

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 910 OF 2012
IN THE MATTER OF THE ESATE OF NELSON MATHEKA
NZIOKI (DECEASED)

BETWEEN

DAVID MBATHA NZIOKI.....1ST
APPLICANT

ELIZABETH MUNYIVA MWEKO.....2ND
APPLICANT

GILBERT MANTHI MWENGA.....3RD
APPLICANT

AND

BRIDGITER STELLA MUENI MWENGA.....1ST
RESPONDENT

PALVIN MATHEKA KIOKO.....2ND
RESPONDENT

RULING

1. Before me are two applications. The first one is filed by the 1st applicant against the two respondents. It is a Notice of Motion dated 3rd March 2025. It is filed pursuant to sections 1A, 1B and 3A of the Civil Procedure Act, order 40, rule 1 and order 51 rule 1 of the Civil Procedure Rules seeking the following reliefs:

1. ... Spent;

2. ... Spent;

3. ... Spent;

4. THAT pending the hearing and determination of this succession cause, this Honourable Court be pleased to issue temporary orders of injunction restraining the respondents herein by themselves, their servants, agents, employees and/or any other person claiming under them from subdividing, surveying, alienating (sic);

5. THAT pending the hearing and determination of this succession cause, this Honourable Court be pleased to issue temporary order that each beneficiary of the estate of Nelson Matheka Nzioki maintains their position on Land Parcel No. MASII/UTITHINI/475;

6. THAT costs of the application be provided for.

2. The application is supported by the grounds on its face and the supporting affidavit of the 1st applicant. The facts supporting the application are that the applicant is the eldest son of the late Gideon Nzioki Matheka, a son of the late Nelson Matheka Nzioki. The 1st respondent is the wife of Philip Mwenga Matheka, a son of the deceased herein, while the 2nd respondent is his grandchild. Upon his death, the deceased Nelson Matheka Nzioki was the registered proprietor of all that parcel of land namely Masii/Utithini/475 the subject of the present succession proceedings.
3. Despite the fact that these succession proceedings are pending, the 1st applicant lamented that the respondents have unlawfully commenced the subdivision of the suit parcel

- of land having instructed a surveyor to conduct a survey. In that regard, the surveyor has placed beacons and hived off a portion belonging to the late Gideon Nzioki Matheka under the guise that the said portion belongs to the 1st respondent.
4. According to the 1st applicant, it is this portion of land that contains the applicant's parents' graves together with developments and houses where the 1st applicant resides with his family. That he has been informed by the respondents that he would be relocated elsewhere with his family, a fact he vehemently opposed. This is because they have resided on that parcel of land that has since become their family home.
 5. The 1st applicant continued that unknown persons have been visiting the suit premises with intent to purchase that parcel of land belonging to his late father. He was therefore apprehensive that if the orders sought are not granted, subdivision would proceed to his detriment. Further, that he would suffer irreparable damage. He further urged that it was in the interest of justice that the orders sought are granted, the balance of convenience tilted in his favor and the respondents suffered no prejudice on the grant of those orders.
 6. The 2nd application is dated 16th June 2025. It is filed by the applicants against the 1st respondent. It has invoked the provisions of sections 1A, 1B and 3A of the Civil Procedure

Act, order 40, rule 1 and order 51, rule 1 of the Civil Procedure Rules seeking the following reliefs:

- 1) ... Spent;**
- 2) ... Spent;**
- 3) THAT pending the hearing and determination of this succession cause, this Honourable Court be pleased to issue temporary orders of injunction restraining the respondent herein by herself, her servants, agents, employees and/or any other person claiming under her from fencing, proceeding with construction works, burning charcoal, subdividing, surveying, alienating, offering for sale, selling, charging, transferring and/or in any other manner whatsoever interfering with land parcel no. Masii/Utithini/475;**
- 4) THAT pending the hearing and determination of this application and succession cause, this Honourable Court be pleased to issue temporary order that each beneficiary of the estate of Nelson Matheka Nzioki maintains their position on Land Parcel No. MASII/UTITHINI/475;**
- 5) THAT pending the hearing and determination of this application and succession cause, this Honourable Court be pleased to issue an order compelling the respondent to demolish the fence illegally erected by her on Land Parcel No. MASII/UTITHINI/475;**
- 6) THAT costs of the application be provided for.**

7. This application is grounded by the facts on the body of the motion as well as the supporting affidavits of the applicants.

8. In summary, it was disclosed that the 1st applicant filed a Notice of Motion dated 3rd March 2025 which is pending hearing and determination before the court. The same was slated to be heard on 14th October 2025. In the meantime, *status quo* orders were granted on 20th March 2025. In spite of those orders, the 1st respondent was accused of fencing out the suit parcel of land namely Masii/Utithini/475.
9. The applicants were dissatisfied because the respondents were hiving out portions belonging to their families. Further, the respondents were accused of giving a portion to a church who have commenced construction works. Furthermore, the respondents were accused of undertaking burning of charcoal on the said parcel of land. The applicants were apprehensive that the actions of the respondents were intended to deprive them of the inheritance of the suit parcel of land causing irreparable damage.
10. The applicants contended that the actions of the respondents contravened the express orders of this court amounting to contempt. They further urged that it was in the interest of justice that the orders sought are granted, the balance of convenience tilted in their favor and the respondents suffered no prejudice on the grant of those orders. Additionally, the continued actions of the respondent to burn charcoal caused destruction and wastage of the portion in dispute.

11. The 2nd and 3rd applicants further contested that it was not true that all beneficiaries of the deceased's estate met on 14th October 2024 and agreed on the mode of distribution morphing into the subdivision exercise. She therefore denied participating in any deliberations regarding the estate or being present during the survey process. She further lamented that part of her allocated property was being claimed by a neighbouring school.
12. The two applications elicited responses from the respondents and the 1st administrator. The 1st respondent filed a replying affidavit sworn on 17th July 2025. She deposed that the survey works and placement of beacons were lawfully done under the authority of the 1st administrator. In fact, the process was not objected to. No fault could thus lie against her. She contended that in any event, those works were carried out before 8th May 2025. She accused the applicants of bridling falsities to this court as the facts set out therein were untrue.
13. Looking at the prayers sought in both applications, the 1st respondent contended that they were mischievous as they were similar prayers. The applicants were therefore undeserving of the orders sought. The 1st respondent was of the view that the applications were filed in bad faith and calculated to malign her name, harass her and deprive her off her portion of the property. She justified that she was entitled to fence her portion of land because she wanted to

secure her investments and farming activities. She added that there was high insecurity in the area as to warrant the fencing activities.

14. The 1st respondent contended that to her knowledge, the dispute was well settled way before 8th May 2025. Amongst the terms of engagement, the 1st respondent and the 1st applicant swapped their portions of land. As such, there was nothing to litigate upon. She explained that the charcoal activities were done in her parcel and had therefore not encroached on anyone's portion. Further, the donation to the church was done during the lifetime of the deceased and was lawful. She added that the 2nd and 3rd applicants were only enjoined maliciously maintaining that they participated in the meeting and subsequent subdivision. She prayed that the applications be dismissed with costs.
15. The 1st administrator, Lazarus Matheka filed a replying affidavit sworn on 3rd April 2025. Having recognized the parties herein, he deposed that the deceased allocated the 1st applicant's father the portion that he was currently occupying together with this family. Similarly, the 1st respondent's husband was given the land that the 1st respondent was currently occupying. He revealed that the beneficiaries agreed to retain their portions currently and that the estate be divided amongst the two houses. It was therefore wrong for the 1st respondent to claim a portion belonging to the 1st applicant. He stated that the beacons

erected on the property by the surveyor had been unlawfully placed and encroached on the suit land.

16. The 1st administrator maintained that from his knowledge, the disputed land remained occupied by the applicants who have made considerable developments on the property. Further, it contains the graves of the applicant's parents. He therefore supported the application and prayed that the same be allowed as prayed.
17. The 1st administrator also filed his replying affidavit sworn on 1st May 2025. The same appears contradictory to his initial affidavit. He deposed that he was the eldest surviving son of the deceased. That the suit land remained registered in the name of his deceased father and could not therefore be sold. He deposed that his replying affidavit sworn on 3rd April 2025 was not properly read out to him. He was therefore recanting the depositions made therein. He stated that by a meeting held on 14th October 2024, the family members agreed to settle their affairs and the objector to withdraw his case to pave way for confirmation of grant. Accordingly, as an administrator, he retained the services of a surveyor to ascertain the portions of the beneficiaries.
18. Following that exercise, the boundaries were ascertained but subject to the confirmation of this court during confirmation of grant. He stated that the only issue that remained was the dispute on portion between the 1st applicant and the 1st respondent. That he recalled that the said parties agreed to

swap their portions of land with each other. As far as he was concerned therefore, the matter was settled. He urged this court to adopt the best way forward to fast track the determination of this matter.

19. The 2nd administrator, Florence Kyenze, the daughter of the deceased, filed her replying affidavit sworn on 12th July 2025. She contended that the application dated 16th June 2025 was malicious as it was intended to frustrate the respondent from peacefully enjoying the inheritance from her late husband. In her view, the applications were simply emotive and lacked any legal or justifiable basis for grant of the orders sought.
20. The deponent explained that the 2nd and 3rd applicants were beneficiaries from the second household managed by her step brother Mr. Lazarus Matheka; a person who had not expressed any grievance or concern. After over twenty years of not dining together, the family met on 14th October 2024. Members present included the applicants. It was unanimously agreed that the objection proceedings be withdrawn to pave way for confirmation of grant.
21. In light of that meeting, the 1st administrator exercised his legal obligation by calling a surveyor to establish the portions of the beneficiaries. A payment list, dated 14th October 2024, to the surveyor was attached to the application in support of that contention. That the boundaries were determined but only serving as a basis to

facilitate the scheduling of share distribution awaiting the issuance of the confirmed grant.

22. Noting the 2nd applicant as the wife of his step brother Peter Matheka, the 2nd administrator deposed that she had been cultivating over ten acres of the estate for commercial agricultural use. She also disclosed that the 2nd applicant was receiving Kshs.70,000.00 monthly on water supply to neighbours since 2018. That the 2nd applicant had no moral right to challenge the fencing activities as she had already fenced on her property. Further, on 10th November 2014, the 2nd applicant evicted the deceased's grandchildren and renovated the house therein for private use. She also installed a fence and a gate.
23. The 2nd administrator accused the 2nd applicant of intermeddling and threatening other beneficiaries with legal action. That she was instructed by her late brother that the 3rd applicant and his other family members be settled at Matuu and not the suit parcel of land. In fact, the 3rd applicant's mother is buried there. After being shown their inheritance, the 2nd administrator's brother and the respondent built a permanent house in 1984. This was after he had separated from the 3rd applicant's mother. Her late brother was buried at the respondent's house in line with Kamba Customary law. She also empathized with the respondent for struggling to raise her children.

24. The 2nd administrator accused the 3rd applicant of being greedy. She urged this court to award land to the 3rd applicant in Masii and the respondent to get a share of the land in Matuu. She urged the court to vacate prayer two of the application as it was not made in good faith.
25. The 2nd applicant filed a further affidavit sworn on 13th October 2025. She raised the following pertinent issues regarding the two applications before me: she stated that on 5th October 2025, the administrators and some of the beneficiaries subdivided the properties and fenced them each claiming their portions. That they also erected a wall blocking access to the 2nd applicant's home. This created so much chaos that led to the intervention of the police. The 2nd applicant filed a complaint under OB number 11/05/10/2025. She was apprehensive that if not asked to stop, the said parties would disinherit her from her portion of the property.
26. The application was canvassed by way of written submissions. The applicants' written submissions dated 22nd December 2025, the 1st respondent filed written submissions dated 13th November 2025 while the 2nd respondent filed written submissions dated 13th October 2025. This court has considered those submissions which are elaborate.
27. I have considered the application and the response thereto and analyzed the law. From the applications, the affidavits in response and opposition thereto, many issues have been raised going to the substratum of the dispute. Some of the

parties have not addressed the present application. Those several issues can only be resolved when the matter comes up for hearing. At this juncture, I am invited to establish whether the applicants have met the test for injunctive relief sought.

28. Before delving into the merits or otherwise of the dispute, I note that the 2nd administrator filed two diametrically opposed replying affidavits. The first one, sworn on 3rd April 2025, appears to have by and large supported the application. The second one, sworn on 1st May 2025, attempted to oppose the application with introductory depositions that the earlier affidavit be recanted. That was unprocedural. Instead, since the 1st administrator raised conflicting positions, this court will disregard his response altogether with a stern warning that depositions, just like testimonies before court are made in the interests of just disposal of cases. Such being made under oath, it is expected that at the very least, the deponent or witness maintains the truth.

29. As stated earlier in this ruling, the applicants have filed two applications seeking orders of injunction. The test for injunctive relief is well settled with the *locus classicus* case of ***Giella vs. Cassman Brown*** (1973) EA 358 as follows:

“Firstly an applicant must establish a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless otherwise the applicant will suffer injury which

will not be compensated in damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

30. On whether the applicants have established a *prima facie* case with probability of success, it has been held to be one which on the material presented to the court, a tribunal properly directing itself would 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. [See ***Mrao vs. First American Bank of Kenya Ltd & 2 others*** (2003) eKLR].
31. In this case, the applicants have complained that the respondents commenced the subdivision process of the suit parcel of land having instructed a surveyor to place beacons. Further, that the respondents had proceeded to put up fencing structures on their claimed portions of land. These facts were admitted by the 1st respondent who maintained that the survey process was sanctioned by a meeting of the beneficiaries and conducted under the behest of the administrators. Furthermore, it was also alleged that the applicants had also fenced and set up new structures on the parcel of land.
32. It is evident that the survey process was commenced yet the grant is yet to be confirmed. Additionally, in spite of the interim orders in force, it appears that the *status quo* was not maintained. In view of the foregoing arguments,

counterarguments and accusations from the parties, I find that a *prima facie* case has been established. As to whether they will succeed, that will be determined after a full hearing.

33. On whether the applicant will suffer irreparable damage that cannot be compensated by an award of damages, the applicants stated that they risked losing their inheritance especially taking into account that some of their parents were buried on the suit land. It is not denied that the applicants are beneficiaries of the estate. They deposed that prospective buyers had been seen scouting on the property. Furthermore, the respondent had given some of the property to a church and nearby school. Those facts were not denied by the respondent or the 1st administrator and was stated to be something that happened in the lifetime of the deceased. In that regard, I find that the second limb for the injunctive test has been met.
34. Since the applicants have demonstrated the first two limbs, I need not consider the balance of convenience. For those reasons, the applications dated 3rd March 2025 and 16th June 2025 are hereby allowed in the following terms:

1. Pending the hearing and determination of this succession cause, a temporary order of injunction is issued restraining all the parties, that is to say, the applicants, the respondents, the beneficiaries and the administrators from subdividing, surveying, alienating, fencing,

proceeding with construction works, burning charcoal, offering for sale, selling, charging, transferring and/or in any other manner whatsoever interfering with land parcel no. Masii/Utithini/475 ;

- 2. Each beneficiary of the estate of Nelson Matheka Nzioki shall maintain their current position on Land Parcel No. MASII/UTITHINI/475; For avoidance of doubt, no further activities should be undertaken on the property without further directions from the Court.*
- 3. The administrators shall move with speed and file the summons for confirmation of grant within the next 30 days to facilitate expeditious disposal of the suit herein;*
- 4. Since this is a family dispute, each party shall bear its own costs of the appeal.*

It is so ordered.

Dated, signed and delivered at Machakos this 13th day of February 2026.

RHODA RUTTO
JUDGE

In the presence of;

.....Appellants

.....Respondent

Selina Court Assistant

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