



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 220 OF 2017**

**JOHN KIMOTHO NDOLO** (*Suing as the Legal*

*Administrator of the Estate of the late*

**JOSEPH MUSILU NDOLO** *alias*

**MUSILU NDOLO** (*Deceased*).....**PLAINTIFF**

**VERSUS**

**RICHARD ZENGA BONGEL**.....**1<sup>ST</sup> DEFENDANT**

**HENRY MAROVA**.....**2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, MACHAKOS**.....**3<sup>RD</sup> DEFENDANT**

**ALI MURSAR** *alias* **MOHAMED**.....**4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In the undated Amended Plaintiff, the Plaintiff averred that at all material times, the deceased was the registered proprietor of land situated in Athi River and known as L.R. No. 337/641 (*IR 54744*) (*the suit property*); that vide a fraudulently obtained title, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants purportedly procured from the 3<sup>rd</sup> Defendant another title in respect of the suit property and that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants trespassed on the suit property in April, 2017.

2. In the Amended Plaintiff, the Plaintiff has sought for the following orders:

***a) A declaration that the genuine title to the suit property L.R. No. 337/641 (I.R 34744) is the one held by the deceased and that the title held by the 1<sup>st</sup> and 2<sup>nd</sup> and/or 4<sup>th</sup> Defendants (Athi River Township Block 6/4) or any other title to the suit property is fraudulent and that the same is null and void ab initio.***

***b) A mandatory order directing the 3<sup>rd</sup> Defendant to cancel the title held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants over the suit property and which title refers to the suit property as Athi River Township Block 614.***

***c) A mandatory injunction restraining the 1<sup>st</sup>, and 2<sup>nd</sup> and 4<sup>th</sup> Defendants from continuing to trespassing, selling, offering or advertising for sale, alienating, developing, occupying, fencing and/or dealing in whatsoever manner with the suit property (L.R. No. 337/641 (I.R 54744).***

***d) Damages for trespass and mesne profits calculated from the time the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants trespassed onto the suit premises in April, 2017 until the date they will hand over vacant possession and/or until the date the Plaintiff obtains vacant possession.***

***e) A mandatory order requiring the 1<sup>st</sup>, 2<sup>nd</sup> and/or 4<sup>th</sup> Defendant to either jointly and/or severally demolish all buildings, walls and/or structures constructed on the suit property L.R. No. 337/641 (I.R 54744) and that such demolition be within such a reasonable period as shall be set by the Honourable Court and in default of which demolition the Plaintiff be at liberty to demolish the same at the 1<sup>st</sup> – 3<sup>rd</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants costs.***

***f) Costs of this suit.***

3. Despite being served with the Plaintiff and the Summons to Enter Appearance, other than the firm of Onesmus Githinji & Company Advocates who entered appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the Defendants never filed a Defence. The matter proceeded for hearing in the absence of the Defendants.

4. The Plaintiff, PW1, informed the court that he is the administrator of the Estate of the late Joseph Musilu Ndolo; that the deceased is the registered owner of land known as L.R. No. 337/641 (*the suit property*) and that the deceased became the registered owner of the suit property in early 1980.

5. According to PW1, he learnt from one of his neighbours that there was a title in existence in respect to the suit property; that the said neighbour gave him a copy of the title which was in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and that the said Defendants are unknown to the Estate of the deceased.

6. According to PW1, when he attempted to know the genuineness of the title that was in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he was informed by the Lands office that the said title document was a forgery. PW1 informed the court that in the year 2017, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' agents trespassed on the suit property and put in place beacons on the lower side of the suit property.

7. The Plaintiff's advocate submitted that the deceased is the registered owner of the suit property situated in Athi River; that the original Grant/Title was issued to him on 1<sup>st</sup> March, 1979; that the original title got lost or misplaced and that he was issued with a Provisional Title on 12<sup>th</sup> July, 2017.

8. Counsel submitted that during his lifetime, the deceased was in possession and control of the suit property as he was leasing out the suit property to third parties for farming until he met his demise on 14<sup>th</sup> April, 2007; and that thereafter, the Plaintiff as the appointed administrator took over the control and possession of the suit property.

9. It was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have in their possession a Title Deed describing the suit property as Athi River Township Block 6/4 issued on 16<sup>th</sup> October, 2003. It was submitted that the Plaintiff's plea is that of fraud as against the Defendants' jointly and severally.

10. The Plaintiff's counsel submitted that there is no evidence that the title held by the Plaintiff since 1<sup>st</sup> March, 1979 has ever been transferred, cancelled, revoked or annulled and that explains why the Plaintiff still holds onto the original title and that in the absence of any evidence to show how the 1<sup>st</sup> and 2<sup>nd</sup> Defendants obtained their title, it follows that the title was obtained fraudulently.

11. The evidence before the court shows that a grant in respect of land known as L.R. No. 337/641 was issued to the late Joseph Musilo Ndolo on 9<sup>th</sup> October, 1980 and registered as I.R 34744/1 on 31<sup>st</sup> October, 1980. The grant shows that a grant of probate of written Will of the Estate of the said Ndolo was registered in favour of the Plaintiff against the title on 5<sup>th</sup> October, 2016. On 12<sup>th</sup> July, 2017, a provisional title was issued in respect to the suit property.

12. The Plaintiff produced in evidence a Certificate of Lease for Athi River Township Block 6/4 registered in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 16<sup>th</sup> October, 2003. According to the Plaintiff, the Defendants are using the said Certificate of Lease to claim the suit property.

13. The Defendants did not rebut the Plaintiff's testimony that they are using the Certificate of Lease for Athi River Township Block 6/4 to claim the suit property. Indeed, the assertion by the Plaintiff that the Certificate of Lease in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is a forgery was not controverted by the Defendant.

14. That being the case, and in the absence of evidence to show that the title in possession of the Plaintiff for L.R. No. 337/614 was fraudulently issued, and the same having come first in time, I find and hold that the Plaintiff has proved his case on a balance of probabilities.

15. For those reasons, I allow the Plaintiff's Amended Plaintiff as follows:

***a) A declaration be and is hereby issued that the genuine title to the suit property L.R. No. 337/641 (I.R 34744) is the one held by the deceased and that the title held by the 1<sup>st</sup> and 2<sup>nd</sup> and/or 4<sup>th</sup> Defendants (Athi River Township Block 6/4) or any other title to the suit property is fraudulent and the same is null and void ab initio.***

***b) A mandatory injunction be and is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants from continuing to trespassing, selling, offering or advertising for sale, alienating, developing, occupying, fencing and/or dealing in whatsoever manner with the suit property (L.R. No. 337/641 (I.R 54744)).***

***c) A mandatory order be and is hereby issued requiring the 1<sup>st</sup>, 2<sup>nd</sup> and/or 4<sup>th</sup> Defendants to either jointly and/or severally demolish all buildings, walls and/or structures constructed on the suit property L.R. No. 337/641 (I.R 54744) within sixty (60) days of the date of this Judgment and in default of which demolition the Plaintiff be at liberty to demolish the same at the 1<sup>st</sup> – 3<sup>rd</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants costs.***

***d) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants to pay the costs of the suit.***

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2<sup>ND</sup> DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE