



REPUBLIC OF KENYA

High Court at Malindi

Civil Suit 29 of 2012

1. SAMSON NGUWA MANDENGE  
2. ERIC NGUWA  
3. GONA NGUWA  
4. CHARLES MWANDENGE NGUWA  
5. MORRICE MWANDENGE NGUWA .....APPLICANTS

VERSUS

DOUGLAS MWATSUMA NYAMBO .....RESPONDENT

R U L I N G

1. Before me is a Notice of Motion filed on 29th February, 2012 seeking three key orders. For the purpose of this ruling only prayer 3 is relevant. It seeks:

***“That an interlocutory injunction do issue restraining the defendants, their servants, employees and/or agents from advertising and/or transferring, conveying, and/or selling the said property to a third party or otherwise encouraging on and/or interfering with the peaceful enjoyment of all that property known as KILIFI/VYAMBANI/220 (Original Number 221) pending the hearing and determination of this suit.”***

2. The application is premised on 4 grounds as follows:

***“a) That the plaintiffs/applicants are the owners of all that property known as Portion KILIFI/VYAMBANI/220 (Original Number 21) Kilifi having been on the said property since time immemorial.***

***b) That the defendant/respondent was the assistant chief of Mavueni – Majajani sub-location when the plaintiffs/applicants herein lived in the said property.***

***c) That the defendant and/or agents and/or his servants are in the process of advertising the sale of the aforementioned property to the public hence I pray that the orders staying any transaction and/or advertisement be allowed.***

***d) That it is in the interest of justice to not only be done but for the same to seem as having been done by the defendant/respondent herein giving vacant possession of the said property”***

The grounds have been further expanded in the affidavit of the 1st plaintiff Samson Chivatsi Nguwa sworn on 28th February, 2012 on the authority of his five co-plaintiffs. The defendant swore a short

affidavit in reply.

3. In brief this dispute relates to a land parcel described as KILIFI/VYAMBANI/220 which measures 14.02ha. The plaintiffs assert that the defendant who was an assistant chief during the adjudication period fraudulently had the suit property registered in his name. The plaintiffs claim this property as their family land and assert that they entrusted the affairs related to the same during adjudication to the defendant as a trusted friend. Later they discovered that the title deed was issued in the defendant's favor. They attached two annexures to the supporting affidavit, one of them SCN-2 which purports that on the 2nd July 2005 the defendant had conceded to their demand and agreed to give back the land. Allegedly, he later defaulted.

4. The defendant relies on an alleged sale agreement through which he claims to have acquired the land parcel (then unregistered) from a third party one Mohamed Salim Bukia, and the title deed issued to him on 14th September, 2010. He also places reliance on the proceedings and decision of the **Land Dispute Tribunal Case No. 18 of 2009 Eric Nguzo Nguwa vs Douglas Nyambu** which he claims terminated in his favor.

He has therefore argued that this matter is *res judicata*.

5. I have considered all the material canvassed before me in respect of the plaintiffs' application and I take the following view. The matter is not *res judicata* because the decision of the tribunal was that it had no jurisdiction to entertain the dispute placed before it. That is the correct position. While the defendant is the registered owner of the suit property through an alleged sale, it does appear that five years prior to registration he had entered into an agreement to give back the suit property to the Nguwa family. His replying affidavit does not refer to that agreement. In light of the allegations of fraud made against him by the plaintiff, it will be necessary that the circumstances in which that agreement was signed be established.

6. The plaintiffs are apparently in occupation of the suit property which they claim is their family land "*since time immemorial*". While the plaintiffs' case falls short when placed on the *prima facie* scale of measurement, it does appear that they may suffer irreparable damage should the suit land be alienated.

Besides the balance of convenience stands in their favor as the present occupants of the suit property. I will therefore grant an injunction in terms of prayer 3 of the Notice of Motion.

Costs will be in the cause.

Delivered and signed at Malindi this **28th November, 2012** in the presence of Mr. Shujaa holding brief for Mrs. Shariff for defendant.

Court clerk – Evans

**C. W. Meoli**

**JUDGE**  
**28-11-12**