



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC SUIT NO.20 OF 2019

PHILIP MUNYAO MUTWOTA (Suing on behalf of

BENJAMIN JACKSON MUTWOTA MUIA).....1ST PLAINTIFF

NDAVI WAMBUA (suing as the administrator and personal

Representative of WAMBUA MAKAU NDUNGU).....2ND PLAINTIFF

-VERSUS-

ELIJAH MULALA.....1ST DEFENDANT

GEORGE NZIOKA.....2ND DEFENDANT

MBULA MUTUNGI.....3RD DEFENDANT

STEPHEN NZOMO.....4TH DEFENDANT

MUTOKO MUSYIMI.....5TH DEFENDANT

ALICE MUSYOKA.....6TH DEFENDANT

KITUKU KIMONDE.....8TH DEFENDANT

AUGUSTUS CEASAR.....9TH DEFENDANT

KYALO MUSA.....10TH DEFENDANT

MRS. JOEL MUSAU.....11TH DEFENDANT

JOSEPHINE MUTHONI KISWIL.....12TH DEFENDANT

JONATHAN MUSYOKA NZOMO.....13TH DEFENDANT

BENARD KITUKU KANYAMBU.....14TH DEFENDANT

JOHN KYALO MUTHOKA.....15TH DEFENDANT

KILONZI KAMULA.....16TH DEFENDANT

TABITHA NZOMO.....17TH DEFENDANT

JUSTUS KUNGA.....	18 TH DEFENDANT
MARGARET MANG’OKA.....	19 TH DEFENDANT
MRS. NGANGA MUSYA.....	20 TH DEFENDANT
MAWEU NTHUSI.....	21 ST DEFENDANT
PAUL MUTISO WAMBUA.....	22 ND DEFENDANT
PASTOR GEORGE (IDCC).....	23 RD DEFENDANT
DO ME I DO YOU YOUTH GROUP.....	24 TH DEFENDANT
JOHN MWANZA KITUKU.....	25 TH DEFENDANT
MAKUMI MUTWIWA.....	26 TH DEFENDANT
DAVID KATULE.....	27 TH DEFENDANT
MUTOKO MUSYIMI.....	28 TH DEFENDANT
MORRIS KAMOLO KING’ELE.....	29 TH DEFENDANT
PASTOR DAVID JOSIAH (AIC NGAAMBA).....	30 TH DEFENDANT
MICHAEL KASATI.....	31 ST DEFENDANT
DICKSON KASYOKA KANYAMBU.....	32 ND DEFENDANT

RULING

1. What is coming up for ruling is the Plaintiffs’/Applicants’ Notice of Motion application expressed to be brought under Order 40 Rule 1(a) of the Civil Procedure Rules, 2010 for orders: -

1. Spent.

2. Spent.

3. An order do issue directing the Registrar of Lands, Makueni to cancel all transactions, subdivisions, registrations and entries done in respect of land parcel number Mukaa/Konza/Kiima Kiu/Block 1/81 and revert it to acreage of 11.65 hectares.

4. Any other order this court deems fit and just to grant.

The application is dated 20th March, 2019 and was filed in court on 22nd March, 2019 and is predicated on the grounds on its face. It is supported by the supporting and supplementary affidavits of Philip Munyao Mutwota, the 1st Plaintiff/Applicant herein, both sworn at Nairobi on 20th March, 2019 and 07th June, 2019.

2. The Defendants/Respondents have opposed the application through a replying affidavit of George Nzioka, the 2nd Defendant/Respondent herein, sworn at Wote on 27th May, 2019 and filed in court on 28th May, 2019. The 2nd Respondent has further sworn what is headed as “supplementary affidavit” the same being dated 19th July, 2019 and filed in court on 22nd July, 2019.

3. On the 29th May, 2019 the court directed that the application be disposed off by way of written submissions. The Applicants and the Respondents filed their submissions on 17th July, 2019 respectively.

4. In his supporting affidavit, the 1st Applicant has deposed that he and his co-Applicant are administrators of the estates of Benjamin Jackson Mutwota and Wambua Makau (hereinafter referred to as the 1st and 2nd deceased) after obtaining their grants marked as NW1 and NW2 in Machakos High Court Succession Cause No.469 of 2013 and Kilungu Senior Resident Magistrate’s Court Succession Cause No.50 of 2016 respectively. The 1st Applicant goes on to narrate the events leading to the filing of this suit and application in his said supporting and supplementary affidavits.

5. On the other hand, the 2nd Respondent has deposed in paragraph 5 among others that the application is legally defective and factually

incurable. He too gave a narration of how the suit property was created.

6. In his submissions, the Applicants' Counsel cited the three principles that an Applicant must establish in order for the order of interlocutory injunction to be granted. I need not repeat the three principles herein save to say that with regard to the principle of prima facie case with probability of success, the Counsel submitted that the Respondents have not denied that the suitland is registered in the names of the deceased person herein.

7. It was further submitted that the Respondents have stated in their replying affidavit that land parcel Mukaa/Konza/Kiima Kiu/Block 1/142 is known to them and as such the Respondents are aware of where the Trading Centre should be situated. The Counsel added that the Respondents invasion of the deceased persons' land on the pretext that it is set aside for a market is unconstitutional, unlawful and unacceptable in a civilized society. It was further submitted that the letter dated 07th July, 2018 from the Director of Lands and Physical Planning Makueni County shows that parcel number 142 is where the market should be and the letter has nothing to do with land parcel number 81. The Counsel submitted that the Applicants have exhibited title deeds and certificates of official search thus there is enough prima facie case with probability of success. The Applicant relies on the case of *Simon Sossion vs. Kiango General Supplies Ltd [2010] eKLR*.

8. Regarding the principle of if the Applicant will suffer irreparable loss which cannot be compensated by award of damages, the Applicants' Counsel submitted that the Applicants are not only beneficiaries of the estate of the deceased persons but what the Respondents are doing is criminal in nature in view of Section 45 of the Law of Succession Act which deals with intermeddling with the estate of deceased persons. The Counsel was of the view that no amount of damages can compensate the estate of the deceased persons for the loss of the land in the manner intended by the Respondent and cited the case of *Agnes Wanjiku Kamweti vs. Thamia Investment & 2 others [2009] eKLR* where R. N. Nambuye J (as she then was) stated thus;

“...a party cannot be allowed by a court of law to trample on another persons' rights with impunity at the pain of ability to pay damages. In such circumstances an injunctive relief is inevitable.”

The learned Judge went on to state that;

“.... however in a situation where the mode of acquisition of the said property is suspicious and cannot be defended, allowing payment of damages, will be tantamount to condoning an illegality a task a court of law cannot be a party to. This ingredient therefore cannot be employed to shield wrong doing. This is a proper case where an injunctive relief should issues as opposed to an order of damages.”

9. Regarding the principle that if the court is in doubt, it will decide the application on a balance of convenience, the Counsel submitted that the balance of convenience herein tilts to the advantage of the Applicants since the Respondents have their own land and they will not suffer any prejudice.

10. On the other hand, the Counsel for the Respondents framed two issues for determination namely;

a. Was there trespass?

b. Will damage occur?

The Counsel submitted that no prima facie case has been shown by the Applicants.

11. Having read the application together with the replying and further affidavits as well as the submissions filed by the Counsel on record for the parties herein, I wish to point out that the principles upon which this application is to be determined are as set in the celebrated case of *Giella vs. Cassman Brown & Co. Ltd [1973] EA 358*. I need not repeat those principles herein save to say that the issues framed for determination by the Respondents' Counsel will have to wait for the substantive hearing of the main suit where the veracity of the evidence to be adduced by the witnesses will be tested during cross-examination. Those issues cannot be determined at this stage of affidavit evidence.

12. From the evidence on record, the Applicants have shown that land parcel number Mukaa/Kiima Kiu/Block 1/81 is registered in the names of Wambua Makau Ndungu and Mutwota Muia as can be seen from a copy of the title marked NW3 and annexed to paragraph 3 of their supporting affidavit. The certificate of official search also annexed as part of NW3 shows the two deceased persons as the registered owners. The Respondents have acknowledged the existence of the suit property in paragraph 11 of their replying affidavit even though they question the search certificate which they term as erroneous. To that extent, therefore, my finding is that the Applicants have demonstrated to this court that they have a prima facie case with probability of success.

13. On the issue of whether the Applicants will suffer irreparable harm if the order of injunction is not granted, I do agree with the Applicants' Counsel that no amount of damages will be adequate compensation for the harm that is likely to befall the estate of the deceased persons unless the order of injunction is granted. The constitution and the law provides the manner in which private property can be converted to public use.

14. As for the balance of convenience, I hold that for the reason that I have given in principles one and two hereinabove, the same tilts in favour of the Applicants.

15. The upshot of the foregoing is that the application has merits and I hereby proceed to allow it in terms of prayers 3 and 4.

Signed, Dated and Delivered at Makueni this 05th day of December, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Ngumbo holding brief for Mr. Kamau for the respondents

Mr. Nthiwa holding brief for Mr. Musyoki for the Applicants present

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

05/12/2019.