



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 477 OF 2017

MARGARET ITUMO TITI *alias*

MARGARET NTHOKI ITUMO.....PLAINTIFF/APPLICANT

VERSUS

DAVID MUTUKU KILOLO.....1ST DEFENDANT/RESPONDENT

ANTHONY MWANGI KAMENJU.....2ND DEFENDANT/RESPONDENT

DANIEL MUTUA NDAMBUKI.....3RD DEFENDANT/RESPONDENT

JACKSON MUTUKU MWIKYA.....4TH DEFENDANT/RESPONDENT

CHARITY MWENDE.....5TH DEFENDANT/RESPONDENT

RULING

1. In the Application dated 14th December, 2017, the Plaintiff is seeking for the following orders:

a. That the Respondents by themselves and or their agents, employees or any persons claiming under them be restrained from demolishing the premises or part thereof on the suit land, namely Plot No. 305 Katheka-kai "A", Machakos County pending the hearing and determination of the suit herein.

b. That the Respondents by themselves and or their agents, employees or any persons claiming under them be restrained from preventing the Applicant from accessing and using the suit land namely, Plot No. 305 Katheka-kai "A", Machakos County, or any portion thereof and the premises thereon or interfering in any manner whatsoever with the Applicant's enjoyment of or exercise of her rights over the land and the premises thereon pending the hearing and determination of the suit herein.

c. That the Respondents by themselves and or their agents and employees be restrained from disposing of , charging, subdividing or dealing in any manner whatsoever with the suit land namely, Plot No. 305 Katheka-kai "A", Machakos County or any portion thereof or the premises thereon or portions thereof pending, the hearing and determination of the suit herein.

d. That the Respondents by themselves and or their agents and employees be restrained from erecting beacons, fences, buildings or any other structures, or amassing building materials of any kind, cultivating, digging or carrying on any other works whatsoever on the suit land namely, Plot No. 305 Katheka-kai "A", Machakos County, or on any portion thereof pending, the hearing and determination of the suit herein.

e. That the Respondents by themselves and or their agents, employees or any persons claiming under them be restrained from remaining in occupation of the suit land namely, Plot No. 305 Katheka-kai "A", Machakos County, or on any portion thereof or in the premises thereon pending the hearing and determination of the suit herein.

f. That the Respondents do remove the illegal beacons and fences that they and their agents and or employees have erected on the suit land or portions thereof.

g. That the Officer Commanding Station, Machakos Police Station do ensure compliance by the Respondents of the orders that the court may issue herein.

h. That the court do issue such further orders as it may deem fit to grant in the interest of justice.

i. That the costs hereof be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that she is the owner of land known as Plot No. 305 Katheka-kai "A" situate in Machakos Town (*the suit land*); that she acquired the suit land through purchase from Batram Mutinda Muthoka in 1999 and that the land belonged to the said Batram by virtue of his membership in the Katheka-kai Farmers Co-operative Society Limited (*the Society*).

3. The Plaintiff deponed that after purchasing the suit land, she put a permanent building on the land; that the Defendants have trespassed on the suit land and have wrongfully remained on the land on the ground that they purchased it from her late husband, Sergio Carlesso and that at the time of the death of Sergio, they had separated and was not living on the suit land with the deceased.

4. It is the Plaintiff's case that she filed Machakos High Court Divorce Cause No. 1 of 2009 against her late husband; that her late husband filed ELC. No. 41 of 2009 in which she filed a Counter-claim and that the two suits are still pending. According to the Plaintiff, the court restrained her late husband from denying her the right to access the suit land and that the Defendants took advantage of the deceased's illness and old age to claim the suit land.

5. In response to the Application, the 1st Defendant deponed that he had the authority of the 4th and 5th Defendants to swear the Affidavit on their behalf; that he entered into an Agreement of Sale dated 10th May, 2017 with the late Sergio in respect of the suit land; that upon purchase of the land and the house, he took possession of the same; that the deceased sold his portion of land to him and that the Application should be dismissed.

6. The 2nd Defendant deponed that he purchased a portion of land measuring 100 feet by 100 feet from the late Sergio Carlesso; that the said land was to be curved from the suit land and that the land that he purchased was the deceased's share of the suit land by dint of a consent dated 26th October, 2009 which was entered into between the Plaintiff and the late Sergio.

7. The 3rd Defendant deponed that he entered into a Sale Agreement with the late Sergio who sold to him a portion of the suit land measuring 50 feet by 100 feet; that after the said purchase, he fenced the land and planted trees and that the deceased and the Plaintiff had shared out Plot No. 305 (*the suit land*) vide a consent dated 26th October, 2009 which was filed in court on the same day.

8. In her Supplementary Affidavit, the Plaintiff averred that it is not true that the Defendants purchased portions of the suit land from the late Sergio Carlesso; that the 1st Defendant has never been in possession of the suit land; that she has since resumed ownership of the house that is on the suit land and that the deceased had no title over any portion of the suit land to pass to the Defendants.

9. The Plaintiff deponed that there was no consent as alleged by the Defendants which gave the deceased any ownership rights over the suit land and that the purported consent was an interim measure relating only to the use of a portion of the suit land by the deceased pending the hearing of an Application in Machakos HCCC No. 41 of 2009 which was decided in her favour on 26th November, 2009.

10. The 2nd Defendant filed a Supplementary Affidavit in which he deponed that he purchased a portion of the suit land from Sergio; that Katheka-kai Society confirmed that the portion he purchased was his and that the Plaintiff's Application should be dismissed.

11. The 1st Defendant deponed in his Supplementary Affidavit that after purchasing the portion of the suit land, the Society confirmed in writing that the said portion belongs to him.

12. The Plaintiff's and the Defendants' advocates filed their respective submissions which I have considered.

13. The evidence placed before this court shows that the Plaintiff purchased the suit land from one Batram Mutinda Muthoka vide an Agreement dated 8th October, 1999. According to the Plaintiff, Batram was a member of Katheka-kai Farmers Co-operative Society Limited which owned the parcel of land of which the said Batram became the owner by virtue of his membership. The Society has not denied that indeed Batram was its member.

14. The Plaintiff has exhibited a Certificate of Marriage which shows that she was married to the late Sergio Carlesso on 28th December, 2005. The Plaintiff has also annexed a copy of the Petition in Machakos Petition Number 1 of 2009 in which she sought for an order dissolving her marriage with the late Sergio. The said Petition was still pending as at the time the said Sergio died.

15. The Plaintiff also annexed a Plaint in Machakos HCCC No. 41 of 2009 in which the late Sergio claimed, *inter alia*, a declaration that he was the owner of the suit land. In her Defence and Counter-claim, the Plaintiff claimed that she is the one who is entitled to the suit land having purchased it. The said suit is still pending in this court.

16. The 1st Defendant's claim over the suit land is by virtue of an Agreement he entered into with the late Sergio dated 28th June, 2016. According to the said Agreement, the 1st Defendant purchased the suit land from Mr. Sergio for Kshs. 2,200,000. However, by the time the 1st Defendant purported to enter into the said Agreement for land measuring 50 feet by 100 feet, the issue of ownership of the entire suit land was pending in court in HCCC No. 41 of 2009.

17. Indeed, by this time, the court had made a Ruling in Machakos HCCC No. 41 of 2009 allowing the Plaintiff herein to "*access to the farm on Plot No. 305 in Katheka-kai Farmers Co-operative Society Limited which is solely owned by the Applicant...*" Consequently, the late

Sergio could not have validly sold a portion of the suit land until and after the said court order had been set aside or varied.

18. In any event, there is no evidence before me to show that it is the late Sergio who purchased the suit land from the former member of the Society. Indeed, the late Sergio did not have any document of ownership in respect of the suit land to enable him pass a good title to the Defendants.

19. Although the 2nd and 3rd Defendants have claimed that the late Sergio sold to them portions of the suit on the strength of the consent order that was signed on 26th October, 2009, the said consent only apportioned the suit land between the Plaintiff and the late Sergio for the purpose of usage of the same “pending the court’s Ruling on the Application in Machakos HCCC No. 41 of 2009 or until further orders of the court.

20. The court made its Ruling in Machakos HCCC No. 41 of 2009 on 26th November, 2009 in favour of the Plaintiff. The Ruling of the court of 26th November, 2009 superceded the consent of 26th October, 2009.

21. In any event, the consent order of 26th October, 2009 did not apportion the ownership of a portion of the suit land on the late Sergio. He could not therefore rely on it to purport to sell the suit land considering that Machakos HCCC No. 41 of 2009 was pending.

22. Considering that the Plaintiff has produced evidence showing that she is the one who purchased the entire suit land, and in view of the pending suits between her and the late Sergio, I find and hold that she has established a prima facie case with chances of success. Further, considering that it is the Plaintiff who is in occupation of the house standing on the suit land, she will suffer irreparable damages that cannot be compensated by way of damages unless the injunctive order is granted in her favour.

23. For those reasons, I allow the Plaintiff’s Application dated 14th December, 2017 as follows:

a. That the Respondents by themselves and or their agents, employees or any persons claiming under them be and are hereby restrained from demolishing the premises or part thereof on the suit land, namely Plot No. 305 Katheka-kai “A”, Machakos County pending the hearing and determination of the suit herein.

b. That the Respondents by themselves and or their agents, employees or any persons claiming under them be and are hereby restrained from preventing the Applicant from accessing and using the suit land namely, Plot No. 305 Katheka-kai “A”, Machakos County, or any portion thereof and the premises thereon or interfering in any manner whatsoever with the Applicant’s enjoyment of or exercise of her rights over the land and the premises thereon pending the hearing and determination of the suit herein.

c. That the Respondents by themselves and or their agents and employees be and are hereby restrained from disposing of , charging, sub-dividing or dealing in any manner whatsoever with the suit land namely, Plot No. 305 Katheka-kai “A”, Machakos County or any portion thereof or the premises thereon or portions thereof pending, the hearing and determination of the suit herein.

d. That the Respondents by themselves and or their agents and employees be and are hereby restrained from erecting beacons, fences, buildings or any other structures, or amassing building materials of any kind, cultivating, digging or carrying on any other works whatsoever on the suit land namely, Plot No. 305 Katheka-kai “A”, Machakos County, or on any portion thereof pending, the hearing and determination of the suit herein.

e. That the Respondents by themselves and or their agents, employees or any persons claiming under them be and are hereby restrained from remaining in occupation of the suit land namely, Plot No. 305 Katheka-kai “A”, Machakos County, or on any portion thereof or in the premises thereon pending the hearing and determination of the suit herein.

f. That the costs hereof be provided for by the Respondents.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE