



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 221 OF 2014

JONES MULULU MUEKE.....PLAINTIFF

VERSUS

SIMON MWANIKI KAUNGA.....1ST DEFENDANT

ANTONY KIOKO MWANIKI.....2ND DEFENDANT

RULING

1. In the Notice of Motion dated 22nd November, 2018, the Plaintiff is seeking for the following orders:

a. That OCPD Machakos Police Station does effect the order herein issued on 20th July, 2018 and served upon the Land Registrar Machakos, Ethics and Anti-Corruption Commission Machakos on 13th September, 2018 and stop the Defendants namely Simon Mwaniki Kaunga and Anthony Kioko Mwaniki including Mr. Muema Ndivo (Land Surveyor), Mr. G.M Njoroge (Land Registrar), Mr. Julius Kyalo Munyao, Mr. Elijah Maina Kimani, Mr. Nicholas Muema Kyembwa, Mr. E. W. Gakuya (Land Registrar) and Mr. Maina (Country Surveyor) from threatening the Plaintiff, trespassing into, alienating or disposing off, damaging, or destroying the developments in plot Machakos/Mua Hills/143 (now sub-divided into Machakos/Mua Hills/601 & 602 in Mua Hills Settlement Scheme) pending the inter parties hearing hereof.

b. That Defendants namely Simon Mwaniki Kaunga and Anthony Kioko Mwaniki including Mr. Muema Ndivo (Land Surveyor), Mr. G. M. Njoroge (Land Registrar), Mr. Julius Kyalo Munyao, Mr. Elija Maina Kimani, Mr. Nicholas Muema Kyembwa, Mr. E. W. Gakuya (Land Registrar and Mr. Maina (County Surveyor), be cited for disobeying the court order issued by Hon. A. Angote, Deputy Registrar issued on 20th July, 2018.

c. That the Defendants namely Simon Mwaniki Kaunga and Anthony Kioko Mwaniki including Mr. Muema Ndivo (Land Surveyor), Mr. G. M. Njoroge (Land Registrar), Mr. Julius Kyalo Munyao, Mr. Elijah Maina Kimani, Mr. Nicholas Muema Kyembwa, Mr. E. W. Gakuya (Land Registrar) and Mr. Maina (County Surveyor), properties be attached jointly and severally be further fined/or committed to jail for at least 6 months for disobeying the court order issued by Hon. A. Angote, Deputy Registrar issued on 20th July, 2018.

d. That costs hereof be to the Plaintiff.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that the cited contemnors have declined to comply with the orders of the court of 22nd September, 2017; that the cited contemnors have sub-divided plot number 601 into numerous sub-plots which include plot numbers 1484, 1485, 1486 and 1487 and that these sub plots have further been sub-divided into plot numbers 1500- 1506.

3. According to the Plaintiff, this court has the powers to punish the cited contemnors for disobeying a court order and that the continued trespass on the suit land is contemptuous.

4. In response, one of the cited contemnors, Elija Maina Kimani, deponed that he is a stranger to these proceedings; that he is a purchaser for value of four acres of land known as Machakos/Mua Hills/143 which he purchased in the year 2001 from Julius Kyalo and that he has been in possession of the portion of land that he bought.

5. According to the said Elija Maina, he obtained his title document for a parcel of land known as Machakos/Mua Hills/1485 in September, 2018 and that he is not in contempt of the order of the court.

