



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 73 OF 2018**

**MICHAEL WAMBUA MULWA.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ANDERSON MUIINDE MULWA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN MULWA NZIOKI .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JACKSON MUISYO MULWA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**NICHOLAS MUTHAMA MULWA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**BENARD MUTINDA MULWA.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**JOHNSON MBENZA MULWA.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. In the Application dated 16<sup>th</sup> April, 2018, the Plaintiffs are seeking for the following orders:

***a. That a permanent order of injunction do issue restraining the Defendants/Respondents whether by themselves, their servants, agents, employees or any other person acting through them or under their instructions from sub-dividing, disposing, selling, leasing, charging, transferring or by other means whatsoever deal adversely with Land Parcel Numbers Machakos/Kiandani/5458-5466, Mavoko Town Block 3/62387-62393, Mavoko Town Block 3/332, Mavoko Town Block 3/408, Mavoko Town Block 3/1194, Mavoko Town Block 3/1224, Mavoko Town Block 3/2936, Mavoko Town Block 3/3557, Mavoko Town Block 3/3558, Machakos/Mua Hills/203, Machakos Mua Hills/204, Machakos/Mua Hills/452, Machakos/Mua Hills/453 and Athi River/Athi River Block 1/1500 pending the hearing and determination of the suit.***

***b. That the costs of the Application be provided for.***

2. The Application is premised on the grounds that the 1<sup>st</sup> Defendant is the father to the Plaintiffs and also the 2<sup>nd</sup>-6<sup>th</sup> Defendants; that the 1<sup>st</sup> Defendant is married to two wives and that the suit properties were acquired with the effort, assistance and input of the Plaintiffs' mother (deceased).

3. According to the Plaintiff, the 1<sup>st</sup> Defendant owned land parcel number Machakos/Kiandani/73 which was closed on sub-division giving rise to land parcel number Machakos/Kiandani/5454-5466; that without the knowledge and consent of the family members, the 1<sup>st</sup> Defendant secretly sold and transferred parcel numbers 5454-5466 to third parties; that the 1<sup>st</sup> Defendant has also transferred other sub-divisions to family members and that he has transferred parcel number 2936 to the 3<sup>rd</sup> Defendant where he has constructed his house.

4. It is the Defendants' case that the Defendants do not own the suit properties absolutely but holds the same in trust for all family members and that unless injunctive orders are issued, many family members will be left landless.

5. In reply, the 1<sup>st</sup> Defendant deponed that the Plaintiffs have not annexed any evidence to show the alleged contribution by their late mother in respect to the suit properties; that he acquired the suit properties single handedly; that he bought shares at Lukenya Farmers and Ranching Co-operative Society and that he became member number 11 while his two wives became member numbers 374 and 375 respectively.

6. It is the 1<sup>st</sup> Defendant's deposition that her two wives were issued with Title Deeds in respect of Mavoko Town Block 3/2935 and 3206

respectively and that he was issued with a Title Deed for parcel number Mavoko Town Block 3/2936.

7. According to the 1<sup>st</sup> Defendant, the family agreed on how the land should be distributed amongst the children and that he purchased parcel of land known as Machakos/Kiandani/73 in 1974 without any assistance from his wives; that he also bought parcels of land known as Machakos/Mua Hills/ 204 and 256 with other people and that his wife Tabitha Mulwa was buried on Mavoko Town Block 3/3561 which he has allocated to her last born son, Nicholas Muthama.

8. The 1<sup>st</sup> Defendant deponed that he gave the Plaintiffs a prime plot in Machakos being parcel number Machakos/Kiandani/2092 and that the family agreed that parcel number Mavoko Town Block 3/2935 should go to the 1<sup>st</sup> Plaintiff after the succession of his mother's Estate.

9. In his submissions, the Plaintiffs' advocate submitted that has transferred certain parcels of land to third parties without the consent of the family; that the 1<sup>st</sup> Defendant has selectively and in a discriminative manner transferred land to some family members and that out of 13 children from the two wives of the 1<sup>st</sup> Defendant, only four children have been allocated land by the 1<sup>st</sup> Defendant.

10. The Plaintiffs' counsel finally submitted that the Plaintiffs, being the sons of the 1<sup>st</sup> Defendant, have a legitimate expectation that the 1<sup>st</sup> Defendant as their father would divide the family land equally to all the children. Counsel relied on several authorities which I have considered.

11. The Defendants' advocate submitted that the Plaintiffs have not adduced evidence demonstrating their capacity to sue as beneficiaries of their deceased mother; that the Plaintiffs are dealing with their father's properties as if he was already dead; that the Plaintiffs have not established the principles for the grant of an injunction and that the Application should be dismissed.

12. In his Affidavit, the Plaintiffs admitted that the 1<sup>st</sup> Defendant owns the suit properties. It was the Plaintiffs' case that the said properties were acquired with the effort, assistance and input of their late mother, Tabitha Kalekye.

13. The 1<sup>st</sup> Defendant has narrated in his Affidavit how he acquired the suit properties, including parcel of land known as Machakos/Kiandani/73 which was sub-divided to create parcels number 5454-5466. Except for parcel number Machakos Town Block 3/2935 which is registered in the name of the Plaintiffs' mother, all the other parcels of land were registered in the name of the 1<sup>st</sup> Defendant who has since transferred some of them to third parties.

14. Considering that none of the suit properties forms the Plaintiffs' ancestral land, the Plaintiffs cannot dictate to the 1<sup>st</sup> Defendant, who is their father, how he should deal with the suit properties. Although it is true that the Land Registration Act recognizes trusts, including customary trusts, the Plaintiffs have not, prima facie, shown that the 1<sup>st</sup> Defendant was holding the suit properties in trust for them.

15. Indeed, in the absence of any written document establishing any fiduciary relationship between the Plaintiffs and the 1<sup>st</sup> Defendant, and in view of the fact that the Plaintiffs do not have the *locus standi* to argue that their mother contributed in the acquisition of the suit properties, the 1<sup>st</sup> Defendant is at liberty to deal with the parcels of land that are registered in his name.

16. The 1<sup>st</sup> Defendant has shown by way of evidence that he single handedly acquired the suit properties. Being alive, the 1<sup>st</sup> Defendant can deal with the said parcels of land as he wishes. Indeed, other than properties being held in trust, the Plaintiffs do not have any entitlement in respect to the land registered in favour of the 1<sup>st</sup> Defendant during his lifetime. Their right over the suit land can only arise in the event their father dies before distributing his Estate.

17. The Plaintiffs being of age should acquire their own assets, and not demand for an equal distribution of their father's land. That is a concept which this court has always frown against. Having failed to establish the doctrine of trust, I find that the Plaintiffs have not established a prima facie case with chances of success. Indeed, the Plaintiffs will not suffer any irreparable loss if the order of injunction is not granted because the suit land do not belong to them in the first place.

18. For those reasons, I dismiss the Notice of Motion dated 16<sup>th</sup> April, 2018 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2019.**

**O.A. ANGOTE**

**JUDGE**