REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Petition 14 of 2011

IN THE MATTER OF: ARTICLE 40(1) CONSTITUTION OF KENYA SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2006

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40(1) OF THE CONSTITUTION REGARDING REGISTRATION RELATING TO PLOT NO. 1084/KILIFI/MTONDIA

B E T W E E N

SIDI KOMBE YERI .....PETITIONER

AND

COMMISSIONER OF LANDS.....1ST RESPONDENT

REGISTRAR OF LANDS, KILIFI DISTRICT.....2ND RESPONDENT

AND

KAZUNGU POLA .....INTERESTED PARTY

R U L I N G

1. The Petitioner comes to court under article 40 (10 of the Constitution and the "Gicheru Rules of 2006 seeking by her petition, a permanent injunction to restrain the interested party his servants or agents from trespassing into or subdividing land parcel LR KILIFI/MTONDIA/1084 and a declaration that the Respondent obtained registration thereto through fraud and an order that the subdivisions created out of the original title be consolidated and registered in favour of the Petitioner.

2. In the meantime, she filed an application under certificate of urgency to restrain the respondent from inter alia trespassing into, developing, alienating or wasting the suit land and subdivision pending the

hearing and determination of this suit. She swore an affidavit in support of her application, which basically expends upon the four grounds upon which the application is premised, namely, that;-

1. The suit property is in the possession of the interested party who is in the process of transferring title to 3rd parties.

2. That the suit land was the property of the petitioner`s late father KARISA MWAMBEGU now deceased but survived as an heir by the petitioner.

3. The interested party swore a replying affidavit denying the petitioner`s claim and asserted that he acquired his title lawfully by virtue of an allocation by the Settlement Fund Trustees. That he subsequently subdivided and disposed of some of the subdivisions retaining for himself LR KILIFI/MTONDIA/111 which is registered in his name.

4. The application was argued by way of written submissions, which I have considered alongside the respective affidavits.

5. The petitioner`s application is brought under order 40 rule 1 and 4 of the Civil Procedure Rule. The principles relating to the grant of interim injunctions was settled in the case of **GIELLA VS CASSMAN BROWN CO. LTD, (1973)EA 358**, cited by both parties participating in the application.

6. The first question is whether the applicant has established a prima facie case with a probability of success. Considering her material, the applicant has failed that hurdle. Beyond her affidavit assertions, there is no evidence to show;-

1. That the suit land belonged to her late father KARISA MWAMBEGU.

2. That the applicant is the daughter and personal representative of the estate of her late father.

7. The latter point, is not merely a matter of technicality as suggested in the submissions of counsel for the applicant. It is both a question of locus standi as well as well the basis of the applicant`s claim. Total chaos would ensue if courts were to presumptuously disregard the express provisions of the Law of Succession. For his part, the interested party has tendered documents to show how he acquired title and has asserted that he has been in physical possession of the suit property, a fact confirmed by the applicant, together with the fact that 3rd parties have taken of some of the subdivisions of the suit land.

8. It is not clear when the applicant discovered the alleged “fraudulent” acts by the Interested Party, but it appears that much water was already past the bridge.

9. I am also concerned that none of the respondents have been served nor does the petition expressly spell out the petitioner’s cause of action against them.

This application has no merit and is accordingly dismissed.

Read and delivered at Malindi this **11th** day of **May, 2012** in the presence of:

C. W. MEOLI
JUDGE