>
> (a) a person acting on behalf of another person who cannot act in their own name;
>
> (b) a person acting as a member of, or in the interest of, a group or class of persons;
>
> (c) a person acting in the public interest; or
>
> (d) an association acting in the interest of one or more of its members."

18. At paragraph 20 of the affidavit in support of the petition it is expressly deponed that the petitioners bring the petition on their own behalf and on behalf of the people of the County of Tana River. In the face of such express averments juxtaposed with the provisions of Article 22(2) this court finds that the petitioners have locus standi to bring this action.

19. Now that the court has found that it has jurisdiction it is vital before the issue whether the suit contravenes the doctrine of avoidance exhaustion arises. Regarding this issue, it has been submitted by the respondents, citing *William Odhiambo Ramogi and 3 Others Vs Attorney General & 4 Others & Muhuri & 2 Others* (IP) 2020 eKLR, *Speaker of The National Assembly v Karume* 1992 KLR 21 and *Geoffrey Muthiga Kabiru & 2 others vs Samuel Munga Henry & 1756 Others* 2015 eKLR that the court will decline to deal with a matter in instances where there exists another remedy provided for in law which the aggrieved party is yet to utilize. The respondents call in the aid of the *Community Land Act* Section 39, 40, and 41 which are as follows:

> 39. Dispute resolution mechanisms
>
> 1. A registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.
>
> 2. Any dispute arising between members of a registered community, a registered community and another registered community shall, at first instance, be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws.
>
> 3. Where a dispute or conflict relating to community land arises, the registered community shall give priority to alternative methods of dispute resolution.
>
> 4. Subject to the provisions of the Constitution and of this Act, a court or any other dispute resolution body shall apply the customary law prevailing in the area of jurisdiction of the parties to a dispute or binding on the parties to a dispute in settlement of community land disputes so far as it is not repugnant to justice and morality and inconsistent with the Constitution.
>
> 40. Mediation

1. Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to mediation.

2. The mediation shall take place in private or in informal setting where the parties participate in the negotiation and design the format of the settlement agreement.

3. The mediator shall have the power to bring together persons to a dispute and settle the dispute by—

(a) convening meetings for the hearing of disputes from parties and keep record of the proceedings;

(b) establishing ground rules for the conduct of parties; structuring and managing the negotiation process and helping to clarify the facts and issues; and

(c) helping the parties to resolve their dispute.

(4) If an agreement is reached during the mediation process, the agreement shall be reduced into writing and signed by the parties at the conclusion of the mediation.

41. Arbitration

5. Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration.

6. Where the parties to an arbitration agreement fail to agree on the appointment of an arbitrator or arbitrators, the provisions of the *Arbitration Act* (Cap. 49) relating to the appointment of arbitrators shall apply."

20. The observation of this court is that sections 39 *CLA* is in respect of disputes involving registered communities, of which the applicants herein do not claim to be. I think the proposal that the doctrine of exhaustion would have fitted in well in reference to the provisions of Section 40 *CLA* had mediation provided for under those provisions, which do not seem to restrict themselves to disputes involving registered communities, been made mandatory. However, the words used in that law are as follows:

> " Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to mediation"

21. The same language is employed in Section 41 (1) as follows:

> "(1) Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration."

22. The use of the word "may" instead of "shall" in the above two section of the *CLA* implies that mediation, though it may seem necessary in a case, is not mandatory

23. For any party, and thus claimants have been set free to approach the court as the petitioners have done herein. For that reason, I am of the view that the petitioners have not violated the doctrine of exhaustion of remedies. This is in respect of the land they claim to be unregistered community land. Of course the provisions not being applicable to land said to be in the hands of the interested party whose status had not been fully clarified as at the date of the hearing of the application and the Preliminary Objection, the issue of violation of the doctrine with regard to the specific claim relating to that land does not arise.

24. The conclusion of the court is that the objection on the basis of exhaustion doctrine lacks merit, though that finding does not bar the parties herein from seeking mediation or arbitration in the matter.

