



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MACHAKOS**

**ELC. CASE NO. 165 OF 2018**

MARIA NDINDA NZOKA.....1<sup>ST</sup> PLAINTIFF/APPLICANT  
CHARLES MAKAU NZOKA.....2<sup>ND</sup> PLAINTIFF/APPLICANT  
ANTONY MUTUKU NZOKA.....3<sup>RD</sup> PLAINTIFF/APPLICANT  
REGINA MBULA NZOKA.....4<sup>TH</sup> PLAINTIFF/APPLICANT  
FLORENCE MBULWA NZOKA.....5<sup>TH</sup> PLAINTIFF/APPLICANT  
NICHOLAS MWANZIA NZOKA.....6<sup>TH</sup> PLAINTIFF/APPLICANT  
PAUL KILAI NZOKA.....7<sup>TH</sup> PLAINTIFF/APPLICANT  
ESTHER KALEKYE NZOKA.....8<sup>TH</sup> PLAINTIFF/APPLICANT  
JANET SYOKAU NZOKA.....9<sup>TH</sup> PLAINTIFF/APPLICANT

VERSUS

DOMITILA NDUNGE DAVID.....1<sup>ST</sup> DEFENDANT/RESPONDENT  
KAVULI NZOKA.....2<sup>ND</sup> DEFENDANT/RESPONDENT  
WESTHILL SHELTERS LTD.....3<sup>RD</sup> DEFENDANT/RESPONDENT

**RULING**

1. In the Notice of Motion dated 5<sup>th</sup> September, 2018 and filed on 25<sup>th</sup> September, 2018, brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules, the Plaintiff/Applicant has sought for the following orders:

a) *Spent.*

b) *Spent.*

c) *That pending the hearing and determination of this suit, the Respondents, their agents and/ or servants be restrained from alienating, disposing, transferring or interfering in any manner with Land parcels numbers Machakos/Matuu/7516, 7518, 7823, 7824 and Matuu town Plot NO. 5.*

d) *That costs of this Application be provided for.*

2. The Application is supported by the Affidavit of Maria Ndinda Nzoka, deponed on 5<sup>th</sup> September, 2018 with the authority of her co-Applicants, in which she deponed that she is the mother of all the Applicants; that she resides on land parcel Machakos/Matuu/1225 (*the suit property*) and that she is a daughter of Nzoka Kilai (*deceased*) and Kavuli Nzoka, the 2<sup>nd</sup> Respondent, through marriage, while the 1<sup>st</sup>

Respondent is their daughter by birth.

3. It was deponed by the 1<sup>st</sup> Applicant that the 2<sup>nd</sup> to 9<sup>th</sup> Applicants are her children by birth; that their father is Nzoka Kilai (*deceased*); that since she got married in the early 1960's, she had lived with the 2<sup>nd</sup> Respondent and her late father on land parcel Machakos/Matuu/1225 and that she did not have any other home other than the suit property.

4. It was deponed that the 1<sup>st</sup> Respondent, since her marriage in the early 1960's, had lived in Molo in Nakuru County with her husband and children and that the 1<sup>st</sup> Respondent did not have any structure or farm on Machakos/Matuu/1225.

5. It was deponed by the 1<sup>st</sup> Applicant that she lodged a caution against any dealings on Machakos/Matuu/1225 after being suspicious of the 2<sup>nd</sup> Respondent's intention in respect to the suit land and that the Respondents sub-divided Machakos/Matuu/1225 into Machakos /Matuu/7516, 7517 and 7518 and transferred the same into the names of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents without her consent and knowledge.

6. It was deponed by the 1<sup>st</sup> Applicant that on 16<sup>th</sup> February, 2018, the 3<sup>rd</sup> Respondent further sub-divided Machakos/Matuu/7516 into Machakos/Matuu/7823 and 7824.

7. The 1<sup>st</sup> Applicant finally deponed that the 2<sup>nd</sup> Respondent has breached her fiduciary duty owed to all the Applicants by failing to safeguard and protect their rights in respect to the suit property.

8. The 1<sup>st</sup> Respondent deponed that the Application is based on unfounded allegations; that the 2<sup>nd</sup> to 9<sup>th</sup> Applicants are his grandchildren whereas the 1<sup>st</sup> Applicant is her sister; that he was the legal registered owner of the parcels of land Machakos/Matuu/7518 and that his father, Nzoka Kilai (*now deceased*), had 4 wives and that prior to his demise, he had identified and shared out his properties to his wives and children.

