



No.44/2014

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC PETITION NO.142 OF 2012

KIMBU KITHAMBU PLAINTIFF

VERSUS

NZULA MUTISYA 1ST DEFENDANT

KISILU MUTISYA2ND DEFENDANT

J U D G M E N T

1. By a **Plaint dated 3.5.2012** Plaintiff lodged instant suit seeking the following reliefs:

- a. A permanent injunction restraining by themselves, their agents, servants or employees from entering upon remaining from, wasting or building any structures whatsoever or otherwise dealing with the suit property all that property MUTHETHENI.UTITHINI/922.
- b. That this Honourable court issue an order compelling the defendants, their agents, servants or employees to vacate the suit premises title MUTHETHENI/UTITHINI/922 and to demolish any structures thereon put up and/or built by the defendants, his agents, servants or employees.
- c. General damages for the wrongful and illegal acts by the defendants.
- d. Any other and/or relief that this Honourable court deems fit and expedient to grant in the aid of justice.
- e. Interest on (a) and (b) herein above.

2. Upon service of summons, the Defendants entered appearances on the 15.5.2012 vide their memorandum of appearance on record and received in court on 15.5.2012. They failed to file defence as required by the rules of procedure and on request for interlocutory judgment, the same was entered on 3.7.2012. The matter was heard for formal proof on 27.10.2014.

3. The Plaintiff's testimony is to the effect that he owns Muthetheni/Utithini/922 and he produced P. Exhibit 1 copy of the title deed. He testified that, the Defendants have trespassed and built 2 houses in the suit property without his consent and they live in the same houses with their families. He testified that he inherited land from his father and he produced grants as P. Exhibit 2. He testified that there was an appeal vide P.Exhibit 3 copy of the appeal to the Minister under Section 29 of Land Adjudication Act between his father Kithambu Maingi and Ndungi Ndambuki Mutisya Mutie in which Mutisya Mutie lost and same verdict has never been challenged to date. His father got suit land 922 and Ndungi Ndambuki got 921.

4. He testified that Mutisya Mutie married 1st Defendant and the 2nd Defendant is his son. He

- testified that he Mutie has his land No.488 which they Defendants ought to move into. He testified that they cultivate and have 2 houses in suit property whereas their Muthetheni/Utithini/488 is unoccupied. He thus prays his prayers in the Plaint to be allowed.
5. The Defendants have not filed defence despite service with the summons. They filed appearances a testimony of their knowledge of existence of the suit. They have failed to appear in court to rebut the Plaintiff's testimony. The Plaintiff has proved that he owns the suit property vide title produced. Section 26 of Land Registration Act 2012 states ***that certificate of title is conclusive evidence of proprietorship.***
 6. The Defendants have not denied they are in occupation and cultivate the suit land without Plaintiff's consent. This amounts to depriving him his right to property under Article 40 of the Constitution of Kenya.
 7. The court thus holds that the Plaintiff has proved his case on balance of probabilities as required by the law. The court therefore, makes the following orders:
 1. **Prayers (a), (b) and (d) of the Plaint granted.**
 2. **Prayer (c) is not proved thus denied.**
 3. **Costs of the plaintiff.**

Signed and Delivered at Machakos this 19th day of December, 2014.

CHARLES KARIUKI

JUDGE