



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 72 OF 2017**

**TITUS NGENYE MUTHAMA.....1<sup>ST</sup> PLAINTIFF**

**ANNE NDUNGE NGENYE .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ANGELINA NZIOKA.....DEFENDANT**

**RULING**

1. In the Notice of Motion dated 11<sup>th</sup> June, 2019, the Defendant is seeking for the following orders:

***a. That the Machakos County Lands Registrar be and is hereby ordered to issue to the court a report on the ownership status of the land known as Machakos Town Block 3/288 before hearing of the main suit herein.***

***b. That the Machakos County Lands Surveyor be and is hereby ordered to issue to the court a report on the location of the land known as Machakos Town Block 3/288 before hearing of the main suit herein and;***

***c. That the costs of this Application be provided for.***

2. The Application is premised on the grounds that the parties are not in agreement as to who owns land which was formally known as Plot No. 1887 measuring 2.04 acres and that pursuant to the Ruling of this court delivered on 28<sup>th</sup> September, 2018, it is prudent to have the aforementioned reports produced in court.

3. In her Affidavit, the Defendant has deponed that it is prudent to have the official report from the Machakos County Land Registrar and Surveyor on the status of the suit property to enable the court to determine the issue of ownership of the land and location of the same.

4. In response, the Plaintiffs' advocate deponed that it is only the court that has the requisite jurisdiction to determine the issues raised in the litigant's respective pleadings; that the Defendant's purported title documents stem from fraudulent dealings and that in filing the current Application, the Defendant is exhibiting signs of guilt. None of the parties filed written submissions.

5. In their Complaint, the Plaintiffs alleged that they are the lawful owners of plot number 1887 measuring approximately 2½ acres which they bought from Johnson Kimeu and that the Defendant has been trying to unlawfully access the said land.

6. In the Defence, the Defendant averred that she is the registered proprietor of land known as Machakos Town Block 3/288 (formerly Plot No. 1887 RM 288) having purchased it from one Joseph Nzioki Mbuvi. The Defendant/Applicant has annexed on her Affidavit a copy of the Title Deed for the said land.

7. In the Ruling of this court delivered on 28<sup>th</sup> September, 2018, the court observed as follows:

***“10. Indeed, there is no evidence before me to show the nexus between parcel numbers Machakos Town Block 3/288 and plot number 1887. Except for a copy of the letter dated 4<sup>th</sup> August, 1998, the Defendant has not attempted to file a report by a surveyor to show that the two parcels of land are one and the same.”***

8. It would appear that the current Application was filed in response to the above observation by the court. It is trite that a party who alleges has the burden of proving the existence of facts which he asserts.

9. If the Defendant's case is that parcel of land known as Machakos Town Block 3/288 is the same as plot number 1887, then the burden of

proving that fact lies with him. Our legal system being adversarial in nature, this court cannot step into the arena of litigation by assisting the Defendant in obtaining evidence, which he is seeking to do in the current Application.

10. Indeed, nothing bars the Defendant from hiring a qualified Surveyor to prepare a report to show the nexus between the two plots, and not to invoke the powers of the court to direct government officials to scout evidence for him.

11. In the circumstances, I find the Application dated 11<sup>th</sup> June, 2019 to be unmeritorious. The Application is therefore dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2019.**

**O.A. ANGOTE**

**JUDGE**