



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 63 OF 2018

MWAU MUTIE MUMOPLAINTIFF

VERSUS

JASON MUTIE.....DEFENDANT

JUDGMENT

1. In the Plaintiff dated 4th April, 2018, the Plaintiff has averred that at all material times, he was the owner of Plot Number 2855 within Masinga Sub-County, Machakos County, measuring approximately 23.36 Ha; that he inherited the suit land from his father following the sub-division of the family land in the year 1977 and that he has been in occupation of the suit property since 1950's.
2. The Plaintiff has averred that the suit property was surveyed and given parcel number Kithyoko/Kithyoko/2855; that when he went to collect the Title Deed for the land, he found that the same was not available and that on further inquiry, he was informed that parcel number 2855 had been consolidated with land parcel number Kithyoko/Kithyoko/1603 and a Title Deed issued in the name of the Defendant.
3. The Plaintiff averred that the purported consolidation of parcel numbers 2855 and 1603 was fraudulent, illegal and in bad faith and that to muddle up the issues, the Defendant has caused parcel number 1598 to be sub-divided into two and another title issued as Kithyoko/Kithyoko/2855 in an attempt to misrepresent that the Plaintiff still has his portion of land.
4. The Plaintiff is seeking for a declaration that the consolidation of land parcel number Kithyoko/Kithyoko/1603 and 2588 by the Defendant was illegal, null and void; a declaration that the sub-division of land parcel number Kithyoko/Kithyoko/1598 was illegal, null and void and a declaration that he is the owner of land parcel number Kithyoko/Kithyoko/1603 measuring 23.36 Ha.
5. Although the Defendant was served with the Plaintiff and the Summons to Enter Appearance, he neither entered appearance nor filed a Defence. The matter proceeded for hearing in the absence of the Defendant.
6. The Plaintiff, PW1, informed the court that he inherited the suit property from his late father in 1977; that he constructed his house on the land and that the land was surveyed as parcel number 2855 during the adjudication process.
7. It was the evidence of PW1 that while awaiting for the issuance of a Title Deed, he was informed that his land had been consolidated with another parcel of land number 1603 owned by the Defendant- who is his step-brother and that he later on learnt that the Defendant had caused parcel number 1598 to be sub-divided into two and created parcels number 1598 and 2855.
8. According to PW1, when he obtained his Title Deed, he realized his portions were very small compared to the actual size on the ground; that he occupies land known as Kithyoko/Kithyoko/1603 which measures approximately 23.36 Ha and that the Defendant is holding the title for parcel number 1603 in trust for him. PW1 produced several documents in support of his case which I have considered.
9. PW2 informed the court that the Plaintiff is his uncle; that the Defendant is a step-brother of the Plaintiff and that the clan sub-divided the land belonging to the Plaintiff's father in 1977.
10. PW2 stated that the Plaintiff's and the Defendant's late father had four wives; that the unsurveyed land was sub-divided into four portions amongst the four (4) wives and that the Plaintiff fenced the portion of land that he was allocated to him by the clan.
11. It was the evidence of PW2 that during adjudication, the Plaintiff was given parcel number 2855 while the Defendant was given parcel number 1603; that the Defendant fraudulently consolidated his land with the Plaintiff's land and that the Defendant caused another parcel of land owned by the Plaintiff being parcel number 1598 to be sub-divided into two, one portion being 2588. The Plaintiff's neighbour, PW3, stated that the Plaintiff's land and the Defendant's land are divided by a road; that he was known the Plaintiff since 1969 and that the Plaintiff has settled on the suit land.

12. In his submissions, the Plaintiff's advocate submitted that the evidence of the Plaintiff in respect of the suit property remains unchallenged; that the Defendant fraudulently caused parcels numbers 2855 and 1603 to be consolidated and that from the Surveyor's report, the Plaintiff is occupying parcel number 1603.

13. The documents produced by the Plaintiff shows that the Defendant was registered as the proprietor of parcel of land known as Kithyoko/Kithyoko/1603 measuring 38.72 Ha on 28th January, 2014, with the Title Deed being issued on 3rd November, 2014.

14. According to the evidence of the Plaintiff, the Defendant fraudulently combined his (*the Plaintiff's land*) known as parcel number 2855 measuring 23.36 Ha with the Defendant's land known as parcel number 1603 to create parcel of land number 1603 measuring 38.72 Ha.

15. In their report of 27th November, 2017, two Surveyors from Koti Geospatial Experts Limited stated as follows in respect to parcel number Kithyoko/Kithyoko/1603:

“The following are our findings:

- ***The parcel is made of 2 portions with a 9 meters' road passing between them as per the attached copy of R.I.M (Sheet No. 13).***
- ***The parcel is indicated as shown in green on the attached google map is fenced with a live fence which after carrying out our survey we found out it was correctly fenced.***
- ***The area was confirmed to be 22.30 Ha (55.10 acres).***
- ***At the middle of the parcel there is an old homestead.***
- ***According to the County Lands Registry the whole parcel is registered under the name Jason Mutie, (Brother to Mwau Mutie Mumo), with a total area of 38.72 Ha. See attached copies of official search.”***

16. It is therefore obvious from the findings of the Surveyors that parcel of land known as Kithyoko/Kithyoko/1603 as currently registered was a combination of two parcels of land. Indeed, the Defendant has not denied that he combined the Plaintiff's land measuring approximately 22.30 Ha with his own land to create parcel of land number 1603.

17. That being the case, the portion currently known as Kithyoko/Kithyoko/1603 should be re-surveyed and new numbers created, taking into account that the Plaintiff's land measures 22.30 Ha.

18. For the reasons I have given above, I find that the Plaintiff has proved his case on a balance of probabilities. The Plaintiff's Plaint dated 4th April, 2018 is allowed as follows:

a. A declaration be and is hereby issued that the consolidation of Land Parcel Number Kithyoko/Kithyoko/1603 and 2588 by the Defendant was illegal, null and void.

b. A declaration be and is hereby issued that the sub-division of Land Parcel Number Kithyoko/Kithyoko/1598 was illegal, null and void.

c. A declaration be and is hereby issued that the Plaintiff is the owner of the portion of Land Parcel Number Kithyoko/Kithyoko/1603 measuring 23.36 Hectares and which he occupies.

d. An order be and is hereby issued that the Defendant do excise a portion measuring 23.36 Hectares from land known as Kithyoko/Kithyoko/1603 in favour of the Plaintiff and which the Plaintiff occupies.

e. An order that the Defendant do sign the transfer forms and in default the Deputy Registrar do sign them to effect the transfer is hereby issued.

f. The Defendant to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 1ST DAY OF NOVEMBER, 2019.

O.A. ANGOTE

JUDGE