



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO. 102 OF 2016**

**BIRYA KALU.....PLAINTIFF**

**=VERSUS=**

- 1. JOHN RIC THETHI MBITHA**
- 2. GARAMA KADENGE BIMUHAMBI**
- 3. MELEY MBITHA MUHAMBI**
- 4. CHANGA KADENGE MUHAMBI**
- 5. NICHOLAS KABONJO MWANGI.....DEFENDANTS**

**R U L I N G**

1. The Application before me is the one dated 3<sup>rd</sup> May, 2016 in which the Plaintiff is seeking for the following reliefs:-

- (a) THAT the applicant be allowed to file a representative suit on behalf of himself and on behalf of all other persons affected by the defendants' activities which form the subject matter of this suit and this suit be deemed as duly filed and the order granting the representative suit be served on all affected persons personally.**
- (b) THAT service upon the 5<sup>th</sup> respondent be affected by way of substituted service through an advertisement in any of the local daily newspapers with countrywide circulation namely the Daily Nation, The Star, The Standard or the People Newspaper.**
- (c) THAT the Respondents, their servants, agents, employees and/or any other person claiming under them be restrained by way of temporary injunction from dealing, leasing, constructing, selling, cultivating, wasting, damaging, intruding, trespassing, developing and/or interfering with land title number Ngomeni Squatter Settlement Scheme/1760 pending the hearing and determination of this suit.**

2. According to the Plaintiff's Affidavit, his family of 41 members have lived on the suit property for more than 15 years; that in 2007, the family, through his brothers, was allocated plot number 1760 in Ngomeni Settlement Scheme and that the 1<sup>st</sup> to 4<sup>th</sup> defendant's brother, Samimni Kadenge Bimhambi, had a plot neighbouring the suit property.

3. The Plaintiff deponed that due to fraud at the time of allocation, his family ended up being listed as beneficiaries of plot number 1781 instead of plot 1760; that the demarcation process was marred with irregularities and that the plot was further sub-divided into plot numbers 1875 and 1760.
4. According to the Plaintiff, the Defendants' father ended up being registered as the proprietor of plot numbers 1781 and 1760.
5. When he filed a dispute in the Land Disputes Tribunal, the Plaintiff deponed that the dispute was decided in his favour but when he conducted a search later, it showed the 5<sup>th</sup> Respondent as the registered owner of the suit land.
6. The Plaintiff finally deponed that his family lives on the land and that they stand to be evicted any time unless the injunctive orders are granted.
7. In response, the 1<sup>st</sup> Defendant deponed that in 1983, his late father bought from the Plaintiff's father an unregistered land measuring 13 acres whereafter the Plaintiff's father relocated to Mpirani village; that his father bought another adjacent land measuring 6 acres from Mr. Mdigoo and that when the area was declared a settlement scheme, the two parcels of land were amalgamated into one.
8. According to the 1<sup>st</sup> Defendant, his father was registered as the proprietor of land known as plot 1760 measuring 7.6 Ha; that the registration of the land in his father's name was not obtained fraudulently and that when his father died in 1997, the land was transferred to his heirs.
9. It is the case of the 1<sup>st</sup> Defendant that they sold the suit property to the 5<sup>th</sup> Defendant and that the Defendants are not aware of the dispute that was filed in the Land Disputes Tribunal; that in any event, the said Tribunal had no jurisdiction to entertain such a dispute and that Kithi Nyale Nkone is not related to them and did not have the authority to represent them in the case.
10. The Defendants denied that their father was registered as the owner of plot number 1781 as alleged.
11. The 5<sup>th</sup> Defendant on the other hand deponed that he is the lawful owner of parcel of land known as Ngomeni Squatter Settlement Scheme/1760 measuring 769 Ha; that he purchased the land after conducting a search and that he is an innocent purchaser for value and without notice.
12. In his Further Affidavit, the Plaintiff deponed that his father moved out of the suit land in 1983 when he was accused of witchcraft; that when his father died in 1993, he was buried in Mpirani and that when they moved to the suit property in 1994, they found the 1<sup>st</sup> – 4<sup>th</sup> Respondents' family in occupation of the suit land.
13. I have considered the submissions and the authorities that were filed by the parties.
14. In the Plaintiff's Complaint dated 3<sup>rd</sup> May, 2016, the Plaintiff is seeking for an order of rectification of the register relating to parcel of land known as Ngomeni squatters settlement scheme 1760 by cancelling the registration of the 5<sup>th</sup> Defendant as the proprietor of the said land on the basis that the same was obtained fraudulently.
15. In the meantime, the Plaintiff is seeking for injunctive orders. The Plaintiff's case is that it is his late father who lived on the suit property before 1983; that his late father was accused of being a witch and he moved out of the suit land for his own safety in 1983 and that when he died in 1993, the whole family moved back to the suit land in 1994.
16. According to the Plaintiff, the Defendants' family owned the neighbouring land measuring 6 acres.
17. It is the Plaintiff's case that during the adjudication process, the Defendants' family was issued with a letter of offer for the suit property instead of plot number 1781.

18. The issue of the confusion in the allocation of the two plots amongst others was escalated by the Plaintiff to the provincial administration.

19. In his letter dated 25<sup>th</sup> March, 2011, the then Assistant Deputy Co-coordinator requested the District Land registrar and his counterpart in the adjudication department to investigate the complaints that had been raised by the residents of the area in respect to sheet numbers 20, 22 and 24 and RIM numbers 1, 3, 5, 7 and 34.

20. Indeed, the dispute between the Plaintiff and the 1<sup>st</sup> to the 4<sup>th</sup> Defendants was deliberated upon by the village elders, otherwise known as Rasi ya Ngome Village Committee, who declared that the land belonged to the Plaintiff's family. That was in the year 2012. The Magarini Disputes Land Tribunal also found in favour of the Plaintiff in its award of 28<sup>th</sup> February, 2011.

21. Although the 1<sup>st</sup> – 4<sup>th</sup> Defendants have deponed that their late father purchased the suit property from the Plaintiff's father in 1983, there is no evidence of such a purchase.

22. In view of the sentiments of the village elders which are documented and the decision of the Magarini Land Disputes Tribunal, I find and hold that the Plaintiff has established a prima facie case with chances of success.

23. Considering that prayer numbers 2 and 3 of the Application were granted by the court ex parte, I grant to the Applicant prayer numbers 5 and 6 of the Application dated 3<sup>rd</sup> May, 2016.

Dated, signed and delivered in Malindi this 3<sup>rd</sup> day of **February**, 2017.

**O. A. Angote**

**Judge**