



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Miscellaneous Civil Application 299 of 2009**

IN THE MATTER OF LIMITATION OF ACTIONS ACT (CAP 22 OF LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR REGISTRATION OF TITLE TO LAND UNDER  
SECTION 38 OF THE LIMITATION OF ACTIONS ACT

BETWEEN

**JOSEPH MBATHA NZAVI ..... APPLICANT**

**VERSUS**

**1. AMBROSE MWIKYA NZAVI**

**2. JANE KAVINDU KATHUKA**

**3. RHODA NDULU KATHUKA**

**4. BROWN NZAVI KATHUKA**

**..... RESPONDENTS**

**R U L I N G**

The application by way of **Chamber Summons** dated 2/10/09 is brought under **Order XXXIX Rules 1, 2, 2A (1) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act**, and any other enabling provision of the law.

The application seeks the following orders:-

1. (Spent).

2. **THAT an order of injunction do issue against the first Respondent restraining him from selling, charging or transferring land parcel No. Kangundo/Isinga/784, or in any other way interfering with the said parcel of land or the title thereto until the suit herein is heard and final orders given.**

3. **THAT an order of injunction do issue against the first, second, third and the fourth Respondents restraining them, their agents and/or servants from entering into land parcel No. Kangundo/Isinga/784 and cultivating, ploughing, cutting down trees/coffee plants, planting crops or in any other way interfering with the said parcel of land until the suit herein is heard and final orders given.**

4. **THAT costs of this application be paid by the Respondent.**

The applicant's case according to the supporting affidavit sworn by the applicant, **Joseph Mbatha Nzavi** on 2/10/2009 is that the Respondent is the registered owner of the suit property. That the 1<sup>st</sup> Respondent who is his younger brother in the year 1978 gave the said parcel of land to the applicant as a gift and authorized him to occupy and use the land and develop it as his own. In the year 2007, the 1<sup>st</sup> Respondent asked the applicant for Ksh.350,000/= as consideration for the said property before he could effect transfer of the same to the applicant. The applicant duly paid Kshs.350,000/= to the 1<sup>st</sup> respondent but the transfer was not effected. The applicant's position is that he has used the suit property since 1978 openly and continuously and cultivated subsistence crops, fruit trees and coffee trees therein.

The applicant's complaint is that the 1<sup>st</sup> Respondent has purported to handover and/or sell the suit property to the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have entered the property and planted euphorbia plants around it and cut the applicant's coffee trees.

In opposition to the application, the 1<sup>st</sup> Respondent, **Ambrose Mwikya Nzavi** swore a replying affidavit on 11/12/2009. The 1<sup>st</sup> Respondent denied the applicant's assertions and stated that the applicant only took advantage because the three parcels of land boarder each other. According to the 1<sup>st</sup> Respondent, the Kshs.350,000/= paid to him by the applicant was for the rent for the land by the applicant since the year 2005. That prior to the year 2005, their late sister, **Beth Nzavi** was the one cultivating the land but the sister's son threatened to sell the land, prompting the 1<sup>st</sup> Respondent to authorize the applicant to use the land but pay rent for the same.

**Mrs Nzei Advocate** appeared for the applicant while the firm of **Makau & Mulei** appeared for the Respondent. The application was canvassed by way of written submissions which I have duly considered.

The applicant's claim is based on adverse possession. The applicant claims to have been given the land as a gift by the 1<sup>st</sup> Respondent in the year 1978 and further paid Kshs.350,000/= as consideration for the land for the 1<sup>st</sup> Respondent to transfer the land to him. On the other hand, the 1<sup>st</sup> Respondent's contention is that the applicant started using the suit land on rental basis from the year 2005 hence the payment of Kshs.350,000/=. The applicant and the 1<sup>st</sup> Respondent are brothers. It seems the suitland is family land that was subdivided between the family members. The applicant's and the 1<sup>st</sup> Respondent's land neighbour each other. According to the affidavit in support, the applicant was cultivating the two parcels of land as one piece. There is also the mention of one **Reuben Makau Mutua** as one of the family members who is said to have initially managed the land for the 1<sup>st</sup> Respondent who lives and works in **Kisii**. Due to these intricate details this is the kind of case which requires a full hearing before the court can tell whether a *prima facie* case with a probability of success has been established or not.

The balance of convenience would however dictate that preservatory orders do issue pending the hearing and determination of the suit. I therefore allow the application. Costs in cause.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this **11<sup>th</sup>** day of **April** 2013.

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**B. THURANIRA JADEN**

**JUDGE**