



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITUI

ELC CASE NO. E001 OF 2021(O.S)

IN THE MATTER OF: SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT,

AND ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: LAND PARCEL NUMBER MATINYANI/KASAINI/114

JULIUS NGUNDI KINAA.....PLAINTIFF/APPLICANT

VERSUS

MALUNDA MAKAU.....1ST DEFENDANT/RESPONDENT

KINAA MAKAU.....2ND DEFENDANT/RESPONDENT

RULING

1. The Application subject matter of this ruling is dated 10th September 2021. It is brought by way of Notice of Motion by the Plaintiff/Applicant seeking for ORDERS:

1. Spent.

2. Spent

3. THAT pending hearing and determination of the summons herein, the Defendants by themselves, their agents, relatives or anybody claiming under them, be restrained from interfering, sub-dividing, alienating, transferring or in any other way dealing with the whole or part of land parcel number MATINYANI/KASAINI/114 and the new titles created thereon being MATINYANI/KASAINI/1748 and 1749.

4. THAT the costs of this application be awarded to the Applicant.

2. The Application is based on the grounds that:

a) **The Plaintiff has been in continuous and uninterrupted use of a portion measuring approximately 10 acres of land on parcel number MATINYANI/KASAINI/114 for more than 12 years, but the Defendants are presently subdividing the parcel among themselves in exclusion of the Plaintiff and his brothers.**

b) **The Defendants herein are registered proprietors holding land parcel number MATINYANI/KASAINI/114 in trust for themselves, the Plaintiff and others not parties herein, but presently have engaged surveyors and are in the process of subdividing the same between themselves in exclusion of the Plaintiff and his brothers.**

c) **The 2nd Defendant is a guardian of the Plaintiff whose mother was in the “traditional woman to woman marriage” locally known as *Iweto* with KAUMO MAKAU, the first wife of MAKAU MWILU the original owner of the land and father to all parties herein.**

d) **The 2nd Defendant is a son of the second marriage while the 1st Defendant is the son of the third marriage of MAKAU MWILU, and since they were both his eldest sons they were registered jointly to hold the title number MATINYANI/KASAINI/114 in trust for themselves and the rest of the family.**

e) **It is necessary and prudent to preserve land parcel number MATINYANI/KASAINI/114 the new titles created thereon being title numbers MATINYANI/KASAINI/1748 and 1749, by restraining the Defendants, their agents, relatives or anybody claiming under them from interfering in any way by sub-dividing, alienating, transferring or otherwise dealing with the whole or any part of the said land pending hearing of the summons herein.**

f) **The Plaintiff stands to suffer great prejudice while the Defendants who still enjoy use and occupation of their portion will suffer no prejudice if the application is allowed.**

3. The application is supported by the affidavit of JULIUS NGUNDI KINAA, in which he states that his brothers and himself have been in continuous and uninterrupted use of a portion measuring approximately 10 acres of land parcel number MATINYANI/KASAINI/114 for more than 12 years but the Defendants are presently sub-dividing the parcel of land among themselves excluding him and his brothers.

4. The Applicant averred that they risk losing the portion of land which they have occupied for a long period of time. The Applicant avers that the Respondents who still enjoy use and occupation of their own portions will suffer no prejudice if the application is allowed but he and his siblings stand to suffer great loss. He further stated that it is necessary and prudent to preserve the suit property pending the hearing of the summons.

5. The Respondents filed a replying affidavit sworn by the 2nd Respondent on 14th October 2021 in which it was stated that he has authority to act on his own behalf and on behalf of the 1st Defendant/Respondent. The Respondent further filed Grounds of Objection dated 5th October 2021.

6. The 2nd Respondent claims that the Applicant is actually his biological son, and his mother KALUYU KINAA is his wife, therefore he is not just the Applicant's guardian.

7. Averred that the Applicant has a reversionary right or interest in every property that he owns by virtue of being his son. He claims that land parcel Matinyani/Kasaini/114 was adjudicated and registered in his name and the 1st Respondent (his step-brother) as proprietors in common and in the late 2020 they decided to partition the land so that each could acquire his own title.

8. The Respondents herein were parties to a suit ELC 11 of 2021, where the 1st Respondent sought sub-division of the entire parcel Matinyani/Kasaini/114 into 2 equal portions in their respective names. The 2nd Respondent clearly admits that the suit became necessary as he was claiming that he owned the whole parcel of land alone and absolutely. He states that the suit was compromised and both parties got their individual portions.

9. The 2nd Respondent states that after he got his parcel, he further caused a sub-division of the same into five units, while the 1st Defendant subdivided his portion with resulting titles Matinyani/Kasaini/1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1766, 1767, 1768, 1769 and 1770.

10. The 2nd Respondent avers that he has caused the Applicant to acquire absolutely Land Parcel Matinyani/Kasaini/1481 registered in the Applicant's name. The Certificate of Official Search on the said title is attached to the Respondents affidavit. He further states that the Applicant has rights and interests in the other properties registered in his name and that he will ultimately get what he is entitled to.

11. The 2nd Respondent further claims that any use, occupation and possession of any land which is registered under his name by the Applicant is by virtue of his rights and interest as his son and licensee and not by way of adverse possession.

The Plaintiff/Applicant's Submissions

12. The Applicant submitted that there are two conflicting theories that have been brought forth by the parties; one as stated by the Applicant that his mother was in a traditional woman to woman marriage known as *Iweto* with KAUMO MAKAU, wife to MAKAU MWILU. On the other hand, the 2nd Respondent's contends that he was married to the Applicant's mother KALUYU KINAA and that the Applicant is his biological son and has reversionary title on the 2nd Respondent's property.

13. It is the Applicant's submission that the patriarch Makau Mwilu had three wives, the 1st Respondent is the son to Mbusa Makau, the 2nd Respondent is the son of Mutinda Makau and Kaumo Makau had no children and therefore married the Applicant's mother under *Iweto*. Counsel for the 2nd Respondent submits that the 2nd Respondent may have stayed with her as his wife or concubine and therefore all the parties herein are step-brothers and beneficiaries of the Estate of MAKAU MWILU.

14. The Applicant relied on the holding of the **Estate of Anthony Mutonga Ndolo (Deceased) (2017)eKLR** where Lady Justice Nyamweya in recognizing children of an *Iweto* marriage as children of the deceased and therefore beneficiaries."

15. The Applicant also submitted that the issues raised are meritorious and triable and would require oral evidence for the court to make a final determination in the matter. He adopted the holding of Justice Madan J.A (as he then was) quoted in **Rift Valley Water Services Board v Oriental Construction Co. Limited (2018)** where the Court of Appeal stated "***The court would not strike out a pleading if it discloses an arguable case or raises a triable issue.***

16. In conclusion, the Applicant submitted that it is prudent to preserve the suit property failure to which will render the entire suit nugatory because there is a risk of disposing the property either by sale or transfer to third parties.

The Defendant/Respondents' Submissions.

17. The Respondents submitted that the land subject matter of this suit was part of an adjudication process and they were registered as proprietors in common of land parcel Matinyani/Kasaini/114. It later became necessary to split the parcel so that each could retain his own independent title, which was done vide orders made in KITUI CMCC ELC No. 11 of 2021.

18. It is their submission that after sub-division into two parcels, which resulted into Matinyani/Kasaini 1748 and 1749, the parcels were further sub-divided and therefore these titles do not exist as they have mutated. They submit that the orders cannot be granted as they have been overtaken by events and cited the case of **Cyrus Nyaga Kabute v. Housing Finance Co. of Kenya & another (2009)eKLR** and **James Kariuki & Another v. Peter Kariuki & 2 others (2009)eKLR**.

19. The Respondents state that they have not denied the sub-division of the suit land and that there was no intended wrong-doing in the exercise. They submit that the Applicant will benefit from the suit land at the end of the day and there is no prejudice to the Applicant. (**CREAW & others vs the A.G (2011)1 EA 84**)

20. Finally, the Respondents submitted that the issue of adverse possession pleaded by the Applicant does not arise and as such there is no good foundation for the interlocutory discretionary orders. They pray for dismissal of the application. (**HCCC No.74 of 2000, Christine Mutuli Musango & others vs Musanga Mutunga (unreported) Machakos**)

Issues for Determination

The Applicant's claim over ten acres out of land parcel Matinyani/Kasaini/114 is two-pronged on the one hand he claims adverse possession and, in the alternative, he bases his claim on trust. In my opinion, the following issues arise for determination:

A) Whether the Plaintiff has a *prima facie* case to warrant granting of an Injunction as the standard in the *Giella vs Cassman Brown* Case.

B) Are the orders sought herein capable of being granted and what orders should the court issue?

A) Whether the Plaintiffs have a *prima facie* case to warrant granting of an Injunction as the standard in the *Giella vs Cassman Brown* Case.

21. As previously stated, the Applicant's allegation that he and his brothers live on a portion of ten acres out of the suit land presently and have been for a while is not disputed. The matter in contention is the Respondents' conduct in sub-dividing the suit land with resultant different titles in their own respective names. It is also noted that some of the resultant titles have been transferred into the names of 3rd parties. The Applicant is apprehensive that the Defendants want to deprive him of his right to the suit land. I find that the Applicants' fear and apprehension is justified and this is indicative of the presence of a *prima facie* case. The 2nd Respondent however claims that he is the biological father to the Applicant and that the Applicant will eventually inherit from him, an allegation that the Applicant refutes in his submissions while reiterating that he is the product of an *Iweto marriage* and therefore both Defendants are his step-brothers. Since no documentary evidence such as a Birth Certificate has been produced to establish who is actually giving a true account of their relationship, I find that the said issue can only be determined at the hearing of the suit.

22. The Applicant claims that it is important at this point to preserve the suit land. I note that the Defendants sub-divided the land parcel **Matinyani/Kasaini/114** and have obtained individual respective titles over the resultant subdivisions. The trouble with this is that the individual titles do not indicate that they are held in trust for the family and can easily be disposed of. Injunction orders can be issued by courts to preserve the suit property and prevent it from being transferred to other parties and/or wasted. In **Ali Kitsao Katana v Kassim Mohamed Omar & 5 others [2018] eKLR** the court noted as follows:

*"The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interest must be put on scales. In my view, it is only fair to make orders that safeguard and maintain the status quo until the Suit is heard and determined. If the 3rd and 4th Defendants went ahead and transferred the suit Property to a third party, the Plaintiff would be liable in every case to be defeated by the 3rd and 4th Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings. As was stated by Madan J in **Mawji –v International University & Another (1976-80)eKLR 229** "It would be a poor and insufficient system of justice, unethical to contemplate, if a successful Plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by fresh suit if the property in dispute is transferred to a third party. The Court must therefore protect the status quo." I am thus satisfied that the facts presented in this case demonstrate that the Applicant has a *prima facie* case and the balance of convenience tilts in favour for the prevailing circumstances to be maintained. The Plaintiff has reason to seek orders to preserve the Suit Property from changing hands so that the case is not rendered an academic exercise."*

23. In my opinion, the matter of trust can only be dealt with during the full hearing. Since the courts have held that existence of a trust over land must be proven, it is in the interest of justice to preserve the suit property until then. As the Supreme Court held in **George Mbiti Kiebia & another v Isaya Theuri M'lintari & another [2014] eKLR**

"The legal burden to prove the existence of the trust rests with the respondents.

In the case of **Selly Jepchumba Samoei & 3 others v Kimwei Arap Samoei [2020] eKLR** the court held as follows in regard to trust land:

“It is to be noted that in African customary law the practice of sons - and at least until their marriage the daughters - of living on their parent’s land and the sons’ act of building their dwellings and marrying wives while resident thereon was very common.”

B) Are the orders sought therein capable of being granted and what orders should the court issue?

24. I note that the Defendants/Respondents first subdivided *Matinyani/ Kasaini/114* into *Matinyani/Kasaini 1748 and 1749* and then further sub-divided the two into several other plots as evidenced in the official searches attached to the affidavits filed by the parties herein. The orders sought in the Plaintiff’s Application pertain to the original parcel of land *Matinyani/ Kasaini/114* and *Matinyani/Kasaini 1748 and 1749* which have currently mutated again into other titles. In my opinion, the orders issued ought to extend to all the various sub-divisions of the suit land to avoid any confusion arising.

25. I also note the averments that all the parties to this suit and their brothers are currently in possession and occupation of portions of the suit land. I am of the opinion that an order completely barring them from interfering or in any other way dealing with the suit land would be unfair to the Respondents and the others since they have been co-existing on the land. I am of the view that appropriate orders should be specific to further sub-dividing, alienating, transferring or disposing of the suit land until the hearing and determination of this matter but the parties can continue occupying the land as they have been.

26. In a case where the Plaintiff sought injunction against one of the defendants who purportedly fraudulently registered the Plaintiff’s property in his own name, the court found in **Tulip Development Limited v Rehema Kazungu Baya & 4 others [2021] eKLR**

“Given the foregoing, I am persuaded that the plaintiff has demonstrated a prima facie case with a probability of success. On irreparable loss, it is clear that if the Land Register is tampered with any further, or the defendants jointly or severally interfere with the land, then the plaintiff stands to lose his land and may suffer loss that may not be compensable by an award of damages. Even if I was to consider the balance of convenience, it tilts towards preserving the property, in the possession of the plaintiff, and stopping any dealings in the register of the suit property, until this case is heard and determined. I am thus persuaded to allow this application”

Final Orders

In conclusion, I find that the Plaintiff/Applicant’s Application dated 10th September 2021 has merit and that the orders granted are as follows;

A) That pending hearing and determination of this suit, the Defendants by themselves their agents, relatives or anybody claiming under them be restrained from further sub-dividing, alienating, transferring or disposing of or any further dealing in the suit land being all subdivisions of *Matinyani/Kasaini/114* to wit *Matinyani/Kasaini/1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1766, 1767, 1768, 1769* and *1770*.

B) That parties herein be at liberty to apply to court to confirm the specific parcels of land where the ten acres claimed by the Plaintiff are located.

C) That the plaintiff shall have the costs of this application.

DATED, SIGNED AND DELIVERED AT KITUI THIS 6TH DAY OF DECEMBER, 2021.

HON. LADY JUSTICE L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

In the presence of:-

C/A S. NZIOKA

MS. NGALA HOLDING BRIEF FOR MWALIMU THE PLAINTIFF/APPLICANT

M/S WAMBUI HOLDING BRIEF FOR KILONZI FOR DEFENDANT/RESPONDENTS