



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 269 OF 2017

MUNYASYA KINYILI.....PLAINTIFF

VERSUS

NZENGWA KINYILIDEFENDANT

RULING

1. In the Application dated 13th June, 2017, the Plaintiff is seeking for the following orders:

a. That this Honourable Court be pleased to grant orders of temporary injunction restraining the Defendant/Respondent either by herself, her agents, servants and or any other person claiming under her from selling, sub-dividing, transferring, alienating, or from anyway interfering with land Parcel No. Nzambani/Kyanika/3593 and Nzambani/Kyanika/3594 which resulted from an illegal sub-division of Nzambani/Kyanika/630 pending the hearing and determination of this suit.

b. The costs of this Application be borne by the Defendant.

2. The Application is premised on the grounds that land parcels numbers Nzambani/Kyanika/3593 and 3594 resulted from an illegal sub-division of Nzambani/Kyanika/630; that parcel number 630 had been registered in the name of the Defendant to hold in trust for himself and the rest of the family members and that there is a risk that the land may be transferred to third parties.

3. In the Affidavit, the Plaintiff deponed that the Defendant is his mother; that his father died in 1991; that in the 1960's during the adjudication process, his father caused parcel of land known as Nzambani/Kyanika/630 to be registered in the Defendant's name to hold it in trust for the family and that the Defendant has been seeking the consent of the Board to sell the said land.

4. In response, the Defendant deponed that she is the legal and absolute registered owner of land known as Nzambani/Kyanika/630 having been registered as such on 13th December, 1985; that although the Plaintiff is his son, she has never held the suit land in trust for her and that the Plaintiff and his siblings have been occupying and working on the suit land as tenants at her will.

5. According to the Defendant, the dispute in respect to the suit land arose in the year 2000 when she proposed to sub-divide the land into three portions and transfer each of the portions to her children and that the Applicant has always objected to his sister getting a share of the suit land.

6. It is the Defendant's deposition that the Plaintiff filed Kitui CMCC No. 7 of 2017 claiming that she holds the suit land in trust for him and that the said suit is still pending.

7. In the Supplementary Affidavit, the Plaintiff deponed that the disputed land was the property of his father and that the Kitui matter was wrongly filed because the court had no jurisdiction.

8. The advocates for both parties filed their respective submissions which I have considered.

9. The Plaintiff has not denied that there is a pending matter in Kitui CMCC No. 7 of 2017 in respect to the same suit property and raising similar issues that have been raised in this matter.

10. Indeed, the Plaintiff has confirmed that the said suit exists and that the same was wrongly filed because the lower court does not have jurisdiction. However, the Plaintiff has not exhibited any evidence to show that he has withdrawn the suit from the lower court.

11. Section 6 of the Civil Procedure Act prohibits the filing of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties litigating under the same title, where such suit is pending in the same or any other court in Kenya.

12. Having not withdrawn the suit in the lower court, the Plaintiff should not have filed the current suit.

13. Although the Plaintiff has deponed that the lower court does not have the jurisdiction to hear the matter, the Court of Appeal in the case of *The Law Society of Kenya Nairobi vs. Malindi Law Society & Others, Nairobi Civil Appeal No. 287 of 2016* has held that the Magistrates have the jurisdiction to deal with disputes relating to Environment and Land depending with their pecuniary jurisdiction.

14. Considering that no evidence has been placed before me to show that the value of the suit land is in excess of Kshs. 20,000,000, which is the pecuniary jurisdiction of the Kitui Chief Magistrate, and in the absence of evidence to show that the suit in the lower court has been withdrawn, I find that the filing of this suit and the Application is contrary to the provisions of Section 6 of the Civil Procedure Act and an abuse of the court process.

15. For those reasons, I dismiss the Notice of Motion dated 13th June, 2017 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JANUARY, 2018.

O.A. ANGOTE

JUDGE