



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 344 OF 2017**

**WILLY MUNYWOKI MAINGI .....PLAINTIFF**

**VERSUS**

**SAMUEL MUTUKU MAINGI .....1<sup>ST</sup> DEFENDANT**

**ALEXANDER MUTINDA KIVUVA .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect to the Applications dated 15<sup>th</sup> August, 2017 and 10<sup>th</sup> October, 2017. In the Application dated 15<sup>th</sup> August, 2017, the Plaintiff is seeking for the following orders:

*a. That pending hearing and determination of the suit herein, an order of injunction do issue against the 1<sup>st</sup> Defendant restraining him, his agents and/or servants from selling, charging or transferring land parcel No. Kisau/Mangani/341, either to the 2<sup>nd</sup> Defendant or to any other person whatsoever.*

*b. That pending hearing and determination of the suit herein, an order of injunction do issue against the 2<sup>nd</sup> Defendant restraining him, his agents, servants and contractors, and each and every one of them from entering land parcel No. Kisau/Mangani/341 and cultivating, grazing, building any form of structures thereon or in any other way interfering with the said land or any part thereof.*

*c. That costs of this Application be provided for.*

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that the 1<sup>st</sup> Defendant is his step-brother; that land parcel number Kisau/Mangani/341 (*the suit land*) is registered in the name of the 1<sup>st</sup> Defendant and that the said land belongs to the entire family.

3. The Plaintiff deponed that the 1<sup>st</sup> Defendant is holding the title document to the suit land in trust for himself and other members of Maingi family; that they are both in occupation of the suit land and that when the 1<sup>st</sup> Defendant attempted to sell the suit land, he filed objection proceedings in which the Minister held that the suit property is ancestral land which cannot be sold without the consent of the family. It is the Plaintiff's case that the 1<sup>st</sup> Defendant is in the process of selling the suit land to the 1<sup>st</sup> Defendant.

4. In response, the 1<sup>st</sup> Defendant deponed that the Plaintiff's mother has four (4) children while his mother has seven (7) children; that the family agreed that he should inherit the suit land; that he moved on the suit land in 1994 while the Plaintiff remained in parcel of land known as Kwale/Shimba Hills/497 and that there was no dispute over the two portions of land at the time of his father's death in the year 2001.

5. The 1<sup>st</sup> Defendant deponed that the Plaintiff has never been in actual possession of the suit land and that according to the Kamba customs, ancestral land is usually divided among wives and that the Minister made a decision in his favour (*the 1<sup>st</sup> Defendant*).

6. The 1<sup>st</sup> Defendant finally deponed that before selling the suit land, they sought for the consent of the Maingi family; that the Maingi family allowed him to sell the suit land and that he has so far received Kshs. 1,400,000 from the 2<sup>nd</sup> Defendant in respect to the suit land.

7. On his part, the 2<sup>nd</sup> Defendant deponed that he purchased the suit land from the 1<sup>st</sup> Defendant vide an Agreement of Sale dated 24<sup>th</sup> January, 2014; that the Land Control Board approved the Transfer of the suit land and that the Plaintiff's Application is vexatious and an abuse of the Court process.

8. In the Application dated 10<sup>th</sup> October, 2017, the 1<sup>st</sup> Defendant is seeking for the following orders against the Plaintiff:

***a. This Honourable Court be pleased to grant an order of temporary injunction to maintain the status quo by restraining the Respondent whether by himself, his agents and/or servants from wasting, cultivating, constructing on, developing, cutting trees, alienating or otherwise interfering or dealing with the suit property, Kisau/Mangani/341 until the hearing and final determination of the main suit.***

***b. Unless restrained, the Respondent will continue to interfere with the suit property and erect structures on the aforesaid property thereby causing the Applicants irreparable damage.***

9. The 1<sup>st</sup> Defendant's Application is supported by the Affidavit of the 1<sup>st</sup> Defendant, which is similar in all respects to his Replying Affidavit which I have already summarized above.

10. In response to the said Application, the Plaintiff reiterated the contents of the Affidavit in support of his Application dated 15<sup>th</sup> August, 2017 which I have already summarized. In the Further Affidavit, the Plaintiff deponed that parcels number Kwale/Shimba Hills/497, Kwale/Mwananya-Mala/140 and 103 are also family land and that they are still registered in the name of their late father, Maingi Kithii.

11. The Plaintiff deponed that the 1<sup>st</sup> Defendant's mother and siblings are settled on parcel number Kwale/Mwananya-Mala/140 and 103 and that the suit land remains family land.

