



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS

ELC. CASE NO. 175 OF 2017

MSAFIRI PHILIP WAMBUA.....1ST PLAINTIFF
JUSTUS KITEMA WAMBUA.....2ND PLAINTIFF
DANCAN WAMBUA.....3RD PLAINTIFF
WILLY WAMBUA.....4TH PLAINTIFF
SERAH MWIKALI WAMBUA.....5TH PLAINTIFF
AURELIA MWISIWA WAMBUA.....6TH PLAINTIFF

VERSUS

PHILIP WAMBUA MUSYIMI.....DEFENDANT

RULING

1. In the Application dated 11th April, 2017, the Plaintiffs are seeking for the following orders:

a. That an injunction be issued restraining the Defendant, agents, servants, employees and representatives from entering, encroaching, trespassing, selling, alienating, disposing off and/or in any manner interfering with land parcel No. Mwingi/Ngaani/130 measuring 10.64Ha and all the unsurveyed land parcel situated at Ngaani Village, Ngaani Sub-location, Nuu Location of Mwingi East Sub-County of Kitui County until the suit is heard and determined.

b. The cost of the Application be in cause.

2. In the Affidavit in support of the Application, the 1st Plaintiff has deponed that parcel of land known as Mwingi/Ngaani/130 measuring 10.64Ha and all that unsurveyed land situated at Ngaani village is ancestral land held in trust by the Defendant for the Plaintiffs having been acquired by their grandfather.

3. It is the Plaintiffs' case that their grandfather bequeathed them with the said land and that one of the parcels of land was registered in the name of their father, the 1st Defendant.

4. The 1st Plaintiff has deponed that the Defendant started disposing off the suit land and that parcel number 130 is to be transferred to one Kitheka Mwaniki without the consent of the family.

5. The 1st Plaintiff finally deponed that he has a legal right over the suit land which should be protected.
6. In response, the Defendant deponed that parcel of land known as Mwingi/Ngaani/130 is not an ancestral land; that he bought the two parcels of land from Kioko Kinyungu and Kithuka Musyimi before the adjudication process commenced and that when the two parcels of land were surveyed, they were allocated the said parcel number.
7. The Defendant deponed that the family's ancestral land is the one occupied by his uncle, Mbuvi Kanuku and that he has educated all his children, including the Plaintiffs.
8. In the Further Affidavit, the Defendant deponed that the 1st Applicant does not have the authority of the other Applicants to swear the Supporting Affidavit as alleged; that the 2nd and 4th Applicants are mentally deranged and are incapable of giving instructions and that he purchased the suit properties.
9. The Defendant also annexed the Affidavit of his mother, Serah Musyimi, who denied that the suit land belonged to her late husband. She denied ever signing a witness statement. The Defendant's uncle also swore an Affidavit in which he denied that the suit land is ancestral land.
10. The parties filed brief submissions which I have considered.
11. The Plaintiffs' case is that the suit land is ancestral land, and that the Defendant, who is their father, is holding it in trust.
12. The 1st Plaintiff has exhibited the Minutes of the family of Ngunze in which the said family stated that the land could only be sold with the consent of the entire family.
13. Although the 1st Plaintiff has annexed an agreement between himself and some persons, the said agreement is in Kamba language. The said agreement is not admissible in these proceedings considering that under Section 86 of the Civil Procedure Act, the language of the Court is English.
14. It is trite that under Section 28(b) of the Land Registration Act, all registered land is subject to trusts, including customary trusts, as an overriding interest.
15. The question of whether the suit land herein is subject to customary trust can only be determined after trial. This court cannot at this stage, determine whether indeed the suit land forms part of the parcels of land that the Defendant bought or is ancestral land.
16. In the circumstances, until that issue is heard and determined, the most appropriate order to make is for an injunctive order to issue pending the hearing of the suit.
17. For those reasons, I allow the Application dated 11th April, 2017 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF NOVEMBER, 2017.

O.A. ANGOTE

JUDGE