



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 229 OF 2013

1. ZIRO NGOMA
2. KUFUJA NOGMA
3. MALAU NGOMA
4. HAMISI NGOMA
5. KAZUNGU NGOMA.....PLAINTIFFS/APPLICANTS

=VERSUS=

KEA NGOMA.....DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. The Application by the Plaintiffs is the one dated 9th December 2013. In the Application, the Plaintiffs are seeking for the following orders.

(a) Pending the hearing and determination of this suit, an injunction do issue restraining the defendant whether by himself, his children, servants, employees and or agents or any other claiming through him from sub-dividing, alienating, selling, or in any manner whatsoever dealing or interfering with the parcel of land known as KILIFI/MTWAPA/12 including erecting any new structures thereon or cutting any trees for sale or construction and from purporting to curtail or stop the 3rd applicant who lives therein from repairing his house which are in a serious state of disrepair and have otherwise become a danger to the member of his family, or preventing him from cultivating and or harvesting foodstuff therein.

(b) THAT costs of this Application be provided for.

The Plaintiffs'/Applicants' case

2. According to the Affidavit of the 1st Plaintiff, the Plaintiffs and the Defendant are the sons of the late Ngoma Dzuya who passed on in the 1960's and that when their father died, the family was left living on

land known as Kilifi/Mtwapa/12 (the suit property).

3. After the death of their father, it was deponed, the Defendant took over the responsibility of the family and the land. The 1st Plaintiff deponed that the family members agreed to buy land elsewhere to allow the family to use the suit property for the business of farming and that they all moved to a place called Bale.

4. However, it was deponed, the rest of the family discovered that the suit property was later registered in favour of the Defendant without involving the rest of the family and that the Defendant now wants to sub-divide the land with the intention of selling it.

The Defendant's/Respondent's case

5. The Respondent filed a Replying Affidavit and denied that the suit property belonged to the family. The Respondent deponed that he is the sole proprietor of the suit property and that he personally entered into an agreement on 1st July 1986 with the Commissioner of Lands in respect to the suit property and that he lives on the suit property with his family.

6. According to the Defendant, their father was buried at Bomani and not the suit property and that the photographs annexed on the supporting affidavit do not depict the true picture of what is on the suit property.

7. The parties filed their respective submissions which I have considered.

Analysis and findings

8. The Plaintiffs' claim is that the suit property initially belonged to their father who died in the 1960's. It is the Plaintiffs' deposition that although the Defendant was registered as the proprietor of the suit property, he is holding the same as a trustee on behalf of the entire family.

9. The extract of the register in respect of the suit property shows that the property was initially registered in favour of the Settlement Fund Trustees on 8th September 1980 before the same was registered in favour of the Defendant on 9th October 1986. It is the Defendant's case that his father has never owned the suit property.

10. Although the Plaintiffs claim that their father, together with the rest of the family, once lived on the property, and that he made some payments to the Settlement Fund Trustees before he died in the 1960's, there is no evidence before me of such payments.

11. Unlike Trust land, where the concept of trust can be implied if a family member is registered as the proprietor, the evidence before shows that the suit property was owned by the Settlement Fund Trustee whose mandate was to settle the landless and people squatting on government land. During the demarcation process, the Settlement Fund Trustee must have identified the Defendant as the person deserving the suit property and not the Plaintiff's late father and his family. That can be the only explanation, at this stage, that can be inferred, as to why the Settlement Fund Trustee issued to the Defendant the Title Deed in respect to the suit property in 1986 and not the Plaintiff's father.

12. In the circumstances, and in view of the fact the Defendant is the registered proprietor of the suit property, and considering that the Plaintiffs do not stay on the suit property, I find and hold that the Plaintiffs have not established a prima facie case with chances of success. The Plaintiffs have also not shown that they shall suffer irreparable damage that cannot be compensated by damages because they have other parcels of land and they do not live on the suit property.

13. For the reasons I have given above, I dismiss the Plaintiffs' Application dated 9th December 2013 with costs.

Dated and delivered in Malindi this 5th day of **September**, 2014.

O. A. Angote

Judge