25. The upshot of the foregoing is that the preliminary objections raised by a section of the respondents lack merit and they are hereby dismissed.

26. Regarding the last issue as to whether the conservatory orders should issue as prayed this court has noted, as outlined in the analysis of the contents of the replying affidavit of David Koskei herein before, the submission of the 1st and 2nd respondents regarding security, which it can not ignore owing to the sensitivity of security issues in any nation, and it must have it at the back of its mind. Indeed, some of the material was said to be so sensitive that it could not be divulged to the public and court had to adjourn in chambers. This court has taken consideration that, though no substantive adversarial application was made that the material be divulged to the respondents, in which case the court would have paused the proceedings and focused on the issue that there are certain admissions by the respondents themselves that made the court believe that they are aware of the sensitivity of the alleged installations on the suit premises.

27. There are facts that have bearing on the present application for conservatory orders, which this court cannot ignore, and the one that has great consequence is the admission by the applicants that the suit land has been occupied by the 1st respondent, though they do not give the period of occupation. They state as follows in their further written submissions dated 4/12/2024:

> "22. It is not in dispute that the 1st and 2nd respondents unlawfully encroached on a portion of the suit property and the neighbouring unsurveyed and unregistered community land measuring approximately 2000 acres and proceeded to fence off the same. The fenced portion is manned by uniformed Kenya Defence Forces officers. The action by the 1st and 2nd respondents to fence off a portion of the suit property and the neighbouring unregistered community land amounts to compulsory acquisition of land."

28. The fact that this admission has been made renders the 1st and 2nd respondent's claim under Article 62(1)(b) a subject of further scrutiny before this court while it is determining the main petition. In *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* [2014] eKLR the Supreme Court of Kenya held as follows:

> "Conservatory orders bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

29. My understanding of the dicta set out by the Supreme Court in the Gatirau Peter Munya case above is that it recognized the need, in conservatory orders applications in cases affecting the workings of public agencies, for the courts not only consider the whether the applicant has established a prima facie case, but also to balance the merits of the case with public interest and constitutional values and apply proportionality in their decisions thereon. Notably, the very admission of the applicants as quoted verbatim herein above confirms that there are security related operations on the suit land

and raises public interest concerns as to what would happen to issues security in the region perchance conservatory orders were granted as prayed for? It is noteworthy that the drafting of the prayers for conservatory orders, taken into consideration in conjunction with the admission of the presence of security personnel and possibly security installations of importance on the suit land, leaves this court with no doubt that if granted, those orders would require immediate cessation of security activities on the suit land and compel the 1st and 2nd respondent's personnel to vacate, and this despite the absence of any insight at the moment as to the future planning needs relevant to the region. This court finds that in the given circumstances, it would be against public interest to grant conservatory orders as sought.

30. Further the submission at the hearing by Mr Kihara that for the time being the only activity being undertaken was the rehabilitation of the runway already constructed on the land to make it safe and useable especially during the impending rains which may have made the terrain impassable, rendered this court to believe that there was no need to extend the conservatory orders earlier made in the matter.

31. However, the broader picture has emerged with occupation being admitted by both sides, there is a triable issue as to whether the land really is community land or has been converted to public land by virtue of the provisions of Article 62(1)(b). This is a subject which, even if there are several other issues for determination in the petition, ranks so importantly among them, such that the grant or denial of issuance of the conservatory orders sought can revolve around it alone.

32. It is also an issue that this court will not dwell on any further in this ruling in order not to prejudice the hearing of the main suit. It must still be remembered that the parties' claims regarding the status of the land are still unproved claims at the moment and it would be prejudicial for this court to make a finding on the true classification of the suit land without hearing out each party.

33. For the reasons given in this ruling as above, I therefore find that the application for conservatory orders dated 10/10/2024 lacks merit and the same is hereby dismissed with no orders as to costs.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 19TH DAY OF DECEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI