



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Civil Case 25 of 2005**

**PAUL MUSEMBI MUTUNGI ..... PLAINTIFF**

**VERSUS**

**ANTHONY KIMULI MATHUVA ..... DEFENDANT**

**RULING**

By the Chamber Summons dated 16/3/05, the plaintiff/Applicant Paul Musembi Mutungi, seeks an order of injunction to restrain the defendant Antony Kimuli Mathuva, his servants or agents, from selling or transferring or in any way dealing with parcels of land measuring 34.6 acres sold by the defendant to the plaintiff within Katheka Kai 'B' Co-operative Society Limited being part of title number Machakos/Katheka Kai Block 5/56 and Machakos Katheka Kai Block 5/55; that the defendant be compelled by way of mandatory injunction to specifically mark and point out to the plaintiffs the boundary marking the 34.6 acres sold to the plaintiff and to supply the appropriate deed plans, survey maps.

The application is premised on grounds found in the body of the application and affidavit sworn by Paul Musembi Mutungi, annexures thereto, a supplementary affidavit sworn by the applicant and another sworn by Joseph Mutavi Kithu.

The application was opposed and a replying affidavit sworn by the defendant/Respondent, Antony Kimuli Mathuva, was filed.

Briefly, the applicant's case is that the defendant is a member of Katheka Kai 'B' Co-operative Society and was allocated parcels of land by virtue of the said membership. It is part of this land that was allegedly sold to the plaintiff. The plaintiff and defendant entered into a sale agreement for 20 acres and he performed his part of the contract but later learnt that it belonged to another member. With the intervention of the society the defendant gave the plaintiff an alternative piece of land. That between 2002 -2003 the defendant sold to the plaintiff another piece of land measuring 14.6 acres which was next to the original 20 acres. The same was pointed out to the plaintiff on the ground. The applicant has annexed copies of the sale agreements as 'A'. Applicant paid the necessary transfer fees to the society as evidenced by copies of receipts Marked 'B'. He took possession of the land and started to develop it but the defendant was unavailable to give the deed plans and survey maps and failed to mark the actual boundary. In November 2004, the applicant noticed people fixing beacons on his land. He got deed plans from the society which show that the beacons are in his land and he has learnt that the defendant has sold part of the land or is in the process of doing so and that a surveyor who visited the site and took measurements of the land has confirmed the acreage of his land to be 24 acres instead of 34.6 acres. Joseph Mutavi, a Secretary of the Katheka Kai 'B' Farmers Co-operative Society deponed that the

Society received a sale agreement between the parties and the plaintiff fully paid transfer fees. He also deponed that because the land is still registered in the name of the society, a party wishing to sell his plot reports to the society, the buyer pays transfer fees as did the plaintiff and there is no requirement for the consent of the Land Control board.

In opposing the application, the defendant/Respondent contends that the suit is incompetent because a similar suit was struck out on 9/12/04 by the Chief Magistrate's Court, that is, 1065/04 and the suit is therefore Res Judicata. It is also deponed that there is no evidence to show that the defendant owns the said land and the orders sought cannot issue and further that this being an agricultural land the defendant cannot be compelled to transfer land to the plaintiff when there was no Land Control Board consent and that if any monies were paid, they are recoverable as a civil debt.

This being a prayer for an order of injunction, the plaintiff has to demonstrate to the court that he has a prima-facie case with high chances of success; that if the order is not granted, he will suffer irreparable harm and if the court is in doubt, it should decide the matter on a balance of convenience.

There is no doubt that the land in question is registered in the name of Katheka Kai 'B' Farmers Co-operative Society. In my view, the defendant is blowing both hot and cold. He does not deny that he entered into a sale agreement of land with the plaintiff. At one time, he claims that what is in dispute is a boundary dispute, then he claims to have no land that he could have transferred to the plaintiff and he says that he is willing to repay the Kshs. 1.8 Million paid to him as a civil debt. The agreements annexed by the plaintiff as annexure 'A' are evidence that the plaintiff and defendant entered into several agreements. The 1<sup>st</sup> one dated 3/8/97 for sale of 10 acres of land; the 2<sup>nd</sup> one dated 22/8/97 for 10 acres of land; the 3<sup>rd</sup> dated 29/5/01 for 4 acres of land; another dated 26/3/02 for 4 acres of land; another dated 8/7/03 for 4 acres of land and lastly one dated 22/4/02. The Secretary of the Society confirms that they received the sale agreements from the parties of the parties' intention and were therefore duly notified. The society had allocated this land to the defendant by virtue of his membership. The defendant even admits having received the purchase price because he claims that it can only be recoverable as a civil debt. I do find, on these facts that the plaintiff has demonstrated that he has an interest in the land that was allocated to the defendant by the Co-operative Society. It is ascertainable as the agreements have specifically spelt out how much was sold and for how much.

It is the defendant's stand that he cannot be ordered to transfer the land to the plaintiff without Land Control Board consent. It has been revealed that infact the defendant is a former official of the Katheka Kai 'B' Farmers Co-operative Society. He entered into those agreements when well aware that since the land was still registered in the names of the society, there may be a hitch of obtaining the Land Control consent. The Secretary of the Society explained how they normally go about it so that the parties never go through the Board. Of course, the law is clear that this being agricultural land, the consent of Land Control Board has to be sought. But that notwithstanding, the court will not go into the issue at this stage as the defendant cannot be let to benefit from a default he was well aware of even at the time of entering into the agreement. It is said that he is transacting another sale transaction. The land is still registered in the names of the society. Will that party suffer the same fate? The issue of whether or not the consent of the Board is necessary will be canvassed at the full hearing.

Is this matter Res Judicata? There is evidence that a similar case seeking similar orders had been filed before Chief Magistrate's Court, Machakos, in CMCC 1065/04. The plaintiff did not annex copies of the proceedings in that case but alleges that it was struck out for want of jurisdiction and that is when the present suit was filed. The defendant annexed to the replying affidavit, the proceedings in the lower court and the decree which shows that the suit was dismissed. What I do not know is why the defendant did not bother to annex the actual proceedings and ruling before the Chief Magistrate's Court and the reasons the court gave for striking out or dismissing the suit. Because it is not clear whether the suit was struck out or dismissed, the court will not deal with that issue at this stage. If indeed the suit was dismissed, the defendant can still take it up later at a preliminary stage with proof of the dismissal. If however it was struck out for want of jurisdiction, then the suit is still properly before this court.

The plaintiff annexed photographs of the land in issue. He has started developments on it. It is land he

has bought over a period of time. He has paid about 1.8 million. I believe he would suffer irreparably if an order of injunction is not granted. I am satisfied that the plaintiff/applicant has satisfied the court that an order of injunction should be granted to restrain the defendant from interfering with the portion of land he allegedly sold to the plaintiff pending hearing and determination of this suit.

As for the prayer for mandatory injunction that the defendant mark and point out the boundary, that cannot be granted at this stage as it will be presuming that this matter has been finalized and final orders have been given in favour of the plaintiff which is not the case. Costs of this application will be in the cause.

**R.V. WENDOH**

**JUDGE**

Dated at Machakos this 17<sup>th</sup> day of August 2005

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**