



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 425 OF 2017

ALEX KYALO MUTUAPLAINTIFF

VERSUS

PHOSTINE TABWE MUSADEFENDANT

RULING

1. In his Notice of Motion dated 27th February, 2018, the Plaintiff is seeking for injunctive orders in the following terms:

a. That pending the inter-partes hearing and determination of this suit, the Defendant, his servants, agents, family members and or in any manner howsoever be restrained from farming on, grazing on, building on, entering, trespassing, advertising, leasing, charging, selling, dealing with, conveying, sub-dividing, encroaching on and/or remaining on the Plaintiff's land Title Number Machakos Town Block 3/698 ("the land") and/or interfering with the Plaintiff's registered, legal, contractual, equitable interests and/or rights of quiet ownership, possession, occupational and enjoyment thereof.

b. That pending the inter-partes hearing and determination of this suit, the Defendant, his servants and/or agents including his family members be restrained from chasing and/or denying the Plaintiff/Applicant access to his land parcel no. Machakos Town Block 3/698 ("the land").

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he acquired a parcel of land known as Machakos Town Block 3/698 (*the suit land*) from Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited (*the Society*); that the suit land was initially known as Plot No. 2408 Machakos and that the Defendant trespassed on the suit land in December, 2015.

3. Several people filed Affidavits in response to the Application. The Respondent deponed that his name is Mutunga Imran Musa; that in 1999, his late mother purchased plot number 2752 "B" from one Phillip Kamwanga Kilonzo for Kshs. 33,000; that after paying the seller the first installment, his mother was allowed to take possession of the land and that at the time of the purchase, the seller had been in occupation of the said land for more than twenty (20) years.

4. The Defendant deponed that other than his mother putting up a house on the suit land, he has also built his own house and that his late mother paid Kshs. 500 to the Society to have the suit land transferred to her.

5. The Defendant finally deponed that he paid Kshs. 6,000 to the Society to have the suit land surveyed and thereafter had the land transferred in his favour; that he bought plot number 1166 from one Joseph Kilonzo Kioko for Kshs. 350,000 and that his brother bought an additional plot known as plot number 2751X.

6. The Defendant deponed that when he went to the Society to have the titles of the three plots issued, he realised that the suit land had consumed the three plots which was then transferred to the Plaintiff. It is the deposition of the Defendant that he in occupation of the three plots to date.

7. The daughter of the late Agnes Wayua Nguku Munyau deponed that her mother was a member of the Society and owned Plot No. 2751X; that she sold the said plot to the Defendant's brother, Peter Katumi Musa and that the suit land forms part of Plot No. 2751X.

8. Phillip Kamwanga Kilonzo deponed that he is one of the founder members of the Society; that he was allocated Plot No. 2407 measuring 2 acres which he sold to two people and that the two acres were sub-divided into plot numbers 2753 "A", 2575 "B", 1162 "C" and 2751X "D".

9. It was the evidence of Phillip that he sold plot number 2752 "B" to Esther Katumi Mutunga who took possession of the land; that on 14th January, 2000, he went to the Society and had the said land transferred to the buyer and that when the buyer died, the suit land was transferred to the Defendant.

10. Another member of the Society, Joseph Kilonzo Kioko, deponed that he was allocated plot number 1166 by the Society; that he bequeathed the said plot to his daughter which she re-transferred back to him and that he then sold the plot to the Defendant for Kshs. 350,000.

11. In the Further Affidavit, the Plaintiff deponed that the suit land was allocated to him; that the same has never been sub-divided as alleged; that Plot No. 1166 has never been in Sheet No. 3 where his land is located and that he has never sold or sub-divided the suit land. Both the Plaintiff and the Defendant's advocate filed submissions which I have considered.

12. In his Supporting Affidavit, the Plaintiff alleged that parcel of land known as Machakos Town Block 3/368 was initially known as Plot No. 2408 and that he acquired the said land from a member of the Society. The Plaintiff produced a receipt showing that he purchased Plot No. 2408 for Kshs. 160,000 and a letter dated 7th October, 2015 from the Society confirming that he is the owner of the plot. A Title Deed was then issued to him on 14th January, 2016.

13. On his part, the Defendant has annexed the membership cards of the people who sold to his mother, himself and his brother portions of what he claims is part of the suit land. The Defendant produced in evidence the sub-division plan of the suit land and the photographs showing the houses that he has built on the land.

14. One of the founder members of Katelembo Athiani Muputi Farming and Ranching Society Ltd, (*the Society*), Paul Kamwanga Kilonzo narrated how the suit land was sub-divided amongst the members of the Society, including himself. He produced a copy of his Membership Card No. 1808 together with a copy of the Share Certificate. The said Philip also produced in evidence a copy of the Transfer dated 28th January, 2013 that was duly signed by the three officials of the Society.

15. Another member of the Society, Joseph Kilonzo, also produced his Membership Card No. 3415 together with the Society's Share Certificate dated 8th May, 1975. He also exhibited the transfer form that transferred a portion of the land he claims to be part of the suit land to the Defendant.

16. Although the Plaintiff has claimed that the suit land was never sub-divided into four (4) portions and allocated to members of the Society, he did not inform this court the member of the Society who sold to him the suit land. Having not disclosed the member of the Society who sold the land to him, or the purported Sale Agreement, I find that the Plaintiff has not established a prima facie case with chances of success. On the other hand, the Defendant produced documents showing that the parcels of land that form part of the suit land belonged to members of the Society who either sold the said portions to him, their mother or brother.

17. In any event, it is the Defendant who is in possession of the suit land. Consequently, the Plaintiff will not suffer any injury that cannot be compensated in damages. For those reasons, I dismiss the Notice of Motion dated 27th February, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 28TH DAY OF FEBRUARY, 2019.

O.A. ANGOTE

JUDGE