



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ELC .NO. 818 OF 2013**

**GEORGE SILA KINGOLA.....PLAINTIFF**

**VERSUS**

**JOSEPH MAKENGA .....1<sup>ST</sup> DEFENDANT**

**MBULI MAWEU TETI.....2<sup>ND</sup> DEFENDANT**

**MUIA MUTAVA .....3<sup>RD</sup> DEFENDANT**

**GRACE NDUKU MUATHA.....4<sup>TH</sup> DEFENDANT**

**THE CHIEF REGISTRAR.....5<sup>TH</sup> DEFENDANT**

**THE LAND ADJ.& SETTLEMENT OFFICER, MAKUENI COUNTY.....6<sup>TH</sup> DEFENDANT**

**RULING:**

The matter coming up for determination before me is the Notice of Motion dated 8<sup>th</sup> July 2013 brought by the Plaintiff/Applicant seeking for Orders that:-

- i. *An order of Temporary Injunction be issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants, their agents, servants, employees and/or nominees or whatsoever from trespassing, wasting, depositing any materials, harassing constructing or in any other way from interfering with the properties known as Ukia /Nzuuni/1112, Ukia/ Nzuuni/1115 and Ukia/Nzuuni/1767 to the extend claimed by the plaintiff, pending the hearing and final determination of this suit .*
- ii. *That the OCS Kilome police Station do enforce the Orders.*
- iii. *The cost of the application be provided for .*

The application was premised on the grounds set up on the face of the application and also on the supporting Affidavit of **George Sila Kingola** , the plaintiff/Applicant herein. It was stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the registered owners of all that parcel for land known as **Ukia /Nzuuni/1112**, measuring approximately **10.39** ha and held in half shares each under absolute proprietorship . Further

that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the beneficial owners of all those parcels of land known as **Ukia/Nzuuni/1115** measuring approximately **4.43 ha** and **Ukia/Nzuuni/1569** measuring **3.43 ha** respectively held under absolute proprietorship by **Mutava Mukunzi** (Deceased) and **Peter Muatha Mailu** (deceased) respectively who were the registered owners of the said parcels of land.

It was further stated that on 21<sup>st</sup> November, 1979, the Land adjudication Office, Machakos District issued a Notice of Declaration of Nzuuni Adjudication Section. The boundaries were therefore described. That pursuant to the stated Notice, the said lands were demarcated and extended beyond the Nzuuni Adjudication sectional boundary into Kyamuoso Adjudication Section. Furthermore, the said demarcation and adjudication of the said parcel of lands were mistakenly extended to and covered the land owned by the plaintiff. It was contended that prior to adjudication, of the suit properties, the plaintiff had occupied the suit land for a period of more than 20 years and had effected developments thereon.

Further, the plaintiff grandfather **Timothy Mutiso Sila** had even put a boundary with Maweu on 23/10/1959 and had settled the boundary dispute concerning the suit land with the clan elders. It was also contended that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are wasting and damaging the suit property by cutting down trees for charcoal and have threatened to put the suit property on fire and thus continue with destruction of the vegetation thereon. Therefore that the said destruction of lands by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, their agents, employees and servants has occasioned irreparable loss and damage to the Plaintiff and thus filing of this suit. That unless the Defendants are restrained, they will continue to destroy the suit land to the detriment of the plaintiff and it is in the interest of justice that the Orders sought should be granted.

The application is opposed. The **1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants** filed their grounds of opposition to this application.

In the grounds of opposition filed by the **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants** it was stated that the application is bad in law and incapable of being granted in that the Respondent herein have already been in possession and occupation of the suit land. Further, that the applicant is not the registered owner of the parcel of land, whereas the respondents are registered owners of their parcels of land. Moreover that if there is any injury then the same took place in the year 1979 with the knowledge of the applicant and applicant is guilty of laches and should not benefit from any prerogative Orders. That the Orders sought cannot be granted as they seek to limit an adjudication process which is outside the ambit of this Court's jurisdiction and the Court cannot enforce the same. Further that the suit ought to have been filed in Machakos Chief Magistrates Court since the value of the land is less than **2 Million**.

