



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CONST. PET. NO. 9 OF 2014

IN THE MATTER OF: ARTICLE 22(1), 23(3) AND 40 OF THE CONSTITUTION

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTALS RIGHTS
AND FREEDOMS ENshrined IN THE BILL OF RIGHTS AND IN PARTICULAR THE
RIGHT TO ACQUIRE AND OWN PROPERTY**

BETWEEN

1. DANIEL MWANGOMBE SHUMAA

2. JOSEPH SANGA SHUMAA

3. MWAGANDI SHUMAA MWANGOMBE

4. WELLINGTON BENSON

RIMBA.....PETITIONERS

AND

1. NYAMAWI CHIMENGA NJUGA

2. FRANCIS CHILENGELI

3. BENSON MUNGA CHIMENGA

4. SAMSON MWAMUYE

5. DONALD MWATATA CHIMEGA

6. ALEX PIRI

7. KAI PILI CHIMEGA

8. AMBROSE M. MWATATA

9. GABRIEL Z. MWATATA

10. THE DISTRICT LAND REGISTRAR, KILIFI

11. THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER, KILIFI

12. THE CABINET SECRETARY, MINISTRY OF LANDS & SETTLEMENT

13. DIRECTOR, LAND ADJUDICATION AND SETTLEMENT

14. CHIEF LAND REGISTRAR

15. THE ATTORNEY

GENERAL.....RESPONDENTS

R U L I N G

1. In his Application dated 17th November 2014, the Petitioner is seeking for conservatory orders in the following terms:

(a) **THAT this Honourable Court be pleased to issue a conservatory order restraining the 1st up to the 10th Respondents by themselves, their employees, servants agents, nominees, assigns or anyone claiming from or through them from entering into, planting, cultivating, subdividing, pledging, entering into, remaining in or I any other manner howsoever interfering with the Petitioners' ownership and quiet possession and enjoyment of ALL THAT piece of parcel of land known as PLOT NUMBER 438 PINGILIKANI ADJUDICATION SECTION, KILIFI (currently encompassing Title Numbers Kilifi/Pingilikani/438, 695 and 1210) as it was in 1979 and/or at the onset of the Adjudication process herein, pending the inter partes hearing of this Application and further pending the hearing and determination of this Application.**

(b) **THAT this Honourable Court be pleased to issue a conservatory order restraining the 1st up to the 12th Respondents by themselves, their employees, servants agents, nominees, assigns or anyone claiming from or through them from entering into, planting, cultivating, subdividing, pledging, entering into, remaining in or I any other manner howsoever interfering with the Petitioners' ownership and quiet possession and enjoyment of ALL THAT piece of parcel of land known as PLOT NUMBER 438 PINGILIKANI ADJUDICATION SECTION, KILIFI (currently encompassing Title Numbers Kilifi/Pingilikani/438, 695 and 1210) as it was in 1979 and/or at the onset of the Adjudication process herein, pending the inter partes hearing of this Application and further pending the hearing and determination of this Application.**

(c) **THAT costs of this Application be provided for.**

The Petitioners'/Applicants' case:

2. According to the 1st Petitioner's Affidavit, him, together with the other Petitioners are the beneficial, legal and registered owners of plot number 438 measuring approximately 32 acres which is located in Pingilikani Adjudication Section in Kilifi County (the suit property).

3. The 1st Petitioner has deponed that the suit property initially belonged to their late father, Shumaa Mwangome; that their late father filed a suit in Kaloleni District Magistrate Court against Pazia Tsuma in Civil suit NO. 3 of 1979 and that Judgment was entered in favour of their late father.

4. In 1982, it has been deponed, the late Chelengeli Njuga, the father of the 1st, 4th, 6th and 7th Respondents and grandfather of the 5th, 8th, and 9th Respondents was charged with the offence of

trespassing on the suit property in which he was convicted and sentenced to serve two months E.M.P.E in lieu of imprisonment.

5. It is the Petitioners case that Pingilikani Land Adjudication Section was declared an adjudication area in 1995; that the suit property was demarcated and registered in their names and that when the Respondents filed a suit being land committee case number 438, the Adjudication Committee ordered that the land be subdivided into two equal parts thus creating plot numbers 695 out of plot 438 which was registered in the names of some of the Respondents.

6. It is the Petitioners deposition that the Land Adjudication and Settlement Officer nullified the decision of the Land Adjudication Committee and ordered for re-hearing of the matter; that after re-hearing the dispute, the committee awarded the whole land to the Petitioners and that when the 5th Respondent filed another case being Committee Case Number 70/96-97, an order to subdivide plot number 438 was made again thus creating plot number 1210. This sub-division was again nullified by the District Land Adjudication and Settlement Officer, Kilifi.

7. When the Respondent lodged an objection at the Arbitration Board, the 1st Petitioner has deponed that the Board dismissed the objection on 23rd August 2011.

8. According to the Petitioners, when the Adjudication register was prepared, it contained plot numbers 695 and 1210 which had been hived off from plot number 438; that their objection to the creation of the two plots in case numbers 262 and 263 were dismissed and the appeal to the Minister has not been heard and determined.

9. However, it was deponed on 8th August 2013, the District Land Registrar issued the Petitioners a title deed for Kilifi/Pingilikani/438 measuring approximately 2.19 Ha, which was smaller; that Title Deeds for Kilifi/Pingilikani 695 and 1210 were issued to the Respondents despite the pending appeal to the Minister and that despite the directions by the Land Adjudication and Settlement Officer, the Respondents have contained to cultivate the suit property.

The Respondents' case:

10. According to the Respondents' deposition, the suit property belonged to their late father, Chilengeli Njuga, who occupied it since 1974; that they have their homesteads on plot number Kilifi/Pingilikani/1210; that at the time the Petitioners' father filed the suit, their father was in possession and occupation of the land and that although the suit was decided in favour of the Gambo clan, in which the Petitioners and the Respondents belong, the Petitioners sought to exclude them.

11. The Respondents have deponed that after numerous hearings before the committee and objections to the adjudication officer, it was ordered that plot number 483 should be subdivided into plot number 1210, 695 and 438 and that in 2013, title deeds were duly issued to all residents of Pingilikani.

Further Affidavit:

12. In his Further Affidavit, the 1st Petitioner denied that the suit property belonged to the Gambo clan; that the Petitioners and the Respondents do not belong to the same family tree and that their father commenced land case number 1979 as an individual and not as a representative of the Gambo clan.

13. I have considered the submissions and authorities that were filed by the parties advocates.

Analysis and findings:

14. In their Petition dated 17th November 2014, the Petitioners are seeking for a declaration that they are the rightful owners of land known as plot number 438 Pingilikani Adjudication Section currently encompassing Kilifi/Pingilikani. 438, 695 and 1210.

15. According to the Petitioners Petition and Affidavit in support of the Application for conservatory orders, the decision in Land Case Number 3 of 1979 and Criminal Case Number 1919 of 1982 settled the issue of ownership of the suit property between their father and the Respondents' father and grandfather.
16. The long running dispute in respect to the suit property is well captured in the Petitioners' Affidavit. Indeed , the dispute which commenced in 1979 before the area was declared an adjudication section has been summarised in the letter dated 3rd March 2005 by the District land Adjudication & Settlement Officer, Kilifi.
17. In the said letter, the District Land Adjudication and Settlement Officer informed the District Officer that parcel of land number 438 was demarcated on 18th July 1995 in the names of the Petitioners.
18. According to the said letter and the proceedings annexed on the Affidavit, the Respondents objected to the said demarcation and the Land Committee decreed that plot number 438 should be subdivided and a portion thereof be registered in favour of the Respondents. That decision was made on 4th July 1997.
19. However, vide his letter dated 20th April 2001, the District Land Adjudication and Settlement Officer overturned the decision of the Committee and stated that the whole parcel of land should remain as demarcated.
20. The dispute was then escalated to the Arbitration Board pursuant to the provisions of the Land Adjudication Act.
21. On 13th January 2006, the District Land Adjudication Officer reminded the Respondents that the land was registered in favour of the Petitioners. The said officer warned the Defendants against putting up structures or planting permanent trees on the suit property pending the hearing and determination of the dispute by the concerned bodies.
22. When the Arbitration Board heard the objection, it delivered its decision on 23rd August 2011 in favour of the Respondents.
23. According to the Arbitration Board, the Petitioners and the Respondents are members of the same clan and that the Respondents were the ones who were on the ground.
24. The Petitioners then filed an appeal to the Minister within the requisite 60 days.
25. Although the Petitioners herein paid the filing fees of the appeal on 26th September 2011 there is no evidence that the said appeal has ever been heard by the Minister.
26. However, on 8th August 2013, the District Land Registrar went ahead and issued title deeds in respect of Kilifi/Pingilikani/438 measuring 2.19 Ha to the Petitioners and title deeds for plot numbers 695 and 1210 to the Respondents.
27. Considering that the register of plot number 695 and 1210 had been cancelled by the Land Adjudication and Settlement Officer, the preparation of the register in respect to the three parcels of land should have awaited the decision of the Minister.
28. Indeed, the Respondents have not annexed any document to show how the adjudication register was completed or that the said register was ever displayed for inspection as provided for under Section 25 of the Land Adjudication Act.
29. The Land Adjudication Act provides that the Chief Land Registrar can only cause registration to be effected when all objections have been determined and the time for appeal has expired.
30. In view of the pending appeal to the Minister by the Petitioners, I am satisfied that the Petitioners

have a prima facie case with a likelihood of success and conservatory orders should issue.

31. For those reasons, I allow the Petitioners' Application dated 17th November 2014.

Dated and delivered in Malindi this 2nd day of October 2015.

O. A. Angote

Judge