6. The other cited contemnor, Julius Kyalo Munyao, deponed that he is not a party to the proceedings; that he purchased a portion of parcel number 143 in 1999 and that he has been in possession of the land since then.
7. On his part, Nicholas Muema Kyembwa deponed that he purchased a portion of parcel number 143 which was later on known as parcel number 601 in the year 2013; that he sued the Defendants herein in Machakos ELC. No. 188 of 2016 and that the court ordered the Defendants herein to sub-divide and transfer the portion he had bought to him.
8. The 2nd Defendant deponed that on 6th March, 2014, the 1st Defendant applied for the sub-division of land known as Machakos/Mua Hills/601; that the Board approved the sub-division of parcel number Machakos/Mua Hills/601 on 18th March, 2014 and that on 9th February, 2017, this court in Machakos ELC No. 188 of 2016 ordered that the suit land be sub-divided and 4 acres be excised thereof.
9. According to the 2nd Defendant, he acted in accordance with the orders that were given in Machakos ELC. No. 188 of 2016; that his advocate was served with the orders of this court on 20th July, 2018 and that by the time the orders were being issued he had already sub-divided the suit land.
10. Both the Plaintiffs' and the Defendants' advocates filed submissions which I have considered.
11. This suit was commenced by way of a Plaint dated 31st July, 2014. In the Plaint, the Plaintiff alleged that he is a beneficial owner of parcel number Machakos/Mua Hills/143 which was sub-divided into parcels numbers 601 and 602; that he purchased from the 1st Defendant the suit property between 1996 to 1998 and that although the two portions of land were registered in favour of the Defendants, they have refused to transfer the same to him.
12. From the prayers in the Plaint, the Plaintiff is seeking for a declaration that he is the owner of 9.5 acres constituted in Machakos/Mua Hills/601.
13. The record shows that on 22nd September, 2017, the court allowed the Plaintiff's Application dated 31st July, 2014 on follows:
- a. That temporary injunction does issue against the Defendants, their agents, servants and/or employees in particular from threatening the Plaintiff, trespassing into, alienating or disposing off, damaging, or destroying the developments in Plot Machakos/Mua Hills/143 (now sub-divided into Machakos/Mua Hills/601 and 602 in Mua Hills Settlement Scheme) and/or howsoever interfering with the Plaintiff's and his agents, servants and/or employees pending the hearing and the determination of this suit.**
 - b. That the O.C.P.D Machakos Police Division does assist in affecting service of the orders, the pleadings and summons to enter appearance.**
 - c. That costs hereof be to the Applicant.**
14. When the Ruling was delivered, neither the Plaintiff nor the Defendants were in court. Indeed, the advocates for both parties were not in court on the said date.
15. According to the Plaintiff's Affidavit, he served on the Defendants' advocate with the order of injunction on 20th July, 2018, while the Land Registrar and the EACC were served with the order on 24th September, 2018.
16. The Plaintiff has deponed that despite the order of injunction, the Defendants, and other parties who are not before the court, have disobeyed the order of the court by sub-dividing parcel number 601 into several sub-plots. The Plaintiff has produced the searches for parcels number 1487, 1486, 1485, 1484 and 601.
17. Some of the cited contemnors have deponed that they were never made aware of this suit or the orders of the court. Indeed, other than the two Defendants herein, the Plaintiff has not exhibited evidence to show that the order of 22nd September, 2019 was brought to their notice. That being the case, this court cannot even interrogate if indeed the said cited contemnors were in contempt of the order of the court or not.
18. The 2nd Defendant has admitted that his advocate was served with the order of 22nd September, 2017 on 20th July, 2018 and that by that time, he had already sub-divided parcel number 601 pursuant to an order of the court in Machakos ELC. No. 188 of 2016.
19. Although the actual mutation forms sub-dividing parcel number 601 have not been produced by the 2nd Defendant, the 2nd Defendant has exhibited a consent order of 9th February, 2017 in Machakos ELC. No. 188 of 2016. In the said consent order, the 2nd Defendant agreed with two of the purported buyers of the suit land, who were the Plaintiffs, as follows:

“3. That the County Land Registrar is hereby ordered to remove all cautions, restrictions and caveets registered over Land Title Number Machakos/Mua Hills/601.

4. That the Defendant do transfer four (4) acres to be excised from Land Title Number Machakos/Mua Hills/60 to the Plaintiff within thirty (30) days and in default the County Surveyor do expeditiously sub-divide and demarcate the land and transfer four (4) acres therefrom and issue a Title Deed to the Plaintiffs at the Plaintiffs' costs.

5. That there be no order to costs.

6.. That the suit is marked as settled.”

20. It would appear that while entering into the above consent between the 2nd Defendant and the Plaintiffs (*who are not parties herein*) in ELC No. 188 of 2016, the 2nd Defendant herein never raised the issue of this suit. Indeed, to the extent that the consent in ELC. No. 188 of 2016 was dealing with the same land that is in issue in this matter, the same was meant to steal a match from the Plaintiff herein.

21. Be that as it may, the 2nd Defendant herein went contrary to the orders of this court issued on 22nd September, 2019 and transferred the suit land to the cited contemnors. In fact, all the Title Deeds in respect of parcels of land number 1487, 1486, 1485, 1484 were issued a few months before the order of injunction was issued by the court.

22. I have perused the official search for Machakos/Mua Hills/601, which is the suit land herein. According to the said search, the title for parcel number 601 was closed on 26th July, 2018 “*as per order in Civil Case No. 188 of 2016.*”

23. As I have stated above, the consent order of 9th February, 2017 in Machakos ELC. No. 188 of 2016 has changed the status of the suit land. Indeed, the material non-disclosure by the 2nd Defendant of the existence of this suit while recording the consent of the 9th February, 2017 was meant to steal a match on the Plaintiff herein.

24. However, having sub-divided parcel number 601 a few days before the order of this court of 22nd September, 2017, I find that the Defendants are not in contempt of the orders of 22nd September, 2017. Considering that the suit land has been sub-divided and transferred to third parties, *pendente lite*, the Plaintiff will have to make up his mind on how to proceed with the suit.

25. For those reasons, I dismiss the Application dated 22nd November, 2018 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE