



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 363 OF 2017**

**MATHEW MWANZA MAKAU.....1<sup>ST</sup> PLAINTIFF**

**PAUL MAKAU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**GOSPEL ASSEMBLY FELLOWSHIP MINISTRY.....1<sup>ST</sup> DEFENDANT**

**MBIVIU MULU.....2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF LANDS KITUI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. In the Application dated 12<sup>th</sup> February, 2018, the Plaintiffs are seeking for the following orders:

***a. That a temporary injunction do issue restraining the Defendants, their servants, agents, or anybody or authority from evicting the Plaintiffs, from, selling, disposing of, from trespassing on, or in any other manner interfering with a parcels of land known as Matinyani/Kalimani/1056, situate within Kitui County pending hearing and final determination of this suit or pending further orders of this Honourable Court.***

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

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the owner of a parcel of land known as Matinyani/Kalimani/1056; that on 17<sup>th</sup> July, 2017, they were shocked to learn that the suit land had been transferred from their deceased brother, Kivuu Makau Nzuva to the 1<sup>st</sup> Defendant and that as a family, they were never involved in the said transfer.

3. According to the 1<sup>st</sup> Plaintiff, they have never commenced succession proceedings in respect of their father's and brother's Estate; that they are the immediate family members of their late brother, Kivuu Makau Nzuva and that they do not know a woman by the name of Mbiviu Mulu, who obtained the death certificate of their late brother.

4. The 1<sup>st</sup> Plaintiff finally deponed that their late brother had mental illness; that their late brother was not married and did not have children and that the transfer of the suit land to the 1<sup>st</sup> Defendant was fraudulent and should be cancelled by this court.

5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed Grounds of Opposition and a Replying Affidavit. In their Grounds of Opposition, the Defendants averred that the Plaintiffs have not established a prima facie case with a probability of success; that the Plaintiffs have not exhibited any Letters of Administration of Grant to show that they have an interest in the suit land and that the Application is frivolous and a waste of judicial time.

6. In her Replying Affidavit, the 2<sup>nd</sup> Defendant deponed that the Plaintiffs have annexed a letter from the Assistant Chief confirming that indeed she is the wife to the deceased; that she applied for the Grant of Letters of Administration Intestate which were duly gazetted in the Kenya Gazette of 16<sup>th</sup> December, 2016 and that the Plaintiffs have never challenged the said Letters of Administration.

7. The 2<sup>nd</sup> Defendant finally deponed that on 15<sup>th</sup> June, 2017, she was issued with a Certificate of Confirmation of Grant; that the sale of the suit property to the 1<sup>st</sup> Defendant was lawful and that there is no evidence to show that the said sale was fraudulent.

8. In his Further Affidavit, the 1<sup>st</sup> Plaintiff deponed that the alleged children of the deceased should be subjected to DNA tests; that the 2<sup>nd</sup> Defendant did not inform any of the family members while conducting the Succession Cause and that the Application for injunction should

be allowed.

9. Both the Plaintiffs' and the Defendants' advocates filed submissions which I have considered. I have also considered the filed authorities.

10. In their Complaint dated 6<sup>th</sup> September, 2017 and the Affidavit in support of the Application, the Plaintiffs averred that parcel of land known as Matinyani/Kalimani/1056 was registered in the name of their late brother, Kivuu Makau Nzuva; that their late brother did not have a wife or children and that their late brother was a person of unsound mind.

11. According to the Plaintiffs, the 2<sup>nd</sup> Defendant fraudulently transferred the suit land to the 1<sup>st</sup> Defendant and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should be evicted from the suit land.

12. The 2<sup>nd</sup> Defendant on the other hand claims to be the legal representative of the deceased. The 2<sup>nd</sup> Defendant produced in evidence the Grant of Letters of Administration Intestate which was issued by the Chief Magistrate in Kitui Succession Cause No. 333 of 2016. The said Letters of Administration was issued on 16<sup>th</sup> January, 2017.

13. The 2<sup>nd</sup> Defendant also produced in evidence the Certificate of Confirmation of a Grant that was issued in the same Succession Cause on 15<sup>th</sup> June, 2017, with the only property of the deceased being the suit land. The Certificate of Confirmation of a Grant shows the suit land having been transferred to the 1<sup>st</sup> Defendant.

14. The transmission of the suit land to the 2<sup>nd</sup> Defendant and the subsequent transfer of the land to the 1<sup>st</sup> Defendant was on the basis of a court order in Succession Cause No. 333 of 2016 by the Chief Magistrate, Kitui.

15. Indeed, the Plaintiffs in this matter can only claim that they have an interest in the suit land if they successfully challenge the Letters of Administration and the Certificate of Grant that was issued by the court in the Succession Cause. Until and unless the Plaintiffs successfully challenge the two documents that were issued by the Succession Court, they cannot claim to have the requisite *locus standi* to bring this suit.

16. In fact, the issue of whether the late Kivuu Makau Nzuva had a wife or not, or whether, he was a person of unsound mind or not can only be raised in the Chief Magistrate's Court at Kitui in Succession Cause No. 333 of 2016 and not in the current suit. Until that is done, the Plaintiffs cannot raise the issue of the sale of the suit land to the 1<sup>st</sup> Defendant as having been fraudulent.

17. For the reasons I have given above, I find that the Plaintiffs have not established a prima facie case with chances of success. The Application dated 12<sup>th</sup> February, 2018 is therefore dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24<sup>TH</sup> DAY OF MAY, 2019.**

**O.A. ANGOTE**

**JUDGE**