



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 291 OF 2016

NYEVU KALUME (Suing as the Administrator of the Estate of

KALUME BIVWANDA.....PLAINTIFF

VERSUS

NYIRO PANDE NGALA.....1ST DEFENDANT

KILIFI DISTRICT LAND REGISTRAR.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. By this application dated 21st October 2016, the Plaintiff/Applicant prays for an order of injunction restraining the Defendants/Respondents herein from trespassing, constructing, selling, transferring, leasing, sub-dividing, charging and/or in any way interfering with all that property comprised in LR No. Kilifi/Ngerenyi/132 pending the hearing and determination of this suit.

2. The Application is premised on the Plaintiff's contention that the 1st Respondent has without any colour of right, illegally and fraudulently proceeded to register his name as the proprietor of the said parcel of land measuring 6.4 Hectares. It is the Applicant's case that the said parcel of land belongs to her husband the late Kalume Bivwanda who died intestate in the year 2000. The Respondents have not taken advantage of the Applicant's old age to register the land in the name of the 1st Respondent and the Applicant is apprehensive that the land may be sold to third parties.

3. In a Replying Affidavit filed herein on 5th February 2018, the 1st Respondent avers that the application lacks merit and the same ought to be dismissed for being filed in abuse of the Court process. The 1st Respondent contends that the Applicant has no capacity to file this suit and the application on behalf of the late Kalume Bivwanda.

4. Contrary to the Applicant's position that she is the wife of the late Kalume Bivwanda, the 1st Respondent avers that the Applicant is the niece of the deceased. It is further the 1st Respondent's position that Kalume Bivwanda died in May 1976 and was survived by one widow namely Diramu Bivwanda. It is therefore not true according to the 1st Respondent that the deceased died on 5th July 2000 as stated by the Applicant.

5. The 1st Respondent avers that he bought the suit property in the year 1977 from the said Diramu Bivwanda. The Plaintiff/Applicant's father witnessed the agreement and the 1st Respondent took possession of the land and continued to live therein with Diramu Bivwanda until her death in 1991. It is the 1st Respondent's position that she followed the due process in processing title for the land which was issued to him on 29th August 2006.

6. I have considered the application and the response thereto. I have equally perused and considered the written submissions placed before me by the Learned Advocates for the parties. As the Court of Appeal stated *in Charter House Investment Ltd –vs- Simon K. Sang and others, Civil Appeal No. 315 of 2004:-*

***“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the Court requires protection and maintenance of the status quo. The award of a temporary injunction by Courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant.*”**

It is a matter of sound judicial discretion, in the exercise of which the Court balances the convenience of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”

7. From the material placed before me, the Plaintiff/Applicant claims to be the 1st wife of the late Kalume Bivwanda. According to the Applicant the said Kalume died on 5th July 2000. Documents produced by the 1st Respondent however point to the fact that Kalume died way back in 1976. Indeed, according to the 1st Respondent, Kalume was survived by only one widow Diramu Bivwanda from whom the 1st Respondent states he bought the suit property.

8. While the Applicant does not deny that Kalume was survived by the said Diramu, it is her case that she had separated from Kalume at the time and went to stay away and that the said Diramu was her co-wife. If her story is to be believed, it would mean that the Applicant has not lived in and/or occupied the suit property since the late 1970s when she separated from the said Kalume.

9. On his part, the 1st Respondent has demonstrated that he has lived on the land since the year 1977 when he bought the land from the late Kalume's widow Diramu Bivwanda. He has annexed receipts showing payments made for the land culminating in the issuance of title deed in his name on 29th August 2006.

10. At it were, the fact that he has a title deed issued in his name is *ipso facto* evidence that the 1st Respondent is the rightful owner of the land. Unless and until the Plaintiff/Applicant provides evidence that the said title is as a result of fraud or illegality, this Court will be slow to interfere with the 1st Respondent's possession of the land.

11. The upshot is that I am not satisfied that the Applicant has made out a prima facie case to warrant the grant of the orders sought.

12. The application dated 21st October 2016 is dismissed with costs to the Respondents.

Dated, signed and delivered at Malindi this 31st day of January, 2019.

J.O. OLOLA

JUDGE