



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 2 OF 2018

DANIEL MUEMA MAITHYA

(Suing as the personal representative

of the Estate of MAITHYA MASITHE (Deceased).....PLAINTIFF

VERSUS

MICHAEL MALOMBE.....1ST DEFENDANT

MWENDWA KAKAI.....2ND DEFENDANT

JUDGMENT

1. In the Plaint dated 5th January, 2018, the Plaintiff has averred that the deceased, Maithya Masithe, is the registered owner of land known as Kyangwithya/Kaveta/161 measuring 33 acres; that the deceased is not related to the Defendants and that on 24th July, 2017, he received a letter from the Chief ordering him, together with his brother, to desist from grazing or making bricks on plot number KY/K/1018 which is a portion of parcel of land known as Kyangwithya/Kaveta/161 (*the suit land*).

2. The Plaintiff is seeking for a declaration that the suit land belongs to the deceased's Estate and for a permanent injunction restraining the Defendants from evicting him from the suit land which includes parcels of land known as Kyangwithya/Kaveta/161, Kyangwithya/Kaveta/169 and Kyangwithya/Kaveta/1018.

3. In their Statement of Defence, the Defendants averred that they are the beneficial owners of parcel of land known as Kyangwithya/Kaveta/1018 and 169 which are registered in the name of the 1st Defendant's uncle; that parcel numbers 169 and 1018 have no connection whatsoever with the Plaintiff's parcel number 161 save that the two parcels of land share a boundary and that while conducting a routine physical check on parcel number 1018, they discovered that the Plaintiff had built a structure on the land.

The Plaintiff's case:

4. The Plaintiff, PW1, informed the court that his late father, Maithya Masithe, died on 20th August, 1987; that he inherited parcel of land known as Kyangwithya/Kaveta/161 from his late father who had in turn inherited the land from his grandfather and that parcel of land numbers 169 and 1018 were carved out of parcel number 161.

5. It was the evidence of PW1 that he has built a house on parcel of land number 1018; that he has been cultivating parcel number 169 for many years and that he has done a borehole on parcel number 169. According to PW1, he had utilized the two parcels of land for more than thirty (30) years before he received a letter from the Chief threatening him with eviction.

6. PW1 stated that he was not aware of the Title Deeds that were issued to Ruth Mwikali for parcel number 169 and to Malombe Mutua (*deceased*) for parcel number 1018. It was the evidence of PW1 that the Defendants do not have the Letters of Administration in respect of the Estate of the registered proprietors of the two parcels of land and that he is the one occupying the two parcels of land. PW1 further stated that the other sub-division of parcel of land number 161 is parcel number 162 and that parcel number 162 is registered in favour of his father.

7. It was the evidence of PW1 that during adjudication, there was a dispute between his father and a Mr. Kakai in respect of the suit land; that the said dispute was settled in the 70's and that Ruth Kakai is the wife of Ngolonya Kakai. PW1 stated that the Title Deed for parcel of land number 169 was issued in the name of Ruth Kakai in 1992 while the Title Deed for parcel number 1018 was issued to Malombe Mutua in 1984. According to PW1, his father died in 1987 before challenging the two titles and that he has been using the two parcels of land for over thirty (30) years.

8. The 1st Defendant, DW1, stated that he is the nephew of Malombe Mutua; that the late Malombe Mutua is the registered owner of parcel number 1018 and that the said Malombe Mutua is the brother to his late father.

9. DW1 informed the court that parcel of land number 1018 was registered in the name of Malombe Mutua on behalf of their family during the adjudication process. According to DW1, when they took the Surveyor on the ground for the establishment of boundaries, the Plaintiff resisted and that the Plaintiff put up a house on one of the suit land in the year 2017.

10. The 2nd Defendant, DW2, informed the court that parcel of land number 169 is registered in the name of his late mother. According to DW2, in 1970, the Plaintiff's father used a relative who sued his father in respect to the suit land and that the dispute was resolved in favour of his (DW2) late father.

11. DW3 informed the court that the 1st Defendant is his first cousin; that his late father is his uncle and that the suit land belonged to his late grandfather. According to DW3, the Plaintiff grabbed the 1st Defendant's land and put up a borehole on it after the death of his father.

Submissions:

12. The Plaintiff's advocate submitted that the Plaintiff's evidence that he has been in possession of the suit properties was not controverted by the evidence of both Defendants; that the Plaintiff has proved his claim by being in actual physical possession of the two suit properties and that the Defendants failed to explain how the alleged relatives came to be registered as the owners of ancestral land that is not located within their ancestral area or clan.

13. The Plaintiff's counsel submitted that the Defendants confirmed that they have not obtained the Letters of Administration in respect to the Estate of the registered owners of the parcels of land known as Kyangwithya/Kaveta/169 and 1018; that the Defendants failed to prove that they have any beneficial interests in the suit properties and that both the Defendants have no legal capacity to defend the suit.

14. On the other hand, the Defendants' advocate submitted that the Plaintiff has not adduced evidence to prove that parcels of land known as Kyangwithya/Kaveta/1018 and 169 belong to his late father; that the 2nd Defendant has adduced evidence showing that parcel number 169 is registered in the name of his late mother and that the 1st Defendant has produced evidence showing that parcel number 1018 is registered in the name of his late uncle.

15. Counsel submitted that the Plaintiff has not challenged the validity of the Title Deeds held by the Defendants and that the Plaintiff is nothing but a bully who is seeking to oust innocent beneficiaries of their ancestral land while he has 33 acres to himself.

Analysis and findings:

16. This suit was commenced by way of a Plaint dated 5th January, 2018. In the Plaint, the Plaintiff sought for the following prayers:

a. A declaration that land reference numbers Kyangwithya/Kaveta/161, Kyangwithya/Kaveta/169 and Kyangwithya/Kaveta/1018 situated at Kyangwithya Location, Kitui County belong to the deceased's Estate as ancestral land.

b. A permanent injunction to issue to restrain the Defendants and or their agents and or servants and or employees and or representatives from entering and or trespassing into and or harassing and or intimating and or evicting or in any manner whatsoever interfering with the Plaintiff's right to ownership, possession and use of land reference numbers Kyangwithya/Kaveta/161, Kyangwithya/Kaveta/169 and Kyangwithya/Kaveta/1018 situated at Kyangwithya Location, Kitui County.

c. Costs and interest in this suit at court rates.

17. The Plaintiff informed the court that he filed the suit as the legal representative of the Estate of Maithya Masithe (*deceased*). According to the Plaintiff, the deceased is the registered proprietor of land known as Kyangwithya/Kaveta/161 and that while his late father and himself hail from Kyangwithya Location, the 1st Defendant's family hails from Tungutu Location situated 30 km from the suit land while the 2nd Defendant hails from Tungutu Location which is 5 km away.

18. According to the Plaintiff, the Defendants are claiming parcels of land numbers 169 and 1018 which were hived from parcel number 161 and that he has been cultivating the three (3) parcels of land for more than thirty (30) years. It was the Plaintiff's evidence that, it was not until 24th July, 2017 when he received the letter from the Chief that he realized that the Defendants were claiming parcels number 1018 and 169. The Plaintiff produced in evidence the official search for parcel of land number Kyangwithya/Kaveta/161 and the Certificate of Death of the late Maithya Masithe and photographs of a house and a borehole.

19. The Defendants on the other hand produced the official searches of parcels of land known Kyangwithya/Kaveta/1018 and 169. According to the Defendants, the two parcels of land were registered in favour of their uncle and mother respectively, and not the Plaintiff. In addition, the Defendants produced in evidence the Registered Index Map of Kaveta Registration Section. The said map shows the location of parcels numbers 161, 169 and 1018.

20. Although the Plaintiff's case is that parcels numbers 169 and 1018 forms part of his father's Estate, there is no evidence before the court to show that the two parcels of land were either hived from parcel number 161 or were allocated to the Plaintiff's father during the adjudication process. Indeed, the Plaintiff did not adduce any independent evidence to show how his father or himself is entitled to land

which was registered in the names of the Defendants' uncle and mother respectively.

21. The reading of the Plaintiff shows that the Plaintiff is not challenging the validity of the titles that were issued to the Defendants' uncle and mother. Section 26(1) of the Land Registration Act provides as follows:

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

22. Having not adduced evidence to show that the Title Deeds for parcels number 169 and 1018 were procured by the Defendants' uncle and mother fraudulently, or by misrepresentative or through a corrupt scheme, the Plaintiff's claim that the two suit properties belong to his father's Estate cannot stand. Indeed, if the suit land belonged to his father, then the issue should have been dealt with by the Land Committee, the Land Arbitration Board, the Land Adjudication Officer and ultimately by the Minister during the adjudication process. That is what the Land Adjudication Act requires.

23. Considering that the two parcels of land were registered on 17th July, 1984, the Plaintiff cannot wait for thirty five (35) years to start asking if indeed the Defendants are from his clan or if their ancestral home is where the suit land is situated. Those are issues that should have been raised, not by him, but by his late father before he died in 1987.

24. Although the Plaintiff has alleged that the Defendants cannot defend the suit because they are not the registered proprietors of the suit land, he is the one who sued the Defendants. Indeed, that argument should be used against the Plaintiff and not the Defendants. Having sued people who are not the registered proprietors of the suit land, the Plaintiff's cause of action is a nullity in so far as the proprietorship of the two parcels of land is concerned.

25. The Plaintiff's claim is not for adverse possession. So the issue of him having been in possession of the suit land for thirty (30) years does not arise. In any event, there is no evidence that the Plaintiff has been in possession of the suit land for that long. Indeed, the photographs produced by the Plaintiff shows a small house which is fairly new in all respects. The said house must have been put up by the Plaintiff hurriedly with a view of defeating the claim of the registered proprietors of the two suit properties.

26. For those reasons, I find and hold that the Plaintiff has not proved his case on a balance of probabilities. The Plaintiff's Plaintiff is therefore dismissed with costs to the Defendants.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE