



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

**Civil Case 60 of 2003**

**MAUNDU KINGA.....PLAINTIFF**

**VERSUS**

**1. KABAKA MUSANGO**

**2. YUMA MUSANGO.....DEFENDANTS**

**RULING**

1. This suit was filed on 28<sup>th</sup> August 2003 by plaintiff of the same date. The Plaintiff pleads that he is the registered owner of **plot No. 81B in Syumile Settlement Scheme, Makueni District**. His case is that “sometimes in November 2002 the Defendants wrongfully and unlawfully entered into the said land and started trespassing into the (same) by cultivating, cutting trees, clearing and burning vegetation therein”. The main reliefs sought are an appropriate permanent injunction and general damages.

2. The Defendants filed a joint statement of defence dated 13<sup>th</sup> October 2003. They denied the Plaintiff’s claims. They also pleaded, without prejudice, that the suit land is family land which was subdivided on 8<sup>th</sup> March 1991 amongst three households represented by Maundu Kinga, Mwinza Mutolonga and Richard Kabualia Musango. They further pleaded that each party peacefully occupied and developed its own portion. They denied that the suit land was registered in the Plaintiff’s name.

3. It appears that the suit was then prepared for hearing. On 28<sup>th</sup> April 2005 an agreed statement of issues duly signed by advocates for the Plaintiff and the Defendants was filed. The case was fixed for hearing on 19<sup>th</sup> May 2005. Apparently hearing never took place.

4. The Plaintiff then filed **chamber summons dated 13<sup>th</sup> August 2008**. That application is the subject of this ruling. It seeks the main order that the Defendants be restrained “from selling, disposing of, trespassing into, constructing buildings, cutting trees, burning vegetation, cultivating or in any other manner interfering with (the suit land) pending hearing and determination of the suit. The application was brought under **Order XXXIX, rules 1, 2, 2A, 3 and 9** of the then **Civil Procedure Rules (the Rules)**. The inherent power of the court under section 3A of the **Civil Procedure Act, Cap 21 (the Act)** was also invoked.

5. The grounds for the application on the face thereof are -

(i) That the Plaintiff is the registered owner of the suit land.

(ii) That since November 2002 the Defendants “have been trespassing, cultivating, cutting trees, clearing and burning vegetation” in the suit land.

(iii) That the Defendants are threatening to sell or dispose portions of the suit land.

(iv) That the 1<sup>st</sup> Defendant “has been constructing a building in the (suit) land since 5<sup>th</sup> July 2005”.

There is a supporting affidavit sworn by the Plaintiff.

6. The Defendants filed a replying affidavit on 12<sup>th</sup> October 2007 and a further replying affidavit on 23<sup>rd</sup> November 2007. Both are sworn by the 1<sup>st</sup> Defendant. In these affidavits the Defendants assert that the Plaintiff is their uncle; that the suit land comprises family land which in 1991 was sub-divided into three portions and allocated to the three households of the family; and that each household has been peacefully occupying its portion since that time.

7. In a supplementary affidavit filed on 30<sup>th</sup> November 2007 the Plaintiff states that the family land was Plot No 81 (not Plot NO. 81B which was subdivided into Plot No. 81A (registered in the names of Kabaka Musango and Mwinzi Mutolonga (his nephews) and Plot No 81B which was registered in his name; that the subdivision was done by the clan and was subsequently endorsed by the Adjudication Officer of the area; that therefore Plot No. 81B (the suit land) is no longer family land; and that the Defendants subsequently and wrongfully trespassed into the suit land.

8. I have considered the submissions of the learned counsels appearing. No authorities were cited.

9. I have noted that the present application was filed about five (5) years after the suit was filed. I have also noted that this is a dispute involving close family members over what was at least originally family land. I have also noted that all the parties are in occupation.

10. I am of the considered view that any temporary injunction intended to remove or keep away any of the parties from the suit land will not be in the interests of justice and can only worsen the dispute between the parties. What the parties should work towards is hearing and final determination of the suit so that their respective claims in the suit land can be adjudicated upon. Interlocutory applications and orders can only delay this.

11. However, the suit property ought to be preserved pending disposal of the suit. So, while refusing the Plaintiff’s application by chamber summons dated 13<sup>th</sup> August 2008 (which is hereby dismissed with costs in the cause) I will nonetheless restrain **all** the parties from selling or in any way alienating any portion of the suit property pending disposal of this suit. Those will be the orders of the court.

13. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thanks God I have now regained my full health.

**DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF AUGUST 2012**

**H. P. G. WAWERU**  
**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**  
.....  
**JUDGE**