



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. E040 OF 2021**

ELIZABETH NGINA MUTUKU.....1<sup>ST</sup> PLAINTIFF

MONICAH MWIKALI MUSAU.....2<sup>ND</sup> PLAINTIFF

JOSPHAT KIOKO MUTUKU.....3<sup>RD</sup> PLAINTIFF

WINFRED MUTINDA.....4<sup>TH</sup> PLAINTIFF

(Suing for and on behalf of the estate of Mutuku Katumbu (deceased))

**-VERSUS-**

EDWARD MUSAU MUTUKU.....1<sup>ST</sup> DEFENDANT

JONES NDONYE MUTUKU.....2<sup>ND</sup> DEFENDANT

JOSEPH MUTUKU MATINGI.....3<sup>RD</sup> DEFENDANT

GEORGE WAMBUA MUIA.....4<sup>TH</sup> DEFENDANT

THE COUNTY LAND REGISTRAR MACHAKOS.....5<sup>TH</sup> DEFENDANT

THEOPHILUS MUTHENGI.....6<sup>TH</sup> DEFENDANT

JETI GENERAL CONTRACTORS.....7<sup>TH</sup> DEFENDANT

**RULING**

1. By a notice of Motion dated 14<sup>th</sup> July 2021 and filed in court on 22<sup>nd</sup> July 2021, the Plaintiffs/Applicants sought for the following orders;

**1. Spent**

**2. Spent**

**3. An order of injunction barring the 6<sup>th</sup> and 7<sup>th</sup> Defendants whether by themselves, their servants and/ or agents from entering onto, continuing to stay, excavating or carrying on any works, parting with possession, alienating, disposing and/or in any manner whatsoever dealing with or interfering with land parcel MACHAKOS/NGULUNI/800 pending the hearing and determination of this suit.**

**4. That the costs of this application be in the cause.**

2. The application is anchored on the grounds on its face together with the supporting affidavit of **ELIZABETH NGINA MUTUKU**, the 1<sup>st</sup> Plaintiff/Applicant sworn on 14<sup>th</sup> July 2021. She deposed that the 1<sup>st</sup> Defendant who is her brother unlawfully and fraudulently transferred land parcel number **MACHAKOS/NGULUNI/800** to himself, although the said property belongs to the Applicants father the late

MUTUKU KATUMBU.

3. The Applicant further stated that her father MUTUKU KATUMBU died on 22<sup>nd</sup> January 2002 and was survived by two widows and nineteen children. That the 1<sup>st</sup> Defendant colluded with the Area Chief who failed to issue a letter showing dependants of the deceased, where of the 1<sup>st</sup> Defendant secretly transferred the suit property to himself. That the 6<sup>th</sup> and 7<sup>th</sup> Defendants have entered the suit land, installed a stone crusher and continue to excavate on the land leading to its degradation.

4. The application is opposed. Edward Musau Mutuku, the 1<sup>st</sup> Defendant/Respondent filed his replying affidavit sworn on 27<sup>th</sup> July 2021 and filed on 28<sup>th</sup> July 2021 in response to the application. He stated that he had authority to swear the affidavit also on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant/Respondents. He averred that he is the registered owner of the suit land known as MACHAKOS/NGULUNI/800, and that he has been in occupation of the same since 1980. That over the years, he has disposed off part of the land to several purchasers, among them the Salvation Army Church and AIC Kikuluni Church; who have constructed on the suit land and remain in occupation to date.

5. The 1<sup>st</sup> Defendant further stated that in the year 2018 he disposed off part of the suit land to the directors of the 7<sup>th</sup> Defendant who took possession of the portion they purchased and continue to do development thereon. He emphasized that the suit land belongs to him and the same has never been owned by his late father MUTUKU KATUMBU. He stated that his late father MUTUKU KATUMBU had his own parcel of land, namely KANGUNDO/ISINGA 1690 and plot no. 89, Kangundo Market. He maintained that the allegations that he secretly transferred the suit land from his father to himself is false and baseless. He stated that the suit land was his private property which he was entitled to deal with in any manner he wished. He concluded that the application lacks merit and was made in bad faith.

6. The 7<sup>th</sup> Defendant/Respondent through TITUS KYALO MUSYOKA, their director filed a Replying Affidavit sworn on 30<sup>th</sup> July 2021 and filed in court on the same date. He averred that the application was frivolous, vexatious, an abuse of the court process and a waste of precious judicial time. He stated that the application was fatally defective and ought to be struck out with costs. He stated that he lawfully purchased a portion of land measuring approximately 5 acres which was to be excised from the suit land. He stated that at the time of negotiation to purchase part of the suit land, there was no caution on the same and only learnt of a caution after the suit property was subdivided and new numbers issued, whereof the portion that belonged to him was number 5621.

7. The 7<sup>th</sup> Defendant also deposed that they were innocent purchasers, for value from the registered proprietor. He stated that his property does not form part of the estate of the Plaintiff's father.

8. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed their submissions on 23<sup>rd</sup> September 2021. The 6<sup>th</sup> and 7<sup>th</sup> Defendant/Respondents filed their submissions on 1<sup>st</sup> October 2021, while the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> submissions were filed on 4<sup>th</sup> October 2021.

#### **PLAINTIFF/APPLICANT'S SUBMISSIONS**

9. The Plaintiff/Applicants submitted that the principles for grant of interlocutory injunctions are well known. They relied on the cases of **Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 Others High Court Civil Suit No. 28 of 2015 [2016] eKLR** and **Lucy Wangui Gachara vs. Minudi Okemba Lore Court Appeal No. 4 of 2015 [2015] eKLR**. They submitted that for a court to grant the orders sought, the Plaintiff/Applicant must satisfy the three requirements set out in the case of **Giella vs. Cassman Brown [1973]EA 358** namely;

**a. That the Applicant must establish a *prima facie* case with a probability of success.**

**b. The Applicant must demonstrate irreparable injury if the injunction is not granted.**

**c. That if the court is in doubt it will decide on a balance of convenience.**

10. The Applicant relied on the holding in the case of **Mrao Limited vs. First American Bank of Kenya and 2 others [2003] KLR 125**, where the court defined a *prima facie* case as a case which on the material presented to court; a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the Defendant.

11. The Plaintiff/Applicants submitted that they had placed before court material that demonstrated that they have an arguable case and also that the Defendants had infringed on their rights. They maintained that the 6<sup>th</sup> and 7<sup>th</sup> Defendant's presence on the suit land was unwarranted, illegal and unfair. They argued that the suit property was ancestral land belonging to the late Mutuku Katumbu, though registered in the name of the 1<sup>st</sup> Defendant.

12. The Applicant further contended that though the 1<sup>st</sup> Defendant alleged that suit land belonged to him, he failed to explain how he acquired it. They also submitted that the 1<sup>st</sup> Defendant failed to explain how and when the Plaintiffs entered on the suit land and the reason, they continue to occupy the suit land. They also stated that the fact that the 1<sup>st</sup> Defendant had sold the suit land was not in contention.

13. The Applicant submitted that the 6<sup>th</sup> and 7<sup>th</sup> Defendants are not innocent purchasers for value as alleged. They submitted that the 6<sup>th</sup> and 7<sup>th</sup> Defendants had not attached any sale agreements to their reply to show that indeed they were innocent purchasers for value. They argued that they had placed a caution on the suit property which should have warned the 6<sup>th</sup> and 7<sup>th</sup> Defendants, that the suit was ancestral land. They further contended that the caution had been on the suit property as late as on 21<sup>st</sup> May 2021, yet the 6<sup>th</sup> and 7<sup>th</sup> Defendants allege to

have entered the suit land in January 2021 which means that they were aware that the suit land's ownership was contested.

14. They further submitted that the 6<sup>th</sup> and 7<sup>th</sup> Defendants acts of crushing stones on the suit land would degrade the land. That if that continues, they will be disinherited of their father's property.

15. On the question of irreparable harm, the Applicants submitted that they stand to suffer irreparable loss and damage that may not be compensated by damages. They stated that the use of the suit land by the 6<sup>th</sup> and 7<sup>th</sup> Defendants would degrade the land. They alleged to have emotional ties to the suit land as their late parents are buried on the suit land.

16. On the question of balance of convenience, the Applicants submitted that the balance of convenience tilted in their favour. That if the orders are not granted, they will be greatly prejudiced as the land will be degraded.

#### **THE 6<sup>TH</sup> AND 7<sup>TH</sup> DEFENDANTS SUBMISSIONS**

17. The 6<sup>th</sup> and 7<sup>th</sup> Defendants submitted that there was no documentary evidence to prove the Plaintiff/Applicant's allegations that the suit property belonged to the late Mutuku Katumbu. They submitted further that they acquired part of the suit property by purchase in 2018 and took possession of the same in January 2021, whereby they installed a stone crusher. They stated that the registered owner had already excised the portion they purchased from the mother title.

18. They contended that the 1<sup>st</sup> Defendant was the first registered owner of the suit property, and therefore the same was protected under Section 26(1) of the Land Registration Act No. 3 of 2012. They averred that the Plaintiff's allegations were not sufficient to challenge the 1<sup>st</sup> Defendant's title to the suit land. They relied on the case of **Gichinga Kibutha vs. Caroline Nduku(2018) eKLR**.

19. They contended that the 1<sup>st</sup> Defendant confirmed having sold a portion of the suit land measuring 5 acres to the 7<sup>th</sup> Defendant and therefore the 7<sup>th</sup> Defendant acquired good title to the land purchased.

20. They also submitted that the 7<sup>th</sup> Defendant had made heavy investments estimated at Kshs. 107,651,114/- and incurred a daily loss of Kshs. 1,200,000/-

21. They relied on the case of **Giella vs. Cassman Brown (1973) EA 358** to argue that the Plaintiff must establish the three principles set out in the said case. They argued that the Plaintiffs/Applicants had not established a *prima facie* case with high chances of success. They stated that the suit land is registered in the name of the 1<sup>st</sup> Defendant and the Plaintiffs have not shown that the same was unprocedurally registered in the name of the 1<sup>st</sup> Defendant and therefore the provision of Section 26(1) of the Land Registration Act No. 3 of 2012 is applicable in favour of the 1<sup>st</sup> Defendant. They further argued that the Plaintiffs had failed to demonstrate that the suit property was part of the estate of the late Mutuku Katumbu. They stated that the suit property was private land and not ancestral land as alleged by the Plaintiffs.

22. They contended that they were innocent purchasers for value and therefore an injunction cannot issue against them. That they purchased 5 acres of the suit property lawfully from the 1<sup>st</sup> Defendant. On the question of irreparable harm, the 6<sup>th</sup> and 7<sup>th</sup> Defendants submitted that though the late Mutuku Katumbu is alleged to have died in 2002, the 1<sup>st</sup> Defendant was registered as proprietor of the suit land in 2017 as the first registered owner and no objection was raised. That the 7<sup>th</sup> Defendant is suffering irreparable loss and if the injunction is issued, he shall continue to suffer irreparable loss. They placed reliance on the case of **Falcon Global Logistics Co. Ltd vs. Management Committee of Eldama Ravine Boarding Primary School [2018] eKLR**.

23. On the question of balance of convenience, they submitted that the balance of convenience tilts in their favour, they also stated that equity aids the vigilant and not the indolent, that the Plaintiffs sat on their rights since 2002 when their father died. They concluded that the Plaintiffs/Applicants application did not meet the threshold for grant of interlocutory injunction.

#### **THE 1<sup>ST</sup>, 2<sup>ND</sup>, 3<sup>RD</sup>, AND 4<sup>TH</sup> DEFENDANTS SUBMISSIONS**

24. The 1<sup>st</sup> to the 4<sup>th</sup> Defendants submitted that the material before court showed that the suit property was not in the name of Mutuku Katumbu at the time of his demise. They argued that the law of succession would only apply if the property in issue was registered in the name of the deceased at the time of their demise.

25. They relied on the cases of **Giella vs. Cassman Brown (1973) EA 358** and **Ngurumani Limited vs. Jan Bonde Nielsen & 2 Others(2014) eKLR** to argue that the Plaintiffs/Applicants did not meet the threshold for grant of interlocutory injunction. They further submitted that for the Applicants to succeed in their application, they must demonstrate that they are the owners of the suit property. They contended that the Applicants' claim was based on their claim as beneficiaries of the estate of the late Mutuku Katumbu. They argued that the Applicants had not placed any material before court to link the suit property to the deceased. They further argued that the 1<sup>st</sup> Defendant's registration was a first registration hence the question of transfer does not arise. They stated that the 1<sup>st</sup> Defendant's proprietary rights were protected under Article 40 of the Constitution as well as under Section 26(1) of the Land Registration Act No. 3 of 2012.

26. They invited the court to evaluate the court's reasoning in **Stephen Abu Mukhobi vs. Daniel Oria Odhiambo & Another [2016] eKLR** and **Jeremiah Mwaura Mithanga & Another v. Njoroge Kuria Joseph [2016] eKLR**. They argued that an injunction cannot issue against a registered proprietor of land and an allegation of unlawful and fraudulent registration must be proved by the person challenging the registration.

27. The 1<sup>st</sup> to 4<sup>th</sup> Defendants also submitted that the Plaintiffs shall not suffer any loss if the injunction is not granted as they are not the registered proprietors of the suit land. They stated that if the injunction is granted, it is the 1<sup>st</sup> Defendant who will suffer irreparably as he will be deprived of his constitutional right to benefit from his property and he will suffer from the 6<sup>th</sup> and 7<sup>th</sup> Defendants' claim for damages.

28. They also submitted that the balance of convenience titled in the favour of the 6<sup>th</sup> and 7<sup>th</sup> Defendants who purchased 5 acres of the suit land and are now in possession. They concluded that the 1<sup>st</sup> Defendant's right over the suit property was superior and it would not be proper to injunct a registered proprietor.

### **ANALYSIS AND DETERMINATION**

29. I have considered the application, the affidavit in support, the Replying Affidavits as well as the parties' submissions. The question that arise for determination is whether the Applicants have met the threshold for grant of injunction.

30. Order 40 Rule 1 of the Civil Procedure Rules provides for injunctions as follows;

**1. Where in any suit it is proved by affidavit or otherwise;-**

**a. That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**

**b. That the Defendant threatens or intends to remove or dispossess of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendants in the suit,**

**The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.**

31. The principles for grant of temporary injunctions are now settled. In the case of **Giella vs. Cassman Brown (1973) E.A. 358**, the court stated as follows;

**“The conditions for grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicant must show a *prima facie* case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.**

**Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

32. For the Applicants to satisfy the court that they are entitled to an interlocutory injunction, they must prove the three conditions as follows;

**a. The Applicant must demonstrate a *prima facie* case with a probability of success.**

**b. The Applicant must demonstrate that they will suffer irreparable loss which may not be compensated by an award of damages if the injunction is not granted.**

**c. Where the court is in doubt, the court should decide the application on the balance of convenience.**

33. A *prima facie* case was defined in the case of **Mrao vs. First American Bank of Kenya Limited & 2 Others (2003) eKLR** as follows;

**“A *prima facie* case in a civil application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

34. On the issue as to whether the Plaintiff has established a *prima facie* case with a probability of success. I note that the Plaintiffs/Applicants have deponed that the suit property belongs to the late Mutuku Katumbu and that the 1<sup>st</sup> Defendant's registration was unlawful and fraudulent. Though the Plaintiff's have alleged that the suit property belongs to the estate of Mutuku Katumbu, they have not placed any material before this court to prove that allegation. The search annexed to the affidavit shows that the 1<sup>st</sup> Defendant was registered as proprietor of the suit land on 23<sup>rd</sup> July 2009 and a title deed issued to him on 26<sup>th</sup> May 2017. The green card produced by the Applicants shows that the 1<sup>st</sup> Defendant was the first registered owner of the suit property, having been registered on 23<sup>rd</sup> July 2009. Therefore, there is no evidence on record creating any form of nexus between the suit land and the late Mutuku Katumbu.

35. A party is bound by their pleadings. I have perused the Amended Plaint filed on 28<sup>th</sup> May 2021, where the Plaintiffs allege that at all material times the deceased Mutuku Katumbu was the owner of the land parcel number MACHAKOS/NGULUNI/800. They stated further in the Plaint that having discovered that the suit land was registered in the name of the 1<sup>st</sup> Defendant they placed a caution on the title of the suit land. It is my view that even the Amended Plaint does not state the basis of alleging that the suit property belongs to the estate of the late Mutuku Katumbu. The allegations made in the submissions that the suit land is ancestral land and that the Plaintiffs are on the suit land do

not feature anywhere in the Plaintiffs pleadings and affidavit in support of their application. Those allegations therefore remain unsupported.

36. It is not in dispute that the 1<sup>st</sup> Defendant is the registered proprietor of the suit land. The Applicants have argued that the 1<sup>st</sup> Defendant has failed to explain how he acquired the suit land. It is an established principle in the law that he who alleges must prove. The burden of proof is on the Plaintiffs/ Applicants to prove that prior to the 1<sup>st</sup> Defendant's registration of the suit land, the same was owned by the late Mutuku Katumbu and that the 1<sup>st</sup> Defendant obtained the registration of the suit land unlawfully and fraudulently. The Amended Plaint does not allege any fraud or particulars of fraud on the part of the 1<sup>st</sup> Defendant. It is therefore my view that at this stage, the Plaintiffs have not placed sufficient material before this court to demonstrate that they have a *prima facie* case with a probability of success.

37. The Applicants have argued that they stand to suffer irreparable injury should the interlocutory injunction not be granted as the 6<sup>th</sup> and 7<sup>th</sup> Defendants' use of the suit land is damaging the land permanently. There can only be irreparable injury if there is a *prima facie* case. In this case, I am of the view that the Plaintiffs/Applicants have not shown that they have an arguable case with high chances of success. In the case of **Pius Kipchirchir Kogo vs. Frank Kimeli Tenai[2018] eKLR**, the court stated as follows;

**“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted, and there is no other remedy open to him by which he will protect himself from consequences of the apprehended injury.”**

38. In the instance case the Applicants have not shown that they will suffer irreparable injury if the injunction is not granted since they are not the registered proprietors of the suit land while the 1<sup>st</sup> Defendant has been registered since 2009.

39. In the event that I am wrong on the above questions, I am of the view that the balance of convenience tilts in favour of the Defendants. The Applicants are not the registered proprietors of the suit land, neither have they pleaded being in occupation of the same. The 1<sup>st</sup> Defendant has stated that the land belongs to him and he has previously sold part of it to Salvation Army Church and AIC Church; both who are in occupation and there have been no objections raised by the Plaintiffs. The 1<sup>st</sup> Defendant is protected under Article 40 of the Constitution and Section 26(1) of the Land Registration Act. The 7<sup>th</sup> Defendants are on the land by virtue of being purchasers.

40. The upshot of the above is that I dismiss the Plaintiff's application dated 14<sup>th</sup> July 2021 with costs.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 1<sup>ST</sup> DAY OF DECEMBER , 2021**

**A. NYUKURI**

**JUDGE**