9. The 1<sup>st</sup> Respondent deponed that the subject land had been given to him by his late father before his demise and that the Applicants were not content with their portions hence the allegations against him.

10. The 3<sup>rd</sup> Respondent opposed the Application vide a Replying Affidavit of its operational manager, who deponed that the Application was misleading having failed to disclose material facts. It was deponed by the 3<sup>rd</sup> Respondent's Manager that on 15<sup>th</sup> August, 2018, the 3<sup>rd</sup> Respondent entered into a Sale Agreement with the 2<sup>nd</sup> Respondent as the registered owner of Machakos/Matuu/1225 for the sale of 2 acres to be excised from the subject land at a consideration of Kshs. 1,000,000.

11. The 3<sup>rd</sup> Respondent's Manager deponed that as per the Sale Agreement dated 15<sup>th</sup> August, 2016, a payment of Kshs. 600,000 was made to the 2<sup>nd</sup> Respondent and that later on, the payment of the balance of Kshs. 400,000 was acknowledged by the 1<sup>st</sup> Respondent in the presence of the area Chief of Matuu Location, Mrs. Susan Mwendu Kingoo.

12. The 3<sup>rd</sup> Respondent's Manager deponed that on 26<sup>th</sup> July, 2017, the 3<sup>rd</sup> Respondent was issued with titles to the 2 acres of land being Machakos/Matuu/7517, 7824 and 7823; that the 3<sup>rd</sup> Respondent sold title Machakos/Matuu/7823 to Jane Karii Kiberenge and a Title Deed in her name was issued on 9<sup>th</sup> March, 2018 and that the Application lacked merit.

13. The Application was canvassed vide written submissions. The Applicants' counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had neither entered appearance nor filed their Defence; that Machakos/Matuu/1225 is ancestral land; that Machakos/Matuu/1225 was sub-divided without the consent and knowledge of the Plaintiffs and that the Plaintiffs have beneficial interest in Machakos/Matuu/1225.

14. The Applicants' counsel submitted that the 3<sup>rd</sup> Respondent bought two acres of land from the 2<sup>nd</sup> Respondent which was excised from Land title Machakos/Matuu/1225; that the two acres were later sub-divided into Machakos/Matuu/7517, 7823 and 7824; that Machakos/Matuu/7823 has been transferred to a Third Party and that an injunction should issue.

15. The learned counsel for the Plaintiffs reiterated the principles for the granting of interlocutory injunction orders as was set out in the case of *Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358* and submitted that the Applicants had established a *prima facie* case against the Respondents.

16. The Plaintiffs' counsel submitted that all the Plaintiffs had been living on Machakos/Matuu/1225 since birth as members of the 2<sup>nd</sup> Defendant's immediate family and that the mere fact that the land parcel Machakos/Matuu/1225 was registered in the name of the 2<sup>nd</sup> Defendant did not give the 2<sup>nd</sup> Defendant the unfettered right and power to dispose the land.

17. As to whether an award of damages can be an adequate remedy for the Plaintiffs, it was submitted that the land in question is ancestral land and that no amount of money can be enough to compensate the Plaintiffs for such loss. Counsel cited the Supreme Court case of *Isack M' Inanga Kiebia vs. Isaaya Theuri M' Lintari Petition No. 10 of 2015 [2018] eKLR* where the court stated as follows:

“... then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land

2. *The claimant belongs to such family, clan, or group*

3. *The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.*

4. *The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*

5. *The claim is directed against the registered proprietor who is a member of the family, clan or group.”*

18. It was counsel’s argument that the 2<sup>nd</sup> Defendant was a trustee for the Plaintiffs; that if the ancestral land is wrongly sold and/or transferred to third parties, the Applicants would suffer more prejudice for they shall be rendered homeless and that the Respondents shall suffer no prejudice at all if the court maintained the status quo until the suit herein is determined.

19. The 1<sup>st</sup> Respondent’s advocate submitted that the suit land was initially registered in the name of the 2<sup>nd</sup> Defendant; that the suit land was then transferred to the 1<sup>st</sup> Respondent who is the 2<sup>nd</sup> Respondent’s daughter and that there is no proof that the Applicants live on the suit property.

20. The Respondents’ counsel submitted that the 1<sup>st</sup> Applicant has not stated if she is the biological daughter of the 2<sup>nd</sup> Respondent and that the 1<sup>st</sup> Applicant has not established her real connection with the owners of the land.

