



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO. 371 OF 2017

EDWARD KAVAI NZIOKA1ST PLAINTIFF/APPLICANT

THOMAS NZIOKA.....2ND PLAINTIFF/APPLICANT

DICKSON MWANTHI NZIOKA3RD PLAINTIFF/APPLICANT

MBUVA NZIOKA.....4TH PLAINTIFF/APPLICANT

JAMES KIMENGEI NZIOKA 5TH PLAINTIFF/APPLICANT

KAMUTI NZIOKA6TH PLAINTIFF/APPLICANT

JONATHAN MUTUNGA NZIOKA..... 7TH PLAINTIFF/APPLICANT

MUTHINI NZIOKA..... 8TH PLAINTIFF/APPLICANT

-VERSUS-

NZIOKA MUTWANYINGI 1ST DEFENDANT/RESPONDENT

KATUTI NZIOKA2ND DEFENDANT/RESPONDENT

MUTHUSI KYENGE..... 3RD DEFENDANT/RESPONDENT

RULING

1. The application for determination is dated 5th December, 2017 and was filed under certificate of urgency. It is brought under Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act, Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. It seeks;

a) Spent.

b) Spent.

c) **THAT an interim order of injunction do issue prohibiting the Defendants/Respondents from evicting, subdividing, trespassing, encroaching or in any other manner interfering with the Plaintiff's lawful use and occupation of land parcel number Nzaui/Kawala/472 and Nzaui/Kawala/170 pending the hearing and determination of the suit herein.**

d) **THAT costs be provided for.**

2. The application is supported by the grounds on its face and the supporting affidavit of the 1st Applicant sworn on the same day. He deposed that he had been authorized by his co-applicants to swear the affidavit on their behalf.

3. The Applicants' case is that the 1st Respondent being the registered owner of Nzaui/Kawala/472 and Nzaui/Kawala/170 (*suit lands*), shared his land to his family members including the Applicants and everyone was shown their respective share. The allocation was followed by occupation but the Respondents have re distributed the suit lands without the Applicants' input. They are apprehensive that if the re distribution is allowed, they will be moved from the areas where they have constructed their houses to their detriment.

4. They exhibited certificates of official search for the suit lands as **EKN-1**, a document dated 14/10/2014 as **EKN-2**, photographs as **EKN-3** and a cash bail receipt as **EKN-4**.
5. The application is opposed through the replying affidavit sworn by the 1st Respondent on 07/12/2016. The gist of the opposition is that he has never distributed his land to any of his children and that the said allocation was forcefully done by the Applicants. He deposed that he has no intention of evicting the Applicants and that the suit was brought in bad faith to deny him a peaceful livelihood or to achieve hideous ends.
6. He exhibited a charge sheet as **NM-1(a)** to show that the 1st Plaintiff was arrested and charged with trespass.
7. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.
8. Relying on the principles enunciated in the *locus classicus*, **Giella –vs-Cassman Brown {1973} EA 358**, they submitted that they have established a *prima facie* case by demonstrating that they developed their portions pursuant to the distribution done by the 1st Respondent.
9. As for irreparable loss, they submitted that they have occupied and constructed on their portions and will suffer if the orders are denied.
10. Further, they submitted that the balance of convenience tilts towards issuing the orders so as to preserve the substratum of the suit.
11. The 1st Respondent submitted that he is the proprietor of the suit lands but the Applicants have been threatening, disturbing and dictating what to do with the parcels.
12. He submitted that the Applicants have already soiled their hands by insulting him and allocating themselves portions of the suit lands and as such, they cannot benefit from equitable remedies.
13. Relying on section 26 (1) of the Registered Land Act 2012, he submitted that his title as the registered owner can only be challenged on grounds of fraud, misrepresentation, illegality or corruption.
14. He has also relied on **Giella –vs-Cassman Brown** (supra) to submit that the Applicants have not established a *prima facie* case with probability of success. He contends that being the registered owner, he is the only one with the right to determine how sub-division of the suit lands will be done.
15. The 2nd Respondent is the wife of the 1st Respondent and is in full support of her husband's position. She submitted that the Applicants' claim against her has no basis and prays that her name be struck out from the suit.
16. The 3rd Respondent is the grandson of the 1st Respondent and is also in support of his grandfather's position. He submitted that he has no legal basis of dealing with the suit lands and is therefore an unnecessary party in the proceedings.
17. Having considered the application, the response and the rival submissions, the only issue for determination is whether the application has merits.
18. It is not in dispute that the 1st Respondent is the registered owner of the suit lands. The Applicants claim that he has already distributed his land to them and are relying on the document dated 14/10/2014 which states as follows;

“It has been agreed between Nzioka and his children that the land Nzaui/Kawala/170 and 472 shall be divided to the sons and not the wives...he has divided the land and cursed whoever shall sell it including grand children except selling to the brothers”
19. The document is signed by the Applicants and thumb printed by the 1st Respondent. The 1st Respondent has however disowned the Applicants' claims.
20. The charge sheet, **NM-1(a)**, shows that on 30/11/2017, the 1st Applicant was charged with trespassing on parcel 170 and interfering with its demarcated boundary. This event happened before this application was filed in Court thus lending credence to the 1st Respondent's version that indeed, it is the Applicants who have been harassing him and dictating what to do. In my view, this application is only meant to sanitize their actions.
21. Further, it is curious that the distribution was allegedly sanctioned by the 1st Respondent in 2014 but up to now, the Applicants are yet to be registered as the proprietors of their individual portions. In my view, the delay in transferring the portions plus the criminal charges negates the alleged distribution.
22. Be that as it may, the 1st Respondent has a Constitutional right to own and hold his property. Further, **section 25 (1) of the Land Registration Act 2012** provides as follows;

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all

privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;

a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b) to such liabilities, rights and interest as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

23. The Applicants claim is not in the exception recognized in the above section neither is it an overriding interest as per section 28 of the Land Registration Act. Accordingly, the 1st Respondent cannot be prohibited from dealing with his own land without a lawful justification and as such, the Applicants have not demonstrated that they have a prima facie case with probability of success.

24. The 1st Respondent has also deposed that he has no intention of evicting them from the suit lands thus allaying the worries of irreparable harm.

25. The upshot is that the application has no merit and I proceed to dismiss it with costs to the Respondent

Signed, dated and delivered at Makueni via email this 26th day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi