



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT EMBU**

**E.L.C. CASE NO. 104 OF 2014**

**ROBERT NJERU KAREGA.....1<sup>ST</sup> PLAINTIFF**  
**WACHIRA GITARE.....2<sup>ND</sup> PLAINTIFF**  
**PIUS KIVUTI NGARI.....3<sup>RD</sup> PLAINTIFF**  
**AMOS MURIITHI NJUKI.....4<sup>TH</sup> PLAINTIFF**  
**BENSON KIURA NJUKI.....5<sup>TH</sup> PLAINTIFF**  
**CHARLES NJAGI NJUKI.....6<sup>TH</sup> PLAINTIFF**  
**JOHN MWANIKI NYAGA.....7<sup>TH</sup> PLAINTIFF**  
**OBADIA MWANIKI NYAGA.....8<sup>TH</sup> PLAINTIFF**  
**MRS ROSE NJAGI.....9<sup>TH</sup> PLAINTIFF**  
**JACKSON KIURA MBUVI.....10<sup>TH</sup> PLAINTIFF**  
**PETER MAINA MUSYOKI.....11<sup>TH</sup> PLAINTIFF**  
**MRS JANE NDUIKO KIURA.....12<sup>TH</sup> PLAINTIFF**  
**IRENE MICHERE IRERI.....13<sup>TH</sup> PLAINTIFF**  
**GITENDE MURIUKI MUNYI.....14<sup>TH</sup> PLAINTIFF**  
**JONATHAN E. MURIUKI IRERI.....15<sup>TH</sup> PLAINTIFF**  
**NICHOLAS MBOGO NYAGA.....16<sup>TH</sup> PLAINTIFF**  
**JOSEPH KARIUKI KANG'OROTI.....17<sup>TH</sup> PLAINTIFF**  
**JACK MORRIS NJIRU.....18<sup>TH</sup> PLAINTIFF**

**VERSUS**

**MUTOKAA NTHAUTHO.....DEFENDANT**

**RULING**

1. By a plaint dated 4<sup>th</sup> July 2014 and filed on 4<sup>th</sup> August 2014 the Plaintiffs pleaded that they were all members of the Mbadi clan of the Mbeere tribe and that the Defendant was their former clan Chairman. It was further pleaded that the Defendant was registered as proprietor of *Title No. Mbeti/Gachuriri/249* (hereinafter the ‘suit property’) not as absolute owner thereof but in his capacity as clan Chairman and as such he held the suit property in trust for them.

2. It was also pleaded that the Defendant had refused to sub-divide and transfer the suit property to the Plaintiffs in consequence of which they sought the following orders against the Defendant:

*a. A declaration that a portion 100 acres out of land parcel Mbeti/Gachuriri/249 belongs to the Plaintiffs according to the customary trust between the Plaintiffs and Defendant.*

*b. That the land registrar be compelled to call for the title of land parcel Mbeti/Gachuriri/249 and cause a sub-division to the Plaintiffs as per the allocation given by the Defendant and cause sub-division and transfer to each of the Plaintiffs in accordance with the rightful share.*

3. Simultaneously with the filing of the suit, the Plaintiffs also filed a notice of motion dated 4<sup>th</sup> August 2014 under certificate of urgency under **section 3A** and **1A of the Civil Procedure Rules (Cap 21)** seeking the following orders:

*a. That this matter be certified as extreme urgent. (sic)*

*b. That pending the hearing of this matter inter-parties the honourable court be pleased to order the land registrar Mbeere to place a restriction, caution and or encumbrance on the suit land parcel No. Mbeti/Gachuriri/249.*

*c. That pending the hearing of this matter pending hearing of suit the Honourable court be pleased to order the land registrar Mbeere to place a restriction, caution and or encumbrance on the suit land parcel No. Mbeti/Gachuriri/249.*

*d. That costs be in the cause.*

4. The said application was supported by an affidavit sworn by Mwaniki Munyi on behalf of all the Plaintiffs. It was briefly stated that the Plaintiffs were in occupation of the suit property and that the Defendant had made attempts to alienate the suit property without involving them. The Plaintiffs also filed a supplementary affidavit sworn by the said Mwaniki Munyi in which he gave a more detailed account of their claim to the suit property.

5. The Defendant, in opposition to the suit and application, pleaded that he was the registered proprietor of the suit property and that he was not holding it in trust for any of the Plaintiffs. He denied the existence of any form of trust in respect of the suit property which he stated was his private property. The Defendant also stated that there were previous court proceedings involving the parties herein, or some of them, hence the instant suit is an abuse of the court process.

6. The court has considered the said Plaintiffs’ application and the submissions of the parties herein. The main question in controversy in this suit is whether or not the Defendant was registered as proprietor in absolute terms or in his capacity as Chairman of Mbadi clan. The alleged customary trust is not an issue which can be established on affidavit evidence alone. The existence or otherwise of a trust can only be fully investigated and determined after a full hearing.

7. The court is of the view that it would not be prudent to allow the suit property which is the subject matter of the suit to be alienated while the suit is still pending. The court has a duty to preserve any property which is dispute pending the determination of the rights of the disputing parties. It was stated by Lyon J in the case of *Shivabhai Patel v. Manibhai Patel [1959] EA 907* that;

**“In my opinion, it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so”.**

8. In view of the foregoing, the court is inclined to allow the Plaintiffs’ notice of motion dated 7<sup>th</sup> July 2014 in terms of prayer No. 2 but only to the extent of requiring the Land Registrar Mbeere to enter a restriction or inhibition against the suit property.

9. The costs of the said application shall be in the cause.

10. It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **12<sup>TH</sup>** day of **OCTOBER, 2017**

In the presence of A.P. Kariithi for the Defendant and in the absence of Victor L. Andande & Co Advocates for the Plaintiffs.

Court clerk Njue/Leadys

**Y.M. ANGIMA**

**JUDGE**

**12.10.17**