



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 4 OF 2018

JOSEPH KIVINDA MWANZA.....1ST APPLICANT

EDWARD MUSYOKA ILUMBA.....2ND APPLICANT

NZESI MUSILA.....3RD APPLICANT

VERSUS

SIMON NYAMAI MUNYWOKI.....RESPONDENT

RULING

1. In the Application of 20th March, 2018, the Applicants are seeking for the following orders:

a. That this Honourable Court be pleased to set aside the orders granted on 1st March, 2018 in Machakos CMCC No. 680 of 2017 Joseph Kivinda Mwanza, Edward Musyoka Ilumba Nzesi Musila vs. Simon Nyamai Munywoki pending hearing and determination of this Appeal.

b. That an ex-parte injunction order do issue restraining the Respondent by himself, his agents, employees, servants and anyone claiming under the Respondent from entering, using, interfering, trespassing, alienating, building, constructing, offloading or collecting building materials, or committing any works of waste, constructing, fencing, building, using the suit premises Wamunyu Market Plot 328 pending hearing and determination of this Application.

c. That an injunction order do issue restraining the Respondent by himself, his agents, employees, servants and anyone claiming under the Respondent from entering, using, interfering, trespassing, alienating, building, constructing, offloading or collecting building materials, or committing any works of waste, constructing, fencing, building, using the suit premises Wamunyu Market Plot 328 pending hearing and determination of this Appeal.

d. That the officer in charge Wamunyu Police Post do assist in compliance and service of the orders herein.

e. That the costs of and incidental to this Application be borne by the Respondents.

2. The Application is premised on the grounds that the Applicants have filed an Appeal against the Ruling of the learned Magistrate in Machakos CMCC No. 680 of 2017; that the orders issued in CMCC No. 680 of 2017 are draconian, unjust, unfair and not based on facts and that the Applicants have an arguable Appeal.

3. The Applicants deponed that the Respondent's structure on the suit land "is a fresh structure" and amounts to trespass; that he uses the suit land to sell poles and that the current Application should be allowed.

4. In response, the Respondent deponed that the Ruling delivered by the learned Magistrate in Machakos CMCC No. 680 of 2017 was meritorious; that there is no material placed before the court to warrant the setting aside of the orders of the court; that the Applicants did not annex any document to prove ownership of the suit land and that he is the one who has been in actual possession of the suit land since 1973.

5. The Appellants'/Applicants' advocate submitted that the Appellants have annexed photographs showing that the Respondent is in the process of building a permanent structure on the suit land; that if the said construction goes on, the Appeal will be rendered nugatory and that an order of stay and injunction should issue.

6. The Respondent's advocate submitted that the Respondent has not been served with a copy of the Memorandum of Appeal; that the Respondent established in the lower court that he had purchased the suit land in the year 1973 and had been in possession of the same since 1973 and that the Applicants failed to establish a prima facie case with chances of success.

7. The Appellants/Applicants are seeking for orders staying the order of the lower court that was issued on 1st March, 2018. The Applicants are also seeking for an order of injunction pending the hearing of the Appeal.

8. The Ruling that the Appellants are challenging has been annexed on the Appellants' Affidavit. However, neither the Application nor the Plaint which gave rise to the impugned Ruling has been annexed on the Application.

9. In the absence of the copy of the Plaint and the Notice of Motion that was filed in the lower court, it is not possible for this court to determine the issues that were raised in the lower court. In any event, the photographs that the Applicants have annexed on the Affidavit shows that it is the Respondent who is in possession of the land, and not him.

10. For the above reasons, I find the Application dated 20th March, 2018 to be unmeritorious and the same is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25TH DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE