



**REPUBLIC OF KENYA**

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

**CASE NO. 174 OF 2017**

**CLEOPHAS MAKORI MAGETO.....1<sup>ST</sup> PLAINTIFF**

**REBMAN MOMANYI MAGETO.....2<sup>ND</sup> PLAINTIFF**

**DUNCAN RASI MAGETO.....3<sup>RD</sup> PLAINTIFF**

**GEORGE NYAKUNDI MAGETO.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**SAMWEL OMARIBA MAGETO .....1<sup>ST</sup> DEFENDANT**

**JAMES BOGONKO MAGETO.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs and the defendants in the instant suit are brothers being the sons of Benson Mageto Omariba who is now deceased. The plaintiffs vide the plaint dated 13<sup>th</sup> September 2017 state that their late father was the registered owner of land parcel number **Central Kitutu/Monyerero/178** and that he had in 2012 demarcated the land amongst all his six (6) sons showing each one of them their respective portions of the land which they occupied and were using until the death of their father on 30<sup>th</sup> June 2017. The plaintiffs further aver that the defendants are now the registered owners of land parcels **Central Kitutu/Monyerero/1823** and **1822** respectively since 3<sup>rd</sup> October 2013 and the land parcels are subdivisions out of land parcel **Central Kitutu/ Monyerero/178**.

2. The plaintiffs state that after the death of their father the defendants commenced uprooting the fences forming the boundaries of the portions occupied by the plaintiffs claiming that there was encroachment onto their land parcels **Central Kitutu/Monyerero/1822** and **1823**. The plaintiffs aver that following the alleged subdivision of land parcel **Central Kitutu/Monyerero/178** to create parcels **1822** and **1823**, only a small portion of land parcel **1821** was left in the name of their deceased father. The plaintiffs aver that they have constructed their homes on the portions claimed by the defendants and they would suffer irreparable loss and damage if they are forced to vacate.

3. The plaintiffs prayed for judgments against the defendants jointly and severally for:-

**(a) An order of injunction restraining the defendants, their agents and/or servants from evicting the plaintiffs from the portions straddling onto the defendants parcel No. Central Kitutu/ Monyerero/1822 and 1823 until this suit is heard and determined.**

**(b) A declaration that the subdivision of land parcel No. Central Kitutu/Monyerero/178 was done stealthily and clandestinely and hence null and void.**

**(c) Costs of the suit.**

**(d) Any other or further relief as the court may deem fit to grant.**

4. Simultaneously with the plaint the plaintiffs filed an application seeking inter alia the following substantive order:-

**That the Honourable Court be pleased to grant a temporary injunction restraining the defendants/respondents, their agents and/or servants from in any way evicting the plaintiffs/applicants from the portions straddling onto the defendants parcels No. Central Kitutu/1822 and 1823 until the final determination of this suit.**

The application was supported on the grounds set out on the body of the application and the affidavit sworn in support thereof by the 1<sup>st</sup> plaintiff. Basically the plaintiffs aver that the defendants unlawfully caused the subdivision of their late father's parcel of land **178** and appropriated portions of land they were occupying and had developed and caused the same to be registered as land parcels **1822** and **1823** in the defendants names to the prejudice of the plaintiffs.

5. The defendants upon being served filed a joint statement of defence and counterclaim dated 10<sup>th</sup> October 2017. The defendants denied having procured the subdivision of land parcel **178** unlawfully and asserted that they are the duly registered owners of land parcels **1822** and **1823** and are entitled to quiet and peaceful enjoyment of the same. The defendants alleged that it was the plaintiffs who unlawfully entered onto their said parcels of land and started plucking the tea belonging to the defendants. The defendants counterclaimed for an order of injunction against the plaintiffs. The 2<sup>nd</sup> defendant swore a replying affidavit dated 24<sup>th</sup> October 2017 in opposition to the plaintiffs' application for injunction. The defendants averred that their father subdivided his land parcel **Central Kitutu/Monyerero/178** into three parcels **1821**, **1822** and **1823** and he transferred land parcels **1822** and **1823** to the defendants. Their father retained land parcel **1821** and that it was on this parcel the plaintiffs were residing. However, the defendants state that after the death of their father on 30<sup>th</sup> June 2017 the plaintiffs invaded the defendants' parcels of land and started laying claim to the same.

6. The defendants at the same time they were filing their defence and reply to the plaintiffs application, equally on 2<sup>nd</sup> November 2017 filed a Notice of Motion application dated 24<sup>th</sup> October 2017 seeking an order of injunction against the plaintiffs who they claimed were plucking and picking tea belonging to the defendants which was growing on the defendants land parcels **Central Kitutu/Monyerero/ 1822** and **1823**.

