



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 91 OF 2015

PAUL NGUI KATILU.....PLAINTIFF

VERSUS

JAMES MWANZIA KATILU.....DEFENDANT

JUDGMENT

1. The claim by the Plaintiff is for a declaration that a parcel of land known as Machakos/Kitanga/28 is family land, owned by the family of Simon Katilu, and which was registered in the name of the Defendant in trust for the family.
2. The Plaintiff has averred in the Complaint that upon the demise of their father, they requested the Defendant to sub-divide the suit land but he refused and that they have been in occupation of the land since they were born.
3. In his Statement of Defence, the Defendant averred that the suit is *res judicata*; that in the year 2006; the Plaintiff initiated proceedings against him in the Land Disputes Tribunal; that he filed an Appeal with the Eastern Province Land Disputes Appeal Tribunal and that no Appeal or Review was filed in respect of the decision of the Appeals Committee.
4. The Defendant finally averred that he is the *bona fide* registered owner of parcel number Machakos/Kitanga/28 (*the suit land*); that the suit land is not ancestral land or family land and that the suit land did not belong to the late Simon Katilu as alleged.
5. It is the averment of the Defendant that their ancestral home is in Utungwa in Mbooni; that Mua Hills was a Settlement Scheme; that the late Simon Katilu Munyao (*deceased*) was allocated 10 acres of land known as Machakos/Mua Hills/135 in the Scheme and that the suit land never belonged to the Estate of the deceased.
6. The Defendant finally averred that the suit land is located in what used to be Kitanga Settlement Scheme; that he was among the founder members of Kitanga Co-operative Society Limited which owned the land in the Settlement Scheme; that he was allocated the suit land in 1978, and that after being issued with an outright purchase certificate in 2000, a Title Deed was issued in his name.
7. Having acquired the land, the Defendant averred that he sold a portion thereof to the Plaintiff, who sold a portion of it to one Judah Mwangela Muasya and that after their father's death, the Plaintiff started claiming that his land forms part of the ancestral land.
8. PW1 informed the court that she was the sister-in-law to both the Plaintiff and the Defendant; that she is the wife of their elder brother and that in the year 1984, she moved on the suit land after her father-in-law, Simon Katilu, directed them to move on the land from Mbooni. It was the evidence of PW1 that the Plaintiff was already living on the suit land by the time she relocated to the suit land and that they have lived on the suit land since then.
9. It was the evidence of PW1 that the Defendant never claimed to own the suit land when her father-in-law was alive and that he only started claiming for the land after the demise of her father-in-law. According to PW1, the suit land is family property and that the Defendant is holding a Title Deed of the land in trust for the entire family.
10. PW2 stated that she is also the sister-in-law of the Plaintiff and the Defendant and that she was married to one David Ngila Katilu, who was the son of Simon Katilu. It was the evidence of PW2 that the suit land belonged to Simon Katilu and that the Defendant was registered as the owner of the same in trust for the family of the late Simon Katilu. PW2 informed the court that the Plaintiff has been living on a portion of the suit land since 1980 and that the land should be sub-divided into five (5) equal portions as per the wish of her father-in-law.
11. The Plaintiff, PW3, stated that the suit land is ancestral land which should be distributed amongst the sons of the late Simon Katilu; that the suit land belonged to their late father and that the suit land was registered in favour of the Defendant because their father allowed the Defendant to hold the same as a Trustee.

12. According to the Plaintiff, his father allowed the Defendant to be registered as the owner of the suit land because he could not have been allocated another land in his name in Kitanga Settlement Scheme having been allocated land in Mua Scheme; that he (*the Plaintiff*) settled on the land in 1980 while his late brother settled on the land in 1984 and that until 1995 when their father died, there were no disputes in respect to the suit land.

13. PW3 stated that the money that was used to pay for the land was contributed by himself and that the contribution by the Plaintiff was from the proceeds of the sale of their father's animals.

14. The evidence of the Plaintiff was that their father settled on a parcel of land known as Machakos/Mua Hills/135 which was divided amongst all his five (5) sons; that it is true that he purchased a portion of the suit land from the Defendant and that what he purchased did not form part of the 80 acres belonging to the family.

15. The evidence by Defendant, DW1, was that they were all born in Muputi location in Machakos; that in 1943, their father relocated to Utangwa Mbooni where his grandfather hailed from and that that is their ancestral home.

16. When the Government started allocating people land within Settlement Schemes, the Defendant informed the court that their father was allocated land in Mua Settlement Scheme which was later on registered as Machakos/Mua Hills/135 and that he settled on the suit land in 1960, and so did his three brothers.

17. DW1 informed the court that he was one of the founder members of Kitanga Co-operative Society in 1968 which owned land in Kitanga Settlement Scheme; that he was initially allocated 2 acres in the Scheme and that by the time the Society was dissolved, he had acquired 34.91 Ha of land within the Scheme.

18. It was the evidence of DW1 that his late father never settled on the suit land; that he applied for a loan in 1979 which he used to develop the land and that he sold a portion of his land to the Plaintiff. It was the evidence of DW1 that their late father was one of the people who witnessed the said sale in 1982 and 1984.

19. DW1 stated that in 1985, their father sub-divided the Mua Hills land amongst his five sons; that the Plaintiff sold a portion of the land he bought from him to one Judah Mwongela Muasya; that the dispute between himself and the Plaintiff over the suit land was heard by the clan and that the Machakos Land Disputes Tribunal and the Eastern Province Land Disputes Appeals Committee also had determined the dispute.

20. DW1 finally stated that the Plaintiff occupies the land he purchased from him; that he (*DW1*) allowed his other brother, Mbila Katilu, to settle within the suit land temporarily and that before he could move out, he died.

21. The Plaintiff's advocate submitted that there exists an overriding interest over the suit land by virtue of the Plaintiff being in occupation and possession of the same; that the Plaintiff and the family of Mbila Katilu had possessory and occupational interests in the suit land and that the Plaintiff has demonstrated the existence of trust in respect of the suit land. The Plaintiff's counsel submitted that this court should find that the suit property is ancestral property which ought to be divided equally amongst the sons of Simon Katilu.

22. The Defendant's advocate submitted that the suit is *res judicata*; that no Appeal has ever been made in respect of RMCC No. 144 of 2008 and that in any event, the Plaintiff bought a portion of the suit land from the Defendant. It was the submissions of counsel that the interest in the suit land was vested in favour of the Defendant upon registration and that the Plaintiff's claim should be dismissed.

23. Before going into the merits of the Plaintiff's claim, I will have to determine if the suit is *res judicata* or not. Section 7 of the Civil Procedure Act states as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

24. The Defendant informed the court that there had been previous suits involving the same parties over the subject matter. The Defendant produced in evidence the proceedings of the Eastern Province Land Disputes Appeals Committee at Embu in Appeal Case No. 19 of 2009. Although the Plaintiff produced in evidence the proceedings of the District Land Disputes Tribunal Case Number 68 of 2006, he did not disclose to the court the existence of the decision of the Appeals Committee.

25. The claim in the District Land Disputes Tribunal in Case number 68 of 2006 shows that the Plaintiff herein sued the Defendant herein in respect of “*Plot No. 28 in Kitanga.*” The Plaintiff's claim before the Tribunal was that the suit land belonged to their late father and that the Defendant was registered as proprietor of the same in trust for the entire family.

26. After hearing both sides, the Tribunal awarded half of the suit property to the Defendant herein and directed that the other half should be divided equally among the sons of the late Simon Katilu. The Defendant appealed against that decision to the Appeals Committee pursuant to the provisions of Section 8 of the Land Disputes Tribunals Act (*repealed*). In its decision, the Appeals Committee held as follows:

“The land is registered in Appellant's name. All the documentary is showing the Appellant's name. The Respondent has no documents to prove the land belongs to the family. The adjudication record proves that the Appellant was the first registered owner. The Respondent bought seven and a quarter (7¼) acres from the Appellant. Appeal accepted. The Appellant to be given seven and a quarter (7¼) acres to the Respondent which he sold to them.”

27. The above decision of the Appeals Committee was adopted as an order of the court in the Machakos Chief Magistrate's Court Civil Miscellaneous Application No. 144 of 2008.

28. The issues raised in the current suit are the same issues that were raised before the District Land Disputes Tribunal and the Appeals Committee. Indeed, it is the Plaintiff who moved the District Land Disputes Tribunal before the matter was escalated to the Appeals Committee. An order of the court is in existence declaring that save for the 7¼ acres land that the Plaintiff purchased from the Defendant, it is the Defendant who is entitled to the suit land. That order has never been varied, quashed or set aside.

29. The parties before the two Tribunals were the same. The issues raised before the said Tribunals are the same issues that the parties have raised herein and there is a decision in respect of those issues that has never been disturbed either by way of Appeal or Judicial Review. This suit is therefore *res judicata*.

30. As was held in the case of ***John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport & Infrastructure & 3 others (2015) eKLR***, the rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from repetitive litigation over the same matter. The court further held that *res judicata* ensures the economic use of the court's limited resources and timely termination of cases.

31. Having found that this suit is *res judicata*, I need not go into the merits of the case. Consequently, the Plaintiff's suit is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF FEBRUARY, 2019.

O.A. ANGOTE

JUDGE