The 4<sup>th</sup> Defendant also filed her grounds of opposition and stated that the application is vexatious, incompetent as the applicant has no **locus standi** to sue for and on behalf of the Estate of **G S Kingola**, the registered owner. Further that the applicant has not demonstrated to this court any damage he will suffer if the orders are not granted. Again the Plaintiff had cautioned the suit land on 6<sup>th</sup> May 2005 and did not do anything else until now when he filed this application.

When the matter came for hearing on 25<sup>th</sup> July 2013, the parties herein consented on **Status Quo** to the effect that the parties to continue living as they had lived before the institution of this suit. Therefore as at the moment, the parties still live as they had lived before this suit was instituted. Further, the parties consented to canvass the Notice of Motion by way of written submissions.

I have now considered the pleadings generally, the written submissions and the relevant laws and I make the following findings:-

There is no doubt that the plaintiff herein has not given the description of the parcel of land that he alleges borders the suit properties. There is no doubt that this suit land was owned by one **Timothy Mutiso Sila**, the grandfather to the plaintiff herein. From the pleadings, filed herein, there is no doubt that the said **Timothy Mutiso Sila** is now deceased. Though there is a document attached to the pleadings describe as general Power of Attorney signed by the said **Timothy Mutiso Sila** donating full power and

authority to **George Sila**, the plaintiff herein, to act on his behalf, the said power of Attorney was issued during the lifetime of **Timothy Mutiso Sila** but did not grant the plaintiff power to act as an administrator of the said Timothy Mutiso Sila. Plaintiff also alleged that **LR No. Ukia/Nzuuni/115 and Ukia /Nzuuni /1767** is registered in the names of **Mutava Mukunzi** and **Peter Muatha Mail**, who are both deceased. No evidence was adduced to confirm that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the beneficial owners of the two parcels of land and can be sued for actions against the two parcels of land. There is no doubt that an adjudication process was carried out in the year 1979, but there was no evidence that neither the Plaintiff herein nor the said **Timothy Mutiso Sila** ever objected to the said process. What the plaintiff herein is raising is the shortfall in the process of adjudication. He seeks for the process to be declared unprocedural or illegal. He is therefore seeking for review of the adjudication process and I find that the best forum would have been in a Judicial Review case.

The applicant herein has sought for injunctive orders. These are equitable remedies that are granted at the discretion of the court. However, the said discretion must be exercised judicially as was held in the case of **Hasmukh Khetshi Shah Vs Tinga Tranders Ltd, Civil Appeal No. 326 of 2002 (2002) KLR 4628, where the court held that:**

***“It must be stated at the outset that the granting of the interim Injunction is an exercise of judicial discretion”***

In deciding whether or not to grant the orders sought herein, I will be guided by the principles laid down in the case of **Giella Vs Cassman Brown and Co .Ltd ( 1973) EA 358**. The Court held that the applicant must show that:-

- a. ***He has a prima facie case with probability of success.***
- b. ***That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c. ***When the court is in doubt, to decide the case on a balance of convenience.***

The applicant firstly needed to demonstrate that he has a prima facie with probability of success. A prima facie case was described in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125, as:-**

***“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.***

The applicant has alleged that the suit land that he is alleging has been affected by the adjudication process belonged to his late grandfather **Timothy Mutiso Sila**. The 1<sup>st</sup> to 4<sup>th</sup> Defendants have stated that the plaintiff has no capacity to bring this suit. It was submitted that the plaintiff has not taken **Letters of Administration** to the Estate of the said Timothy Mutiso Sila and that a family does not confer capacity. It is indeed not in doubt that plaintiff herein has not availed any evidence to show that he is the Administrator of the estate of **Timothy Mutiso Sila**, and that he has capacity to bring this suit on behalf of the said estate. I rely on **Section 45** of the **Succession Act Cap 160 Laws of Kenya** which reads as follows:-

1. ***“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.***
2. ***Any person who contravenes the provisions of this section shall: -***
  - a. ***Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of***

***imprisonment not exceeding one year or to both such fine and imprisonment; and***

- b. ***Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.***”

Further Section 79 of Succession Act provides as follows: -

***“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”***

I therefore find and hold that the plaintiff /applicant has offended the provisions of the above section of the Succession Act. He indeed has no capacity to bring this suit in Court on behalf of the said estate. The plaintiff also alleged that 3<sup>rd</sup> and 4<sup>th</sup> Defendant are the beneficial owners of ***Ukia/Nzuuni/1115 ad Ukia/Nzuuni/1767*** which are registered in the names ***Mutava Mukunzi and Peter Muatha Mailu*** now both deceased. No evidence that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the beneficial owners of the Estate of the two deceased persons especially on the two parcels of land and can be sued as such. Further, the suit land ***No. Ukia /Nzuuni/1112*** is registered in the names of 1<sup>st</sup>, 2<sup>nd</sup> Defendants. As submitted by the Defendants by the dint of ***Section 26*** of the ***Land Registration Act***, they are the indefeasible owners. The said section reads as follows:-

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***

- a. ***On the ground of fraud or misrepresentation to which the person is proved to be a party; or***
- b. ***where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***”

There is no doubt that the adjudication process began in 1979 and the applicant did not file any complaint then. It is also evident that he even registered cautions on the suit land in the year 2005. He also never filed a suit. The plaintiff has taken too long to bring this suit and it is a common maxion, of equity that

***“ equity aids the vigilant and not the indolent”*** . Applicant is guilty of laches and he cannot benefit from the equitable remedy that he is seeking. See the case of...

Having now considered the pleadings generally, the attached exhibit and the submissions, the Court finds and holds that the applicant has not made a prima facie case with probability of success.

The Plaintiff has also alleged that the Defendants are destroying vegetation on their parcels of land. Even if the said vegetation were on the part of land that the plaintiff alleges that falls in the parcels of land for ***Timothy Mutiso Sila***; the said trees or vegetation can be quantified and damages paid. Where damages can be recovered, then an injunction cannot issue. This was the finding in the case of **Wairimu Mureithi Vs City Council of Nairobi , Civil Appeal No. 5 of 1979 KLR 332 396** where it was held that: -

***“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”***.

The applicant has not demonstrated that he will suffer irreparable loss which cannot be compensated by an award of damages .On the balance of convenience; I find that it tilts in favour of the

Defendants. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are registered proprietors of their parcel of land. Their titles are absolute and indefeasible by dint of section 26 of the land Registration Act. The same can only be challenged as provided by the said Section. The same has not been challenged. I find that the balance of convenience tilts in favour of the Defendants herein.

Having now considered the applicant's Notice of Motion dated **8<sup>th</sup> July, 2013** and the submissions herein, I find the same not merited. The upshot therefore is that the said application is dismissed with costs to the 1<sup>st</sup> – 4<sup>th</sup> Defendants. The applicant should set down the matter for hearing so that issues herein are canvassed through a full hearing. However, I have noted that the matter herein relates to parcels of land in **Makueni/Machakos** area. That matter falls under the Jurisdiction of Machakos High Court - Environment and Land Court. I therefore direct that matter be transferred to **Machakos High Court - Environment and Land Court** for full and final determination of the main suit.

It is so ordered.

**Dated , Signed and Delivered this 25th day of November , 2014**

**L.GACHERU**

**JUDGE**

In the presence of ;

.....for the 1st, 2nd & 3rd Defendants/Respondents

.....for the 4th Defendant/Respondent

.....for the 5th Defendant/Respondent

.....for the 6th Defendant/Respondent

Kamau: Court Clerk

**Court:**

Ruling Read in open Court in the presence of Mr.Musungu holding brief for Mr Makundi for 1st, 2nd and 3rd Defendants/Respondents

None attendance by the other Respondents though notified.

**L GACHERU**

**JUDGE**

**25/11/2014**