



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND HIGH COURT AT GARISSA

CASE NO 35 OF 2017

PETER MALINDI MUISYO.....PLAINTIFF

VERSUS

KATINDI MUTHUI.....1ST DEFENDANT

KYALO MUTHUI.....2ND DEFENDANT

RULING

INTRODUCTION

The application before me is the Notice of Motion dated 24th May, 2017 brought under Order 40 Rules 1,2, 2A and 9 CPR, Section 3A CPA and all enabling provisions of the law. The plaintiff/Applicant is seeking the following orders:-

1. (Spent)

2. THAT an order of temporary injunction be issued restraining the defendants (Respondents, their family members, agents, servants and/or employees from burying the Late MUTHUI KITHEKA at the disputed piece of land No.2156 Kyuso adjudication section which has a pending appeal at the L.C.C Board at Kyuso Lands office pending the hearing and determination of this application.

3. THAT an order of permanent injunction be issued restraining defendant/respondents, their family members, agents and servants from burying the late MUTHUI KITHEKA at my parcel of land No.2156 Kyuso Adjudication section which has a pending appeal at L.C.C Board at Kyuso Lands Office until the hearing and determination of this suit.

4. THAT the Officer Commanding Kyuso Police Station together with the Chief Kimangao location and Assistant Chief Maseki Sub-location do enforce the order herein.

5. THAT cost of this application be provided for.

The application is based on grounds shown on the face of the said application and a supporting affidavit of the applicant sworn the same date.

The Plaintiff's/Applicant's case

In this affidavit in support of the application, the plaintiff states that the suit land belongs to him after he

inherited from his late father one Muisyo Muthangya who passed on in 1998. He said that the suit land has been having dispute since 1968. The plaintiff further stated that the defendant's father (deceased) had made a complaint to the area Assistant Chief who called for a meeting to be held on 26/6/2004. After the meeting, it was resolved that the two parties go for oath taking. On 31st August, 2004 they went for the oath taking and then the deceased was affected by the said oath taking and was rushed to Nairobi for treatment and later passed on in May 2017. The plaintiff argues that unless the orders sought are granted, he will suffer irreparable loss.

Defendants/Respondents case

The defendants, who are acting in person through their replying affidavit sworn on 7th June, 2017 stated that the land in question is an ancestral land which they inherited from their late father Muthui Kitheka who had also inherited from their grandfather one Kitheka Ngumbau. He further stated that sometime in the month of April 2017 the Survey of Kenya came and demarcated the suit land and registered under his late father's name as P/No.2156 Kyuso Adjudication Section.

Analysis and findings

The land in dispute is not registered either in favour of the plaintiff or the defendants. Each of them is claiming customary rights over the parcel of land. No documents of ownership has been placed by the applicant to show that he has a better title capable of being protected by a court of Equity pending the full hearing of the case. From the averments contained in the affidavit evidence adduced by both sides, the land in dispute is a Community Land that is yet to be Gazetted for adjudication and identification for purposes of private recognition and registration. Until such exercise is conducted by the entities authorized by Law to do so. The interest of justice is better served by deciding the application on the principal of convenience. Doing the best I could in the circumstance of this case, the interest of justice tilts in declining the orders sought. Consequently, the application dated 24th May 2017 is hereby dismissed for lack of merit with each party to bear their own costs.

READ and DELIVERED in the open court this 25th day of July 2017

E.C CHERONO (MR)

ELC JUDGE

IN THE PRESENCE OF:

1. Applicant
2. 1st Respondent
3. 2nd Respondent
4. Court Clerk - Ijabo