



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 265 OF 2012 (O.S)

PETER MUTISO KITOLO & 189 OTHERS PLAINTIFFS/APPLICANTS

VERSUS

- 1. KATAKATA LIMITED**
- 2. DESIRELANDS LIMITED**
- 3. ABDULKADIR ADAN ALEW**
- 4. LUKENYA RANCHING & FARMING CO-OPERATIVE SOCIETY**
..... DEFENDANTS/RESPONDENTS

R U L I N G

1. The application dated 20/7/2012 seeks orders that pending the hearing and determination of this suit, the Respondents, their agents, servants and/or employees or in any manner howsoever be restrained from claiming interests, rights or in any way dealing with or trespassing onto or continuing further trespass onto original land title L.R. 339/4 and any subsequent sub-divisions thereof and/or interfering with the Applicants' rights of quiet possession, occupation and enjoyment thereof.
2. According to the affidavit in support, before the colonial era, their forefathers and ancestors occupied the area known as **Kivae**. The land is adjacent to the Administration Training School. That after independence, the said area was surveyed and allocated original No. LR 339/4 (hereinafter suit land). Subsequently the Applicants organized themselves for the purpose of pursuing the issuance of title deeds and registered themselves as **Kivae Residents Self Help Group** on 29/1/2007.
3. That in the year 2010, the Respondents attempted to enter the suit land and even filed **Nairobi Milimani CMCC 5744 of 2010 Desirelands –vs- Matata Kituku, David Mwema, Muteti Nthanga, Bosco Makau Mbondo and Maria Kimuyu** which were later withdrawn.
4. The Applicants' complaint is that the Respondents are harassing them and have even had the 1st Applicant arrested and charged in **Mavoko PMCC 247/2012 – Republic –vs- Peter Mutiso Kitolo**. The Applicants allege that the Respondents in cahoots with the Ministry of Lands officials have attempted to grab the suitland in defiance of the Government directive staying further land transactions and dealings in the land around the **Athi River – Syokimau** area.
5. The Applicant's contention is that they are entitled to be registered as the proprietors of the suitland under the principle of adverse possession as they have been in continuous uninterrupted and peaceful occupation, use and enjoyment of the land at all times and with the full knowledge and acquiescence of the Respondents and their predecessors. The Applicants have deponed that they had established homesteads on the suitland and carry out social and economic activities there and have buried their dead there.
6. The application is opposed. The Respondents filed the grounds of opposition dated 15/10/12 and a replying affidavit sworn by **Adan Abdirahaman Hassan**, a Director of 2nd Respondent on

- 2/22/2012. It is the case for 2nd Respondent that due diligence was carried out before they purchased land title No. **Mavoko Town/Block/3/2326** and **Mavoko Town/Block/3/232** and **Mavoko Town/Block 3/2332** as *bona fide* purchasers for value from the 4th Respondent. That there were no squatters or any human settlements on the three parcels of land. That the vendors who are the 4th Defendant, **Lukenya Ranching and Co-operative Society** had obtained the relevant Land Control Board consent to transfer the land to the 1st and 2nd Respondent. The land was transferred and registered and the 1st and 2nd Respondents charged the Title No. **Mavoko/Block/312326** and **Mavoko Town/Block 3/2327** to **Equity Bank**.
7. The Respondent gave a history of previous cases of trespass in **CMCC Milimani (Nairobi) CM'S Civil Case No. 5743 of 2010 - Katakata Ltd –vs- Lamu Kivondo & 3 Others which was withdrawn and Desirelands Ltd –vs- Matata Kituku & 4 Others in Milimani (Nairobi) CMCC 5744 of 2010** which was settled.
 8. The Respondents expressed doubts how people of diverse tribal lineages could trace their continuous and uninterrupted possession to pre-colonial days to a tribal reserve land protected by the provisions of the **Trust Land Act**. That the dispute between the Applicants and the 4th Defendant negates the claim of uninterrupted possession.
 9. According to the Respondent, any claim against the Respondent is *Res judicata* and should abide the judgment of **Misc. H.C.C 162/2007**. It is denied that the 3rd Respondent owns or has the possession of any portion of the suit property.
 10. The Respondents have also contended that the Applicants' case is incompetent and defective for lack of compliance with **Order 1 rule 13, Order 3 rule 6, Order 22 rules 10, 11 and 13 and section 6 and 7 of the Civil Procedure Rules**. The Respondents further faulted the Applicants' case for non joinder of the **Commissioner of Land/Land Commission**.
 11. There was no appearance for the 4th Respondent, **Lukenya Ranching & Farming Co-operative Society** though served as per the affidavit of service sworn by the process server on 16/10/2012.
 12. The application was canvassed by way of written submissions which I have duly considered.
 13. I will first deal with the issue as to whether the Applicants are properly before court. The heading of the pleadings herein reflect that the Applicants are in court in their individual capacity and not members of the **Kivae Residents Self-Help Group** (Hereinafter **Kivae Residents**). No leave was therefore required from the **Kivae Residents** for this suit to be instituted.
 14. However, although the 1st Applicant, **Peter Mutiso Kitolo** has averred in the first paragraph of his affidavit in support sworn on 20/7/2012 that he was duly authorized by the rest of the Applicants to depone to the contents of the affidavit, he has not exhibited any such authority. I have gone through all the documents annexed to the Applicants' pleadings but I have not seen any.
 15. On the issue raised whether the leave of the court ought to have been sought, **Order 3 rule 6 (d)** of the **Civil Procedure Rules** makes an exemption for claims for reliefs based on the same cause of action. The claim for temporary injunction is anchored on the **Originating Summons** which seeks, *inter alia* a determination of the question whether a permanent injunction should issue against the Respondents.
 16. The Respondents have prayed that **Order 22 rule 19, 11 and 13** of the **Civil Procedure Rules** have been contravened. However, **Order 22** of the **Civil Procedure Rules** deals with execution of decrees and orders. It is premature to talk about execution at this stage. However, **Order 36 rule 7** which requires that a certified extract of the title to the land in question be annexed has not been complied with.
 17. The Applicants had the burden to produce the certified extracts of title in respect of the suit properties (*See Kasuve –vs- Mwaani Investments Ltd & 4 Others Nairobi Court of Appeal No. 35 of 2002*).
 18. The Respondents raised the issue as to whether this suit contravenes the subjudice or *Res-judicata* rules. The Applicants have in paragraph No. 9 and 10 of their affidavit in support talked about **CMCC 5743 of 2010** (supra) and **CMCC 5744 of 2010** (supra) which are cases essentially between the same parties over the same subject matter. Although both the Applicants and the Respondent have averred that the said suits were withdrawn, there is no evidence to show whether the said notices of withdrawal were adopted as an order of the court. I am persuaded by the reasoning in **Theluji Dry Cleaners –vs- Muchiri & 3 Others (2002) 2 KLR** that the Notice of Withdrawal does not take effect from the date it was filed but from the date it was adopted as an

order of the court. Although the withdrawal of a suit is not a bar to the filing of a subsequent suit, without an order of the court endorsing the withdrawal, one may as well argue that the suit herein contravenes the provisions of section 6 of the Civil Procedure Act.

19. I have considered **HCC Misc. Application (Nairobi) 162 of 2007 – Lukenya Ranching Farming Co-operative Society Ltd –vs- CM’s Court Machakos** (Respondent) and **Kivae Residents Organization** (Interested Party) which is annexed to the Respondent’s affidavit. Although the last page of that judgment is missing from the said annexure, those proceedings were Judicial Review proceedings and could therefore not have dealt with the merits of the case. In any event, the said **Kivae Residents Organization** is not a party to the proceedings herein. There is no evidence before this court that supports the argument that this case is *Res-judicata*.
20. The **Commissioner for Land/Land Commission** is not a party herein. The certified copy of the extract has not been attached to the pleadings herein. The Applicants have talked about **Land Reference No. 339/4**. The Respondents in the Survey Report annexed to their affidavit in reply have talked about the amalgamation of **Land Reference No. 339/4** and **8521/2** which were given **L.R No. 8529/4** under the **Registered Title Act** but later converted to **Registered Land Act** and subdivided into **Mavoko Town Block 3/2333, 2326 and 2327**. My view is that it was the Applicants’ responsibility to unearth the current registration status of the parcel of the land they claim to enable the court to deal with an identifiable parcel of land.
21. With the foregoing, this court is not satisfied that the Applicants have met the threshold for the grant of injunctive orders (See **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358**). Consequently, the application fails with costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **30th** day of **September** 2014.

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B. THURANIRA JADEN

JUDGE