



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 33 OF 2016

RICHARD DAUDI NZYUKO.....1ST PLAINTIFF

ALPHONCE MUENDO NZYUKO.....2ND PLAINTIFF

VERSUS

RACHAEL KAILU NZIOKA.....1ST DEFENDANT

MUEMA NZIOKA.....2ND DEFENDANT

KELI NZIOKA.....3RD DEFENDANT

JUDGMENT

1. In the Plaint dated 20th May, 2016, the Plaintiffs averred that the land known as Machakos/Katheka-Kai Block 4/18 (*the suit property*) is registered in the name of the late Nzyuko Mbovu; that they are the administrators of the late Nzyuko and that the Defendants have trespassed on the suit property. The Plaintiffs have sought for a permanent injunction against the Defendants, costs of the suit and any other relief.

2. The Defendants filed a joint Defence and Counter-claim dated 7th June, 2016. In the Defence, the Defendants averred that the suit property which was previously known as Katheka-Kai Farm B Volta 180 was purchased by the late David Nzioka Mbai from King'ola Kiilu between March 1996 and December 1997 and that it is the Plaintiffs who have trespassed on the suit property.

3. The Defendants have sought for orders that:

- a) *A declaration that Katheka-Kai Farm B Vota 180 and/or Machakos/Katheka-Kai Block 4/180 belongs to the Estate of David Nzioka Mbai (Deceased);*
- b) *An order directing the Committee Katheka-Kai Farmers Co-operative Society Limited to issue Title in the name of the 1st Defendant;*
- c) *An order for permanent injunction barring and/or restraining the Plaintiffs by themselves, their servants, agents or anyone claiming under them or through them from trespassing, transferring, alienating or in any way dealing with the suit premises in a manner calculated to deprive the Defendants of their enjoyment to land parcel Katheka-Kai Farm Vota B and/or Machakos/Katheka-Kai Block 4/180; and*
- d) *Costs of the suit.*

4. In response, the Plaintiffs filed a Reply to Defence and Defence to Counter-claim dated 28th November, 2016. The Plaintiffs pleaded that the Defendants joint Counter-claim dated 7th June, 2016 be dismissed with costs.

The Plaintiffs' case:

5. The 1st Plaintiff, PW1, informed the court that him and the 2nd Plaintiff are the joint administrators of the Estate of Nzyuko Mbovu (*deceased*); that parcel of land known as Machakos/Katheka Kai Block 4/180 (*the suit property*) is registered in the name of the deceased and that the Defendants have continued to encroach and/or trespass on the parcel of land by cutting down trees, destroying the fence and clearing vegetation.

6. According to the testimony of PW1, the late Nzyuko was a member of Kathaka-Kai; that the Defendants invaded the suit property

between 1994 and 1996 and that the Defendants are usually on and off the suit property.

7. PW1 informed the court that the suit property does not belong to King'ola Kiilu; that the beneficiaries of the late King'ola Kiilu sold the suit property to David Nzioka Mbai without legal capacity to enter into the alleged sale transaction and that the Defendants, their servants and family members should be restricted from trespassing on the suit property.

8. In cross-examination, PW1 testified that the Defendants encroached on the suit property immediately it was allocated to the Plaintiffs and that by the time the allocation was done, their father Nzyuko Mbovu had not died. PW1 testified that the Defendants have never lived on the suit property but used to graze on the suit property and would go away whenever chased by the Plaintiffs.

9. PW1 testified that the suit property which is not fenced and is far away from where the Plaintiffs reside; that different people used to graze on the suit property and that his late father's membership number was number 34.

10. In re-examination, PW1 testified that Plot No. 180 was in the name of his late father; that the records show that the Defendants started encroaching on the suit property in 1994 by grazing on the land and that they used to chase them away. PW1 testified that whenever they fenced the suit property, the Defendants would demolish the fence.

11. The 2nd Plaintiff, PW2, testified that the Defendants started grazing animals on the suit property in 1995/1996; that the suit property belongs to their late father Nzyuko Mbovu and that he does not know King'ola Kiilu. PW1 stated that although they reported about the invasion of the suit property by the Defendants to the Chief, he cannot remember the name of the area Chief and that he never received a letter from an advocate in regard to the suit property.

Defendants' case:

12. According to the 1st Defendant, DW1, she is the legal administratrix of the Estate of David Nzioka Mbai (*deceased*); that the 2nd and 3rd Defendants are her children and that the suit property was registered on 14th October 1999 in the name of David Nzioka Mbai after purchasing the suit property in 1999 from Wambua King'ola and Kiilu King'ola, the sons of King'ola Kiilu (*deceased*) and his brother Peter Kilonzo Kiilu.

13. DW1 stated that the transfer of the suit property being Katheka-Kai K/KAI (B) ('B') No.180 to her late husband was effected at the offices of Katheka-Kai Farmers Co-operative Society and that King'ola Kiilu(*deceased*) membership number was 164. According to DW1, the documents presented in support of the Plaintiffs' case are fraudulent.

14. The 1st Defendant pleaded that the suit property was fenced and had a cattle dip since 1999; that she has occupied the suit property peacefully and that the transfer and mutation forms are with the society. DW1 denied that they have encroached on the suit property.

Submissions:

15. The Plaintiffs' counsel submitted that the suit property belongs to the Plaintiffs' late father Nzyuko Mbovu; that no evidence has been tendered in court to show that King'ola Kiilu was the owner of the suit property and that the Sale Agreements produced by the Defendants were not signed by King'ola Kiilu or the purported sellers.

16. Counsel submitted that there was no evidence by way of a confirmation letter or a letter of allotment from Kitheka-Kai Co-operative Society to show that the suit property was registered in the name of the 1st Defendant's husband, David Nzioka Mbai.

17. In response, counsel for the Defendants submitted that the letter dated 18th April, 2006 produced by PW1 was only signed by Mutavi Kithu, the Secretary of the Co-operative Society and had no official seal or signatures from the other officials and that the maker of the letter was not called to explain how the letter was issued. According to counsel, the membership certificate that was produced in evidence by the Plaintiff only indicated the membership number and not the parcel of land in question.

Analysis and determination:

18. The Plaintiffs are the administrators of the Estate of the late Nzyuko Mbovu while the 1st Defendant is the administratrix of the Estate of the late David Nzioka Mbai. The only issue for determination is who between the late Nzyuko Mbovu and David Nzioka Mbai owns parcel of land known as Machakos/Katheka-Kai Block 4/180 (*the suit property*).

19. The 1st Plaintiff, PW1, informed the court that the suit property is registered in the name of late Nzyuko Mbovu (*deceased*) and that the Defendants have continued to encroach and/or trespass on the parcel of land by cutting down trees, destroying the fence and clearing vegetation. According to the testimony of PW1, the late Nzyuko was a member of Katheka-Kai Co-operative Society; that the Defendants invaded the suit property between 1994 and 1996 and that the Defendants are usually on and off the suit property.

20. The Plaintiffs produced four documents to prove that the late Nzyuko was the owner of the suit property. The only document that the Plaintiff produced from Katheka-Kai Farmers Co-operative Society Limited is a letter dated 18th April 2006 purportedly authored by Mutavi Kithu, the Secretary to the Society.

21. In the said letter, the secretary to the society has stated that according to the records, the suit property measuring 20 acres is owned by the late Nzyuko Mbovu, the same having been allocated to him by virtue of his membership to the society. The copy of the membership

certificate that was issued to the late Nzyuko Mbovu, who died in 1988, was produced in evidence.

22. PW1 informed the court that the suit property does not belong to King'ola Kiilu; that the beneficiaries of the late King'ola Kiilu sold the suit property to David Nzioka Mbai without legal capacity to enter into the alleged sale transaction and that the Defendants, their servants and family members should be restricted from trespassing on the suit property.

23. On the other hand, the Defendants' case is that the suit property was registered on 14th October 1999 in the name of David Nzioka Mbai after purchasing the same in 1999 from Wambua King'ola and Kiilu King'ola, the sons of King'ola Kiilu (*deceased*) and his brother Peter Kilonzo Kiilu.

24. DW1 stated that the transfer of the suit property, also known as Katheka Kai K/KAI (B) ('B') No.180 to her late husband was effected at the offices of Katheka-Kai Farmers Co-operative Society and that King'ola Kiilu (*deceased*) membership number was number 164. According to DW1, the documents presented in support of the Plaintiffs' case are fraudulent.

25. The 1st Defendant informed the court that the suit property was fenced and has had a cattle dip since 1999; that she has occupied the suit property peacefully and that the transfer and mutation forms in favour of her husband are with the society. DW1 produced in evidence the sale agreements that the late David Mbai entered into with the King'oli family together with the transfer form from the society.

26. The acknowledgment note dated 6th February, 1999 shows that the late Mbai finished paying the Kshs. 400,000 which was the price of the 20 acres of the suit property. The said acknowledgement slip authorised the society to register the said David Mbai as the proprietor of the land. The Defendants produced numerous receipts that were issued to David Mbai each time he paid to the King'olis the instalments towards the purchase price. The said receipts were issued between the years 1997 and 1999.

27. Other than the acknowledgement notes, the receipts and the Transfer form from Katheka-Kai, the Defendant also produced in evidence the certificate of confirmation of grant that was issued in Machakos High Court Succession Cause No. 434 of 2008. The said certificate of confirmation of grant shows that the suit property was one of the assets that devolved to the estate of the late David Nzioka Mbai.

28. Although the Plaintiffs produced in evidence a copy of the membership certificate issued to the late Nzyuko Mbovu, no evidence was produced to show that on the strength of the said certificate, the late Nzyuko Mbovu was allocated parcel number 180 by the society. Indeed, unlike the Defendants, the Plaintiff's did not produce a transfer form duly signed by the officials of the society and sealed showing that the said land was ever registered in favour of the late Nzyuko Mbovu.

29. Furthermore, the Plaintiffs did not offer any explanation as to why the membership certificate that was purportedly issued to the late Nzyuko Mbovu was issued on 15th February, 1999, ten years after his death. Indeed, the evidence before me shows that by the time the said certificate was purportedly issued to the late Nzyuko Mbovu in 1999, the same land had already been sold to David Mbai by the King'oli family.

30. To the extent that the Defendants are in possession of the Transfer form which was issued by Katheka-Kai Cooperative Society on 14th October, 1999 showing that King'oli Kiilu, member number 164, was the owner of parcel number 180, and that his family had transferred the land to David Mbai, and in view of the acknowledgement slips and the receipts showing the purchase of the suit property by the late David Mbai, it is my finding that it is the Defendants who have proved on a balance of probabilities that they own the land.

31. The Plaintiffs have not proved on a balance of probabilities that Nzyuko Mbovu, who died in 1988, ever owned parcel number 180 in the society, or that they ever took possession of the said land on the basis of the alleged ownership. Indeed, since the demise of late Nzyuko Mbovu in 1988, the Plaintiffs have never included the suit property in the estate of the deceased for the purpose of obtaining a certificate of confirmation of grant.

32. For those reasons, I dismiss the Plaintiffs' suit with costs and allow the Defendants' counter claim as follows:

a) A declaration be and is hereby issued that Katheka-Kai Farm B Vota 180 also known as Machakos/Katheka-Kai Block 4/180 belongs to the Estate of David Nzioka Mbai.

b) An order is hereby issued to the Committee of Katheka-Kai Farmers Co-operative Society Limited to issue a title in respect of Katheka-Kai Farm B Vota 180 also known as Machakos/Katheka-Kai Block 4/180 to the 1st Defendant.

c) An order for permanent injunction be and is hereby issued barring and/or restraining the Plaintiffs by themselves, their servants, agents or anyone claiming under them or through them from trespassing, transferring, alienating or in any way dealing with the suit premises in a manner calculated to deprive the Defendants of their enjoyment to land parcel Katheka-Kai Farm Vota B also known as Machakos/Katheka-Kai Block 4/180; and

d) The Plaintiffs to pay the costs of the suit and the Counter- claim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 25TH DAY OF JUNE, 2021.

O. A. ANGOTE

JUDGE