



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CONST. PETITION NO. 10 OF 2017**

**HERMAN MWANIKI KAMAU.....1<sup>ST</sup> PETITIONER**

**SALOME WAMBUI MUIRURI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**KATELEMBO ATHIANI MUPUTI FARMING & RANCHING**

**CO-OPERATIVE SOCIETY LTD.....1<sup>ST</sup> RESPONDENT**

**MATHEW MULI MWANTHI.....2<sup>ND</sup> RESPONDENT**

**CO-OPERATIVE TRIBUNAL.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. In the Petition dated 29<sup>th</sup> June, 2017 and filed on 30<sup>th</sup> June, 2017, the Petitioners have averred that they are the registered owners of land known as Athi River/Athi River Block 1/98 measuring 0.8256 Ha (*the suit property*); that they purchased the suit land from one Francis Mutuku Muia and that the said Francis Mutuku Muia was a member of the 1<sup>st</sup> Respondent.

2. According to the Petitioners, they obtained a letter of consent dated 5<sup>th</sup> August, 2010 from the 1<sup>st</sup> Respondent to sub-divide the suit land into parcels of land numbers Athi River/Athi River Block 1/4942-4957; that the 2<sup>nd</sup> Respondent sued the Petitioners in Machakos ELC. Case No. 390 of 2016 for a declaration that the sub-division and transfer of the suit land in their names was unlawful and fraudulent and that the 2<sup>nd</sup> Respondent filed another suit in the Co-operative Tribunal being Tribunal Case Number 533 of 2012 against the 1<sup>st</sup> Respondent in respect to the same suit property.

3. The Petitioners averred that they were not parties to the Tribunal case in which the 2<sup>nd</sup> Respondent purportedly admitted the 1<sup>st</sup> Respondent's claim and that the 2<sup>nd</sup> Respondent is trying to enforce a consent Judgment which was obtained fraudulently.

4. The Petitioners are praying for a declaration that the suit land belongs to them; that the admission by the 2<sup>nd</sup> Respondent herein is unconstitutional and a declaration that the rights of the Petitioners to a fair hearing were violated. The Petitioners are further praying for an order of Judicial Review in the form of certiorari to remove into this court for purposes of quashing the whole claim, proceedings and consent orders in Co-operative Tribunal Case Number 533 of 2012.

5. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed Grounds of Opposition in which they averred that the Petition does not disclose any cause of action as against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents; that the Petition is sub-judice Machakos ELC. No. 390 of 2016 and that the Petition is an abuse of the court process. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not oppose the Petition.

6. In his submissions, the Petitioners' advocate submitted that the proceedings before the Tribunal were conducted contrary to the Constitution and in violation of the principle of Natural justice; that under Article 50 of the Constitution, every person has the right to have any dispute that can be resolved by the Application of law decided in a fair and public hearing before a court of law and that the Petitioners were not afforded a fair hearing in the case that was filed in the Tribunal.

7. The Petitioners' counsel further submitted that the Ruling of the Co-operative Tribunal case, which the Tribunal declined to set aside, purports to take away the Petitioners' land contrary to the provisions of Article 40 (1) of the Constitution and that the Petition should be allowed. The Respondents did not file submissions.

8. The Petitioners' case is that vide an Agreement of Sale dated 19<sup>th</sup> July, 2010, they entered into a Sale Agreement with Francis Mutua, a member of the 1<sup>st</sup> Respondent, to purchase from him land known as Athi River/Athi River Block 1/98 measuring 0.825 Ha (*the suit land*).

9. According to the Petitioners, after purchasing the suit land, the same was transferred to them on 17<sup>th</sup> September, 2010 whereafter they subdivided the land into several portions. However, in December, 2016, they were sued by the 2<sup>nd</sup> Respondent herein in Machakos ELC. No. 390 of 2016.

10. The Petitioners have deponed that upon perusal of the pleadings and annexures in Machakos ELC. No. 390 of 2016, they discovered that the 2<sup>nd</sup> Respondent had sued the 1<sup>st</sup> Respondent in Tribunal Case No. 533 of 2012 in respect of the same land; that the Tribunal case proceeded for hearing in their absence and that a consent Judgment was entered into.

11. The Petitioners have annexed on their Affidavit the Application dated 26<sup>th</sup> September, 2016 filed in CTC No. 533 of 2012 in which they sought to set aside the consent Judgment that was entered into on 4<sup>th</sup> March, 2014. In that Application, the Petitioners averred that they are the registered owners of the suit land and that the consent Judgment had been entered into without involving them.

12. Having heard the Application, the Tribunal dismissed the Petitioners' Application on two grounds: firstly, that the Petitioners not being members of a Tribunal divests it of jurisdiction to order for their joinder in the suit and secondly, that there being another suit in the High Court involving the same parties over the same suit property, then they should pursue their remedies in that court.

13. The Petitioners have not filed an Appeal challenging the decision of the Tribunal in CTC No. 533 of 2012. Indeed, the Petitioners have conceded that Machakos ELC. No. 390 of 2016 involving the same parties and in respect of the same suit property is pending in this court.

14. I have perused the pleadings in ELC. No. 390 of 2016. In that suit, the 2<sup>nd</sup> Respondent herein is challenging the registration of the suit land in the name of the Petitioner. The Petitioners herein have filed their joint Defence in which they have averred that they are the registered proprietors of the suit land. Indeed, the issues that the Petitioners have raised in their joint Statement of Defence are the same issues that they have raised in the current Petition.

15. Considering that the issue of ownership of the suit land as between the Petitioners and the 2<sup>nd</sup> Respondent will be determined in Machakos ELC. No. 390 of 2016, I do not see why the Petitioners opted to file the current Petition. Indeed, having not been parties to the consent order in CTC No. 533 of 2012, the said consent order is neither binding on the Petitioners or this court.

16. I have read the consent order that was made in CTC No. 533 of 2012. The said order did not determine the issue of ownership of land as between the Petitioners and the 2<sup>nd</sup> Respondent. That being the case, the issue of quashing the consent order just because the Petitioners were never heard does not arise. The issue of ownership of the suit land as between the Petitioners and the 2<sup>nd</sup> Respondent will be decided conclusively in Machakos ELC. No. 390 of 2016.

17. The analysis of the pleadings and the evidence before me shows that the Petition herein is sub-judice ELC. No. 390 of 2016. The issue of the 1<sup>st</sup> Respondent conceding that the suit land should be registered in favour of the 2<sup>nd</sup> Respondent, will be tested when ELC. No. 390 of 2016 is heard and determined.

18. For those reasons, the Petition dated 29<sup>th</sup> June, 2017 is struck out but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4<sup>TH</sup> DAY OF OCTOBER, 2019.**

**O.A. ANGOTE**

**JUDGE**