



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 69 OF 2017

LABAN MASAI.....1ST PLAINTIFF/RESPONDENT

KING'OO MUTETEMA ITUMO.....2ND PLAINTIFF/RESPONDENT

VERSUS

JOSEPH MAKUSA MUTHOKA.....DEFENDANT/APPLICANT

AND

JOHN MUIA KIMENE.....1ST INTERESTED PARTY

SIMEON KIMONDIU NALYUKA.....2ND INTERESTED PARTY

RULING

1. In the Notice of Motion dated 8th May, 2018, the Defendant has sought for the following orders:

- a. That the firm of Janet, Jackson & Susan LLP Advocates be allowed to come on record for the Defendant by consent in the place Mutisya Ngala & Co. Advocates.*
- b. That a restraint injunctive order do issue stopping the Respondents by themselves, agents, or servants, employees or any other assigns or representatives from dealing in any manner with land parcel No. Machakos/Ulu/450 and Machakos/Ulu/451 pending hearing and determination of this Application and the main suit.*
- c. That the order dismissing the suit issued on 1st November, 2006 be varied and or set aside for sufficient reason to be shown.*
- d. That upon the grant of prayer No. 3 an order do issue to the Registrar of Lands to cancel the entries entered over land parcel No. Machakos/Ulu/450 and Machakos/Ulu/451 pursuant to the orders issued on 25th July, 1995 which were set aside on 17th December, 1998.*
- e. That in the alternative the Applicant be allowed to amend the Defence dated 21st December, 1998 to include a Counter-claim and parties be allowed to be heard on merit.*
- f. That costs of this Application be provided for.*

2. The Application is supported by the Affidavit of the Defendant who has deponed that he is the administrator of the Estate of the late Muthoka Itumo; that the family of the late Itumo have been in open possession and use of parcels of land known as Machakos/Ulu/450 and 451 (the suit properties) and that the late Itumo is the registered owner of the suit land.

3. According to the Defendant, the suit properties were registered in favour of the deceased pursuant to an irregularly obtained court order of 25th July, 1995 which was set aside on 17th December, 1998; that at the time of applying to set aside the said orders, his father was not aware that the Plaintiffs had already procured the transfer of the titles in their names and that this suit was dismissed on 1st November, 2006 for want of prosecution.

4. According to the Defendant, the deceased misled the court by saying that they were in occupation of the suit land whereas they were

evicted from the land in the 1970's and that the confirmation of the grant for the Estate of Kamene Nzalai and Mutetema Itumo in Kilungu SRMCC Nos. 27 and 28 of 2016 concealed the fact that the two parcels of land belonged to the late Muthoka Itumo.

5. According to the Defendant, it is in the interest of justice that that Land Registrar be ordered to rectify the Title Deeds over the suit land and that the Plaintiffs will not suffer any prejudice if the Application is allowed.

6. In reply, the 1st Plaintiff deponed that the Application lacks merit and is otherwise an abuse of the court process; that the Applicant does not have the legal capacity to bring the Application and that the Application has been overtaken by events.

7. The 1st Plaintiff deponed that there exists no suit and that the Land Registrar cannot cancel certificates of title in respect of a non-existent suit. Neither the Plaintiffs' nor the Defendant's advocates filed submissions.

8. This suit was commenced in Nairobi High Court Civil Case No. 1727 of 1990 by Mutetema Itumo and Kamene Nzalai as Plaintiffs against Muthoka Itumo as the Defendant. Both parties have since died. The Defendant/Applicant was appointed as the legal administrator of the Estate of the initial Defendant, Muthoka Itumo, on 19th October, 2015.

9. The Defendant/Applicant has annexed on his Affidavit an order of this court dated 1st November, 2006. According to the said order, the court upon hearing the Application dated 11th May, 2005 by the Defendant, dismissed the Plaintiffs' suit with costs. The Application for dismissal of the suit was filed and argued by the Defendant/Applicant

10. I have perused the record and I have not seen an order reinstating the suit. Indeed, one of the orders that the Defendant/Applicant is seeking is to have the order of 1st November, 2006 dismissing the suit set aside.

11. It would appear that when the Defendant sought by way of an Application dated 9th May, 2005 to have the suit dismissed of want of prosecution, he was not aware that the Plaintiffs had actually executed the orders of 25th July, 1995 which were set aside on 17th December, 1998. It is on that basis that the Defendant wants this old matter to be revived, and various orders issued, including an order of injunction and rectification of title to issue.

12. This suit having been dismissed in the year 2006 at the instance of the Defendant, the Defendant cannot, after a lapse of more than thirteen (13) years, seek to revive the suit just because he was not aware that the Plaintiffs had already procured the transfer of the suit properties in their names using an irregularly obtained order. That is not a plausible reason to reinstate a dismissed suit.

13. In any event, there is no law allowing a Defendant to revive a suit that has been dismissed for want of prosecution. If the Defendant had the suit dismissed by the court for want of prosecution before ascertaining the consequences of such a dismissal, he should suffer the consequences of the dismissal.

14. Considering that no good reason has been given as to why a suit that was dismissed in the year 2006 should be revised, and in view of the well cherished doctrine that litigation should come to an end, I decline to set aside the order of 1st November, 2006 dismissing the suit for want of prosecution.

15. Having declined to set aside the orders dismissing the suit, the rest of the prayers by the Defendant fall along the wayside. I say so because orders can only be granted by the court in respect of an existing suit and not otherwise.

16. For those reasons, I dismiss the Application dated 8th May, 2018 with no order as to costs. For avoidance of doubt, this suit stands dismissed and should be marked as such in the register.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE