



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 158 OF 2017

MUATHE MULWA & 21 OTHERS.....PLAINTIFFS/RESPONDENTS

VERSUS

DAVID MUNYAE & 10 OTHERS.....DEFENDANTS

AND

JOSEPH M. NDAKA & 260 OTHERS.....INTERESTED PARTIES

RULING

1. In the Notice of Motion dated 5th April, 2017, the Plaintiffs are seeking for the following orders:

a. That a temporary injunction be issued restraining the Respondents, their assignees, their agents, servants, or employees from surveying, demarcating, alienating, selling or disposing or in any manner interfering with Land Parcel Number L.R. No. 1849 pending the hearing and determination of this suit.

b. That a mandatory injunction do issue directing the Respondents or their representatives to excise any portion of land in excess of 80 acres held in L.R. No. 1849 for distribution among the Applicants.

2. The Application is supported by the Affidavit of the 1st Plaintiff who has deponed that on 19th April, 1978, Kakuzi Limited transferred land parcel number L.R. 1849 measuring 2,882 acres to the 1st Plaintiff and 31 other members at a consideration of Kshs. 33,000; that the 32 persons who purchased the land were to hold the same as tenants in common and that on 27th July, 1996, a surveyor was appointed to sub-divided the land amongst the 32 purchasers.

3. According to the 1st Plaintiff, on 13th November, 2008, the 32 members received a report from the surveyor which purported to give different people different acreage of land contrary to what was agreed upon that each member gets an equal acreage of 80 acres and that the 1st and 2nd Defendants were unlawfully allocated 161.7 and 119.8 acres respectively by the Surveyor instead of 80 acres.

4. According to the Plaintiffs, the late fathers of the 3rd to 11th Defendants were unlawfully allocated land which was over and above 80 acres and that if the Title Deeds are processed with the current acreage, the Plaintiffs would suffer irreparable harm and injury.

5. In response, the 1st Defendant deponed that the Applicants have no legal capacity to bring the current suit and have no title to the land; that the Defendants have no capacity to be sued and that the 2nd and 4th Defendants have since died.

6. According to the 1st Defendant, the suit premises were bequeathed to 32 former employees of Kakuzi Limited; that he was then the Manager of Kakuzi and that with a common understanding, some of the owners, including himself, obtained slightly bigger portions of land than others based on their input in the entire exercise.

7. According to the Defendants, at no time was there an agreement on equal ownership of the suit land; that the majority of the Applicants have largely sold their father's portions of land and that 90% of the suit land has been sold to outsiders.

8. The 1st Defendant finally deponed that to date, only two (2) of the original allottees are surviving, that the 1st and 2nd Plaintiffs passed on three weeks prior to the filing of the Replying Affidavit and that he is not aware of annexures MM4, MM5, MM6, MM7 and MM9.

9. In his submissions, the Plaintiffs' advocate submitted that there is a real danger that if the surveyor is engaged by the Defendants, the Plaintiffs will not get a fair distribution of the suit property and that the Applicants have shown that the suit property is in danger of being wasted.

10. Counsel submitted that the original 32 members hold the title in equal shares; that the Respondents have admitted that other members obtained bigger portions of the suit land and that the principles in the case of *Giella vs. Cassman Brown (1973) E.A 358* have been established.

11. In his submissions, the Defendants' advocate submitted that the 32 registered owners demarcated their land into 32 unequal portions; that the sub-division was on a common understanding and that there were no disputes when the sub-divisions were done.

12. Counsel submitted that the Plaintiffs have not exhibited full or Limited Grants of Letters of Administration Intestate on behalf of the various Estates; that the 3rd-11th Defendants have not taken out Letters of Administration in respect of their respective father's Estate and that the Application should be dismissed.

13. The Assignment annexed on the 1st Plaintiff's Affidavit shows that Kakuzi Limited transferred land known as L.R. No. 1849 measuring 2,882 acres to the 1st Plaintiff and 31 other members. The Assignment shows that the 32 purchasers were to hold the unexpired term of 999 years as "*tenants in common*".

14. According to the 1st Plaintiff, he was one of the 32 purchasers, together with the fathers of the 2nd and 21st Plaintiffs. On the part of the Defendants, the initial purchasers were the 1st and 2nd Defendants, while the 3rd to 11th Defendants represent their late fathers.

15. The 1st Defendant has admitted that although the land was to be held by all the 32 purchasers as tenants in common, some owners, including himself, got slightly bigger portions of land based on their input in the entire exercise. The 1st Defendant did not however annex any document showing the acreage that each of the 32 members had agreed upon.

16. Indeed, until it is agreed in writing on the acreage of land that each of the initial 32 members should get, it follows that tenants in common to a piece of land are entitled to an equal share. Considering that the 1st Defendant has admitted that a few members obtained bigger portions of land, the whole exercise of issuing title documents in respect of the suit land should be stopped pending the hearing of the suit.

17. Although the 1st Defendant has argued that the 2nd-21st Plaintiffs and the 3rd to 11th Defendants do not have full or Limited Grants of Administration, to the extent that the 1st Plaintiff is one of the original 32 members, the suit can still be sustained. Indeed, the suit as between the 1st Plaintiff and the 1st Defendant can still proceed to trial in the absence of the other initial purchasers of the suit land.

18. In the circumstances, and for the reasons I have given above, I find and hold that the Plaintiffs have established a prima facie case with chances of success. For those reasons, the Application dated 5th April, 2017 is allowed as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF APRIL, 2020.

O.A. ANGOTE

JUDGE