



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 106 OF 2017

PETER MWAKA MUTHIANI.....PLAINTIFF

VERSUS

PIMARK MUTISYA KISINI.....1ST DEFENDANT

LAND COUNTY REGISTRAR, MACHAKOS.....2ND DEFENDANT

THE COUNTY LAND ADJUDICATION OFFICER,

MACHAKOS COUNTY.....3RD DEFENDANT

THE NATIONAL LAND COMMISSION.....4TH DEFENDANT

RULING

1. In the Amended Notice of Motion dated 13th March, 2017, the Plaintiff has sought for the following orders:

a. That this Honourable Court be pleased to grant the Plaintiff leave to amend the Plaintiff dated and filed 13th March, 2017 in terms of the draft amended Plaintiff annexed herein.

b. That the draft Amended Plaintiff annexed herewith be deemed as properly filed and served upon payment of the requisite court filing fees.

c. That a temporary injunction do issue against the 1st and 2nd Respondents, their agents, servants assigns or anybody acting under their instruction restraining them from transferring, charging, trespassing, alienating or carrying out any activity on land Title Number Matungulu/Nguluni/3701, 3702, 3703, 3704, 3705 and 3706 registered in the name of the 1st Defendant which will be prejudicial to the Plaintiff pending the hearing and determination of this suit.

d. That the 2nd Respondent be ordered to avail approvals of mutation for sub-division which are mandatory before any alienation is done and the documents lodged by the 1st Defendant for purposes of the transfer.

e. That the 4th Defendant be ordered to investigate how the names of the 1st Defendant found its way into the register of beneficiaries in the disputed parcel of land Matungulu/Nguluni/3701, 3702, 3703, 3704, 3705 and 3706 which was initially Matungulu/Nguluni/3388 and on how the land was curved out of what could have been now Matungulu/Nguluni/570 before issuance of Titles during the adjudication or thereafter and make its recommendation to the court within sixty (60) days from the time of receipt of the court orders and the role played by each of the parties.

f. That the 3rd Defendant be ordered to avail the original register of beneficiaries which was used during the adjudication of Nguluni location.

2. The Application is supported by the Affidavit of the Plaintiff who has deposed that the amendments sought in the Plaintiff are necessary to enable the court determine the suit; that before adjudication of the suit land, he had been in occupation of parcel of land known as Matungulu/Nguluni/3388 by virtue of it being ancestral land which was later sub-divided into parcels number 3701-3706 and that he was registered as the proprietor of parcel number 571 which bordered parcel number 3388.

3. It is the Plaintiff's deposition that the Defendants moved on the suit land in January, 2017; that he discovered that during the adjudication process, the 1st Defendant fraudulently colluded with the 3rd Defendant and curved out of parcel of land number 570 a portion of land which

was registered as parcel number 3388 which has since been sub-divided and that parcel of land number 3388 was part of parcel number 570 which the Plaintiff has been in occupation for over forty (40) years.

4. It is the Plaintiff's deposition that the 1st Defendant's ancestral land is five(5) kilometers from where the suit land is situated; that the 1st Defendant has never taken possession of the suit land and that he has never sold the suit land to the 1st Defendant.

5. In his response, the 1st Defendant deponed that he has never curved out an acre of land from parcel of land known as Matungulu/Nguluni/570 as alleged by the Plaintiff; that he is lawfully occupying parcel of land known as Machakos/Nguluni/3388 which is adjacent to the Plaintiff's land and that the Plaintiff's Title Deed for parcel number 570 is different from his land which is parcel number 3388.

6. The 1st Defendant deponed that the suit land did not mutate from the Plaintiff's parcel of land and that his Title Deed was not fraudulently obtained. Both parties filed their submissions through their advocates which I have considered.

7. The evidence before me shows that the Plaintiff was registered as the proprietor of a parcel of land known as Matungulu/Nguluni/570 measuring 14.19 Ha. The Title Deed exhibited by the Plaintiff shows that the said land was registered in his favour on 23rd July, 2009 and a Title Deed was issued to him on 28th April, 2011.

8. The Plaintiff has also exhibited the Registered Index Map (R.I.M) which shows the location of parcel number 570 viz-a-viz parcel number 3388. Other than those two documents, there is no other document, including the Mutation forms, showing that parcel number 3388 measuring 0.47 Ha which has since been sub-divided was actually hived from parcel number 570.

9. In any event, the Plaintiff should have requested for the adjudication records from the Land Adjudication Department to proof, prima facie, the alleged fraudulent dealings. In the absence of any evidence to show that parcel number 3388, which was registered in favour of the 1st Defendant on 23rd July, 1999 and a Title Deed issued on 13th June, 2011, was curved out of parcel number 570, I find that the Plaintiff has not established a prima facie case with chances of success.

10. In any event, the 1st Defendant is not only in possession of parcel number 3388, which he has since sub-divided and fenced, but is also the registered proprietor of the said. The 1st Defendant will therefore suffer irreparable damages if the injunctive orders are issued. Consequently, the Plaintiff's Application is dismissed with no order as to costs, save for prayer number 1 and 2 for the amendment of the Plaintiff.

11. The Plaintiff's Amended Application dated 13th March, 2017 is therefore allowed in terms of prayer numbers 1 and 2 alone.

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

O. A. ANGOTE

JUDGE