7. On 10<sup>th</sup> October 2017 when the plaintiffs' application for injunction was listed for hearing the defendants sought leave to file a response to the application and were granted 21 days leave to do so. The court further on the same date directed the parties to observe and maintain the status quo that was then obtaining until the application was heard and determined. On 2<sup>nd</sup> November 2017 the defendants in addition to filing their response to the plaintiffs' application filed a similar application for injunction against the plaintiffs which the court directed to be served and listed for direction on 16<sup>th</sup> November 2017. On the said date the court noted that the matter was one that involved the same family and referred the dispute to the local chief for arbitration with the assistance of elders. The chief filed a report dated 15<sup>th</sup> January 2018 and the following were the findings:-

**1. That the coffee and tea bushes on land parcel C/K/ Monyerero/1823 registered in the name of Samuel Omariba was planted by him solely and has been plucking and picking them without any problem until recently which resulted in the filing of this matter in court.**

**2. That the coffee and tea bushes on land parcel C/K/ Monyerero/1822 registered in the names James Bongoko Mageto was partly planted by parent (the late father) and another part was planted by James Bongoko Mageto and who has been solely picking and plucking without any problem until recently which resulted in the filing of this matter in court.**

8. On 1<sup>st</sup> March 2018 the parties were furnished copies of the report filed by the chief in court on 31<sup>st</sup> January 2018. On 9<sup>th</sup> March 2018 the defendants filed a Notice of Motion application dated on the same date seeking orders that the plaintiffs be cited for contempt of court for deliberately and willingly disobeying the court order requiring the parties to observe and maintain the status quo on the basis that the plaintiffs had started building structures on the defendants parcels of land, cutting the 1<sup>st</sup> defendant's sugarcane and cutting trees as illustrated on the photographs annexed and marked "**S0M1(a) and (b)**". The 1<sup>st</sup> defendant states the wanton acts of destruction were reported to Rioma Police Station as per the copy of OB annexed and marked "**S0M2**".

9. The plaintiffs vide an affidavit sworn in reply deny that they have disobeyed the court order requiring them to observe and maintain the status quo. In particular the plaintiffs aver that there is no particularity respecting the acts of disobedience and/or by whom they were committed since there are four plaintiffs.

10. It is the said defendant's application for contempt dated 9<sup>th</sup> March 2018 which is the subject of this ruling but it was necessary to give the background information to contextualize the circumstances giving rise to the application for contempt. I have considered the defendants application for contempt together with the affidavit and further affidavit in support thereof and the replying affidavit sworn in opposition thereto by the 1<sup>st</sup> plaintiff and I am not satisfied that the defendants have proved that the plaintiffs are in contempt. In regard to a charge of contempt of court where the liberty of a person is placed at risk, proof must be at higher standard than mere proof on a balance of probabilities as is the norm in civil cases, though the same need not be as high as proof beyond a reasonable doubt as is required in criminal cases.

11. In the instant application the alleged acts giving rise to disobedience of the court order lack particularity and specificity. It is not clear by whom they were committed and when. Did anybody witness the commission of the acts by any specified person? That is not indicated. On which specific day were the alleged acts committed and by who? That again is not indicated. The court cannot make an assumption that the plaintiffs must be the ones who committed the acts complained of simply because the defendants say so. There must be proof by way of evidence and this is lacking. In the premises, I find and hold that contempt by the plaintiffs has not been proved and I accordingly disallow the defendants Notice of Motion dated 9<sup>th</sup> March 2018.

12. I have in the course of this ruling adverted to the twin applications for injunction filed by both the plaintiffs and the defendants which prompted the court to make an order of reference to the area chief to arbitrate the dispute in view of the fact that the disputants were members of one family. The chief as earlier indicated filed his report in which he made specific findings as to who was making use of land parcels **Central Kitutu/Monyerero/1822** and **1823**. From the report filed by the chief it was clear that it was the defendants who were utilizing the two parcels.

13. I take note that the plaintiffs are challenging the subdivision that led to the creation of land parcels **Central Kitutu/Monyerero/1822** and **1823** from land parcel **Central Kitutu/Monyerero/178** which belonged to their late father and want the subdivision to be declared null and

void. Whether or not the subdivision was null and void can only be determined after hearing evidence at the trial and cannot be determined at this interlocutory stage. On the basis of the material and evidence before the court, I am satisfied that it is the defendants who are and have been utilizing land parcels **Central Kitutu/ Monyerero/1822 and 1823** and I accordingly order that status quo be maintained which means the plaintiffs are barred and restrained from entering, utilizing, plucking and picking the tea and coffee growing in the two parcels of land until the suit is heard and determined. The net effect of this ruling is that the plaintiffs Notice of Motion dated 13<sup>th</sup> September 2017 is disallowed while the defendants Notice of Motion dated 24<sup>th</sup> October 2017 is allowed. The costs of all the interlocutory applications shall be in the cause.

14. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED at KISHI this 11<sup>TH</sup> DAY of MAY, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Masese for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs

Mr. Nyawencha for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**