12. In her submissions, the Plaintiff's advocate submitted that the Minister for Lands found that the suit property is ancestral land; that the Plaintiff is in possession of the suit land together with the 1<sup>st</sup> Defendant and that his Application should be allowed.

13. The Defendants' advocate submitted that it is the 1<sup>st</sup> Defendant who is residing on the suit land; that the Adjudication Officer found as a fact that it is the 1<sup>st</sup> Defendant who is in actual possession of the suit land and that the 1<sup>st</sup> Defendant obtained the consent of the family to sell the suit land.

14. It is not in dispute that parcel of land known as Kisau/Mangani/341 was registered in favour of the 1<sup>st</sup> Defendant on 28<sup>th</sup> January, 2014. Before the said registration, there were proceedings that were conducted by the Land Adjudication Officer and the Minister for Lands pursuant to the provisions of the Land Adjudication Act.

15. In the proceedings before the Land Adjudication Officer, the Plaintiff herein stated that the suit land was ancestral land; that his father, Maingi, has two wives, and that every wife of Maingi has a right over the suit land. On his part, the 1<sup>st</sup> Defendant stated that their father moved with the entire family to Shimba Hills in 1961 and that later, his father moved him to the suit land where he has been living to date.

16. In cross-examination, the 1<sup>st</sup> Defendant agreed that indeed the suit land was their ancestral land and that the Maingi family had been living on the land before they moved to Shimba Hills. In his decision, the Land Adjudication Officer dismissed the Plaintiff's claim and directed that the land should remain in the name of the 1<sup>st</sup> Defendant.

17. When the dispute escalated to the Minister, the Minister made contradicting findings. However, in the penultimate finding, the Minister stated as follows:

***“According to Kamba customs ancestral land should not be sold without family consensus. I advise therefore that Kiema Wambua who is alleged to have bought part of the disputed land to be advised to seek family consensus before demanding for any transfer of part of the same.”***

18. The evidence before me shows that indeed the suit land was ancestral land belonging to the late Maingi. However, he moved the entire family, including the 1<sup>st</sup> Defendant's mother and siblings to Shimba Hills. The 1<sup>st</sup> Defendant's mother and other siblings are still living in Shimba Hills.

19. Although it is not clear to this court the circumstances that led to the registration of the suit land in the name of the 1<sup>st</sup> Defendant, it is obvious that all the parcels of land that the late Maingi acquired in Shimba Hills are still in his names. It is also trite that the Land Registration Act recognizes customary trust as an overriding interest over registered land (*See Section 28 of the Land Registration Act*). This concept of customary trust was recently pronounced by the Supreme Court in the case of *Isack M'Inanga Kiebia vs. Isaaya Theuri & Another Supreme Court Petition No. 10 of 2015* where it was held as follows:

***“It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register...”***

20. In the said case, the Supreme Court further held that to prove a trust in land, one need not be in actual physical possession and occupation of the land. The court further observed as follows:

***“Although the Respondents herein were not in possession or actual occupation of parcel number Njia/Kiegoi Scheme 70, both the High Court and the Court of Appeal were entitled to enquire into the circumstances of registration, to establish whether a trust was envisaged.”***

21. As I have stated above, the suit land was customary land belonging to the late Mr. Maingi. Mr. Maingi died before distributing his Estate, including the parcels of land in Shimba Hills. Therefore, the fact that the suit property is registered in the name of the 1<sup>st</sup> Defendant cannot

be said that the customary trust doctrine in respect of ancestral land is not applicable in this matter. Indeed, the Minister of Lands, while dealing with the dispute between the Plaintiff and the 1<sup>st</sup> Defendant recognized that the 1<sup>st</sup> Defendant required the consent of the family members before he could sell the land. Consequently, the Plaintiff's case that the 1<sup>st</sup> Defendant is holding the Title Deed in respect of the suit land on behalf of the Maingi family is arguable.

22. For those reasons, I find that the Plaintiff has established a prima facie case with chances of success. Indeed, considering that the 1<sup>st</sup> Defendant has admitted that he is in the process of selling the suit land, the Plaintiff will suffer irreparable damages unless the injunctive orders are granted. Having found that prima facie the suit land is ancestral land, I do not see the basis for injuncting the Plaintiff from utilizing or accessing the suit land pending the hearing of the suit.

23. Consequently, I allow the Plaintiff's Application dated 15<sup>th</sup> August, 2017 as prayed and dismiss the 1<sup>st</sup> Defendant's Application dated 10<sup>th</sup> August, 2017 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26<sup>TH</sup> DAY OF OCTOBER, 2018.**

**O.A. ANGOTE**

**JUDGE**