



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 40 OF 2018

MICHAEL MUNYAO (Suing as the legal representative

of the Estate of PATRICK JOHN MATHEKA).....PLAINTIFF

VERSUS

JEREMIAH MUTHOKA KITELE.....1ST DEFENDANT

JOAN KALEWA NYETTE.....2ND DEFENDANT

JAMES KITAKA MUTUA.....3RD DEFENDANT

RULING

1. In the Notice of Motion dated 26th February, 2013, the Plaintiff is seeking for the following orders of injunction:

a. That pending the hearing and determination of the present suit this Honourable Court be pleased to issue a temporary injunction against the Defendants and/or their agents/servants/employees restraining them from taking possession, selling, constructing, trespassing or in any other way dealing with known as parcel of land now known as Land Reference Number 12715/153 originally known as Plot No. 41 on L.R. No. 7147/11/R.

b. That the costs of this Application be in the cause.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the legal representative of Patrick John Matheka and that on 17th January, 1985, the late Patrick John Matheka (*the deceased*) bought 2½ acres of parcel of land known as Land Reference number 12715/153 (*the suit land*) from the 1st Defendant's father.

3. According to the Plaintiff, during his lifetime, the 1st Defendant's father had informed his family that he had sold the suit property to Patrick John Matheka and that the transfer of the suit property by the 1st and 3rd Defendants to the 2nd Defendant was unlawful and fraudulent.

4. In response, the 2nd Defendant deponed that he has never trespassed on the suit land; that he is a stranger to the allegations made in the Plaintiff and the Plaintiff's Affidavit and that he neither resides nor intends to reside on the suit land.

5. The 2nd Defendant deponed that he innocently purchased the suit property from the 1st and the 3rd Defendants which he has since subdivided and sold to various people; that when he conducted the searches, he ascertained that the suit land was registered in favour of the 1st and 3rd Defendants and that the people who bought the suit land from him are in occupation of the land.

6. The 3rd Defendant deponed that he does not know the Plaintiff or the late Patrick John Matheka; that he was a joint registered owner of L.R. No. 12715/153 together with the 1st Defendant's father, Kitele Kitingu, in equal shares since the year 1981 and that they were in possession of the said land until they sold the suit land to the 2nd Defendant.

7. According to the 3rd Defendant, since they acquired the suit land, his partner has never sold his portion to anyone; that he has never bought land from the late Kitele Kitingu as alleged by the Plaintiff and that him together with the late Kitele Kitingu purchased shares from Syokimau Limited in 1981 and were then issued with a title as joint owners of the suit land in the year 1990.

8. The 1st Defendant deponed that his late father and the 3rd Defendant were the registered owners of the suit property; that his father has never sold his share of the suit property as alleged and that upon the death of their father, the family, together with the 3rd Defendant, sold the suit land to the 2nd Defendant.

9. In the Supplementary Affidavit, the Plaintiff deponed that the 1st Defendant's father sold to his father 2.5 acres of the suit property; that while buying the suit property, the 2nd Defendant did not exercise due diligence; that only two (2) parcels of the 2.5 acres on which he is laying claim have been developed and that his father was constantly in and out of the country and that is why he never made a follow up on the land he had purchased.

10. The claim by the Plaintiff is that his late father, Patrick John Matheka, bought a portion of L.R No. 12715/153 (*originally known as Plot No. 41*) measuring 2.5 acres from the 1st Defendant's late father, Kitele Kitingu. The Plaintiff has deponed that upon the demise of both his father and the 1st Defendant's father, the 1st Defendant and the 3rd Defendant transferred the entire suit land measuring 5 acres to the 2nd Defendant.

11. The Plaintiff produced a copy of the Agreement dated 17th January, 1985 purportedly entered into between his late father, Patrick Matheka and the 1st Defendant's late father, Kitele Kitingu. In the said Agreement, the late Kitele purportedly agreed as follows:

“That the said Mr. Kitele Kitingu being the registered owner of share certificate number 41 with Syokimau Farm Limited at Embakasi in Nairobi wishes to sell the aforesaid shares, to FR. Patrick Matheka... That the parcel of land sold is Two and a half (2½) acres of the entire parcel share No. 41 which comprises five (5) acres...”

12. The Agreement further stated that the purchase price was Kshs. 80,000 and that a deposit of Kshs. 7,000 was paid on the date the Agreement was signed. The balance of the purchase price of Kshs. 73,000 was to be paid on or before the 31st December, 1985.

13. It is not clear if the said balance of the purchase price was ever paid by the Plaintiff's father. However, according to the Plaintiff, the late Kitele did a letter dated 25th May, 1985 informing the Manager of Syokimau Farm that he had sold Plot No. 41 to Reverend Patrick J. Matheka, thus making him the owner of the land together with James Kitaka.

14. According to the Affidavit of the 3rd Defendant, he was registered as the owner of L.R. Number 12715/153 with the late Kitele Kitingu in equal shares since 1981. The 3rd Defendant produced in evidence the Letter of Allotment that was issued to them in respect of Plot No. 41 on 6th August, 1981.

15. The copy of the title annexed on the Plaintiff's Affidavit shows that Plot No. 41 was subsequently registered in the name of the 1st Defendant's late father, Kitele Kitingu and the 3rd Defendant on 20th November, 1990. Upon the demise of the 1st Defendant's father, the 1st Defendant was registered as the proprietor of his father's share on 23rd August, 2006. The 1st and 3rd Defendants then transferred the entire land to the 2nd Defendant on 23rd August, 2006.

16. The Plaintiff has not explained why his father was not registered as the proprietor of a share of L.R. No. 12715/153 when the grant was transferred from Syokimau Farm Limited to the new owners in 1990. If indeed the Plaintiff's father bought the land in 1985, then one would have expected the two parties to cause changes to be effected in the records of Syokimau Farm Limited, the original owner of the land, before the title was issued in 1990.

17. In any event, considering that the title in respect of L.R. No. 12715/152 was first registered in favour of the 1st Defendant's father and the 3rd Defendant on 20th November, 1990, and this suit having been filed twenty three (23) years later, the Plaintiff's suit may have been caught up by the Limitation of Actions Act, and specifically Section 7. The said Section states as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

18. Considering that the Plaintiff has not offered any plausible explanation why the grant for L.R. No. 12715/153 was not registered in the name of his father in 1990, and in view of the long period that has passed since the said title was registered in the name of the 1st and 3rd Defendants, I find that the Plaintiff has not established a prima facie case with chances of success.

19. For those reasons, I dismiss the Application dated 26th February, 2013 with costs.

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

O.A. ANGOTE

JUDGE