



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 453 OF 2017

JOSEPH MUTHAMI MUTINDA.....PLAINTIFF/APPLICANT

VERSUS

JOHN KIMANZI MUTINDA.....1ST DEFENDANT/RESPONDENT

COUNTY GOVERNMENT OF KITUI....2ND DEFENDANT/RESPONDENT

RULING

1. In the Notice of Motion dated 14th November, 2017, the Plaintiff is seeking for the following reliefs:

a. That the Honourable Court be pleased to grant a temporary injunction restraining the Respondents whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the property being Kyangwithya/Misewani/1446 situate at Kitui County pending the hearing and determination of this suit.

b. That the Honourable Court be pleased to issue an order to survey both Kyangwithya/Misewani/1446 and Kyangwithya/Misewani/509 owned by the Applicant and 1st Respondent respectively to establish the acreage as per the records contained at the Kitui County Lands Registry.

c. That the OCS Kitui Central Police Station to enforce compliance of the orders above.

d. That a declaration that the acts of the Respondents are fraudulent, unlawful and the same constitute illegalities.

e. That the Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

f. That the costs of this Application be provided for.

2. According to the Applicant's deposition, he is the registered proprietor of land known as Kyangwithya/Misewani/1446 (*the suit property*); that the said land was bequeathed to him by his father, David Mutinda Kambi, and that the 1st Defendant, who is the registered proprietor of an adjacent parcel of land known as Kyangwithya/Misewani/1447 and 509 was also bequeathed the said land by their father.

3. It is the Plaintiff's deposition that the Defendants' parcel of land known as Kyangwithya/Misewani/509 borders the suit land; that the Respondent has consistently developed the habit of illegally encroaching on the suit land and that he has since altered the said boundaries by fencing.

4. The Plaintiff finally deponed that the Defendant intends to excise a portion of his land and use it as a road to access his parcel of land known as Kyangwithya/Misewani/1447 and that he has never initiated any sub-division and the mutation forms for the suit land and that the mutation forms that the Defendant is relying on are nullities.

5. In response, the 1st Defendant deponed that both the suit land and parcel number 1447 are a resultant of the sub-division of parcel of land number Kyangwithya/Misewani/1388 which belonged to their father; that during the said sub-division, an access road was created between the two parcels of land but was never opened on the ground and that the said road should be opened up.

6. In his Further Affidavit, the Plaintiff deponed that an access road does not exist on his parcel of land number 1446; that there exists a 40 metre road which was demarcated by the Government and that the 1st Respondent is at liberty to demarcate the access road on his own parcel of land number 509 through parcel number 1447.

7. Both the Plaintiff's and the Defendants' advocates filed brief submissions. The Plaintiff's advocate submitted that the 1st Defendant being the owner of parcels 509 and 1447 can easily do his own access road and that the Plaintiff has shown that he has a prima facie case with chances of success.

8. The 1st Defendant's advocate submitted that parcels of land number 1446, 1445 and 1447 are a sub-division of parcel of land number Kyangwithya/Misewani/1388; that the access road between those parcels of land was created during the said sub-division and is clearly demarcated on the map and that the Plaintiff has not established a prima facie case with chances of success.

9. It is not in dispute that the Plaintiff is the registered proprietor of parcel of land known as Kyangwithya/Misewani/1446 while the Defendant is the owner of the neighbouring land known as parcel number 1447. The two parcels of land, including parcels numbers 1442, 1443, 1444 and 1445 are as a result of the sub-division of parcel number 1388.

10. The Defendant has produced in evidence the Mutation form that was signed by the owner of parcel number 1388. The Mutation form shows the existence of a road of access which runs from the 40 metre Road all the way to parcel number 1447. The said access road cuts through parcels number 1446 and 509.

11. The Plaintiff did not produce any report by a Surveyor or the Land Registrar showing that the Mutation form that created the road of access to parcel number 1447 is erroneous or does not exist. Indeed, to the extent that the Plaintiff has not produced the copy of the Mutation form that created parcels number 1442-1447, I find that he has not established a prima facie case with chances of success.

12. Indeed, the Plaintiff should comply with the directions of the County Surveyor's letter of 5th October, 2017 and avail himself with a view of having the boundaries between his land and the Defendant's land fixed, and allow the opening of roads of access that exist on the maps which were drawn during the sub-division of parcel number 1388.

13. For those reasons, I find that the Plaintiff's Application dated 14th November, 2017 is not meritorious. The Application is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE