



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 118 OF 2011

- 1. LAZARUS MUVUVA SYANO**
- 2. SUSAN KIMENZE SYANO ... PLAINTIFFS/APPLICANTS**

VERSUS

BONIFACE NZYOKA SYANO..... DEFENDANT/RESPONDENT

RULING

1. The application dated 19/5/2011 is brought under **Order Sections 1A, 3A, 63 (c) of the Civil Procedure Act Cap 21 Laws of Kenya, Order 40 Rules 1 & 2 and Order 51 Rule 1 of the Civil Procedure Rules 2010** and all other enabling provisions of the law.
2. The application seeks an order of injunction to restrain the Defendant/Respondent from disposing, alienating land parcel known as Title No. **Nzai/Mumbuni/677** and evicting the Plaintiffs/Applicants therefrom pending the hearing and determination of this suit.
3. The thrust of the affidavit in support is that the Applicants and the Respondent are siblings. Their father **Syano Kitunga** owned land parcel No. **Nzai/Mumbuni/90** measuring 50.0 hectares. The land was subdivided into land parcels No. **Nzai/Mumbuni/673-679**. The resultant parcels of land are registered in their father's name except land parcel No. **Nzai/Mumbuni/677** which is registered in the Respondent's name. The Applicants' complaint is that the Respondent took advantage of their father's poor health and initiated the subdivision and transfer of land parcel No. **Nzai/Mumbuni/677** without the involvement of the other family members. The Applicants' contention is that prior to the subdivision, their father had shown them the area where to establish their home and they had constructed houses therein and started farming yet the said area fell under land parcel **Nzai/Mumbuni/677** which is now registered in the Respondent's name. The efforts made by the Applicants to lodge a caveat on land parcel **Nzai/Mumbuni/677** failed. The Applicants' father also ignored their concerns. The Respondent started using the office of the area chief to evict the Applicants, thereby triggering this suit. According to the Applicants, the Respondent is holding the land parcel in question in trust for them.
4. In opposition to the application, the Respondent, **Bonface Nzyoka Syano** swore a replying affidavit on 24/10/2011. It is the Respondent's position that land parcel No. **Nzai/Mumbuni/90** was subdivided into seven plots No. **673; 674; 675; 676; 677; 678 & 679**. That their father gave plot No. **Nzai/Mumbuni/677** as a gift and he has since taken possession of the same and started cultivating therein.
5. The application was canvassed by way of written submissions which I have duly considered.
6. It is not in dispute that plot No. **Nzai/Mumbuni/677** belonged to the litigants' father who transferred it to the Respondent. The circumstances leading to the subdivision and the transfer of the parcel of land in question are not clear, save for the claims of ill health of the father to the parties herein and the alleged skewed transfer of land parcel No. **Nzai/Mumbuni/677**. The original land parcel No. **Nzai/Mumbuni/90** was registered in the father's name. It is clear from the affidavit evidence that the father is still alive. If the father is incapable of taking care of his

properties, there is no evidence to show what steps the family has taken to legally safeguard the property. It is also noted that there is no evidence to show whether the land was ancestral land or not.

7. The land in question is registered under the **Registered Land Act** (now repealed). **Section 28** of the said **Act** provides as follows:-

“The rights of a proprietor, whether acquired on first registration or whether acquired 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. **unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register;**

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

8. The Respondent has not denied the averments by the Applicants that the Applicants live on the plot in question and have built their homes there and cultivate therein. Did a trust arise between the Applicants and their father? Is the Respondent holding the land in trust for the Applicants? As held by the Court of Appeal in the case of **John Teleyio Ole Sawoyo –vs-David Omwenga Maobe 2013 eKLR** while referring to the case of **John Gitiba Buruno & Another –vs- Jackson Rioba Burumo (Civil Appeal No. 89 of 2003) (UR):-**

“a constructive trust arises where the property the subject matter of a constructive trust is held by a person in circumstances where it would be inequitable to allow him assert full beneficial ownership of the property.”

9. This court has entertained doubts on whether the Applicants have established a *prima facie* case. There are issues as to whether there is a non-joinder of parties and/or the legal capacity of the father to the parties herein. This court is however satisfied that the Applicants loss cannot be compensated by an award of damages. On a balance of convenience, the Applicants have met the threshold for a grant of an order of injunction. (*See Giella –vs- Cassman Brown Ltd (1973) EA 358*). Consequently, I allow the application with costs in cause.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **6th** day of **March** 2014.

.....

B. THURANIRA JADEN

JUDGE