21. On his part, the 3<sup>rd</sup> Respondent’s advocate submitted that the 3<sup>rd</sup> Respondent bought a portion of the suit property from the 2<sup>nd</sup> Respondent; that the remaining 14 acres of the suit property is still in the name of the 2<sup>nd</sup> Respondent and that the Applicants have not made any attempts to join in this suit one Jane Karii Kiberenge, the registered proprietor of parcel number 7823.

22. Having considered the pleadings and the submissions of counsel, the issue for determination is whether the Applicants ought to be granted the orders sought.

23. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction are now settled: the Applicant must show a *prima facie* case with a probability of success; the likelihood of the Applicants suffering irreparable damage which would not be adequately compensated by an award of damages unless the order of injunction is given and where in doubt in respect of the two considerations, then the Application should be decided on a balance of convenience (*See Giella vs. Cassman Brown (1973) EA 358 and Fellowes and Son vs. Fisher [1976] 1 QB 122*).

24. What amounts to a *prima facie* case was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* as follows;

“...in Civil cases, it is a case in 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.”

25. It has been established by the law and decided cases that the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the status quo between the parties pending the disposal of the main suit.

26. The Plaintiffs’ case is that they all live on parcel number Machakos/Matuu Town/1225 (*the suit property*). According to the Affidavit of the 1<sup>st</sup> Plaintiff, she is the mother of the 2<sup>nd</sup> to the 9<sup>th</sup> Plaintiffs and that the father to the 2<sup>nd</sup> to 9<sup>th</sup> Plaintiffs is one Nzoka Kalai (*deceased*).

27. The 1<sup>st</sup> Plaintiff deponed that she was married in 1960’s; that she has lived on the suit property with the 2<sup>nd</sup> Defendant and their late father; that she does not have any other place to call home; that the 1<sup>st</sup> Defendant has always lived in Molo with her children and husband and that the Defendants sub-divided the suit property on 27<sup>th</sup> July, 2017 and transferred some portions thereof to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

28. The Plaintiffs’ claim, as I understand it, is that the 2<sup>nd</sup> Defendant holds the suit property on his own behalf, and on behalf of the rest of the family, including the Plaintiffs. Indeed, the doctrine of customary trust, being one of the overriding interest over land, has now been recognised under Section 28 of the Land Registration Act.

29. In the case of *Isack M’inanga Kiebia vs. Isaaya Theuri M’lintari & another [2018] eKLR*, the Supreme Court stated as follows about customary trust being an overriding interest over land:

“[54] In the foregoing premises, it follows that we agree with the Court of Appeal’s assertion that “to prove a trust in land; one need not be in actual physical possession and occupation of the land.” A customary trust falls within the ambit of the proviso to Section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act.

*Although the Respondents herein were not in possession or actual occupation of Parcel No. Njia/Kiegoi Scheme 70, both the High Court and Court of Appeal were entitled to enquire into the circumstances of registration, to establish whether a trust was envisaged.”*

30. In the same case, the Supreme considered the elements that would lead a court to declare one to be holding land in trust under customary trust doctrine as follows:

*“...then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:*

- 1. The land in question was before registration, family, clan or group land*
- 2. The claimant belongs to such family, clan, or group*
- 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.*
- 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”*

31. The deposition by the 1<sup>st</sup> Plaintiff shows that the Plaintiffs are related to the 2<sup>nd</sup> Defendant, either through marriage or birth. Indeed, the Plaintiffs have claimed that they have always lived on parcel of land known as Machakos/Matuu/1225 as a family, and that the said land was registered in the name of the 2<sup>nd</sup> Defendant on behalf of the entire family.

32. Indeed, no evidence was adduced by the Defendants to show that the suit property is not ancestral land, and that the registration of the suit land does not fall within the purview of the doctrine of customary trust which is an overriding interest over ancestral or family land.

33. That being the case, it is not frivolous on the part of the Plaintiffs to claim that the 2<sup>nd</sup> Defendant has always held the suit land in trust for the entire family. Consequently, I find that the Plaintiffs have established a *prima facie* case with chances of success, not only in respect to parcel of land known as Machakos/Matuu/1225 but also the sub-divisions that arose therefrom.

34. For those reasons, I allow the Application dated 5<sup>th</sup> September, 2018 as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30<sup>TH</sup> DAY OF JULY, 2020.**

**O.A. ANGOTE**

**JUDGE**