



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 69 OF 2017

MUTETEMA ITUMO1ST PLAINTIFF

KAMENE NZALAI2ND PLAINTIFF

VERSUS

MUTHOKA ITUMODEFENDANT

RULING

1. What is before me is the Application dated 23rd August, 2007 by the Defendant seeking for the following orders:

a. That this Honourable Court be pleased to authorize the Deputy Registrar of this Honourable Court to execute the necessary documents for the re-transfer of the parcels of land known as L.R. No. Machakos/Ulu/450 and 451 in Makueni District, Kenya. From the Plaintiff/Respondents to the Defendant/Applicant herein.

b. That the cost of this Application be provided for.

2. The Application is premised on the grounds that parcel of land numbers Machakos/Ulu/450 and 451 (*the suit land*) are a sub-division of Plot No. 427; that the ownership of Plot No. 427 was the subject matter herein and that on 1st November, 2006 this court dismissed the matter for want of prosecution.

3. According to the Defendant, the suit land was transferred to the Plaintiff vide a default Judgment which Judgment was set aside.

4. In response, the Administrator of the Estate of the Plaintiff deponed that the orders being sought are incapable of being granted because the Judgment and Decree was executed twenty (20) years ago; that the Plaintiffs had acquired titles by the time the suit was dismissed and that the Application has been brought too late in the day.

5. In his submissions, the Defendant's/Applicant's advocate deponed that the titles subject of this Application were issued on the basis of the orders that were set aside by this court; that the entire suit was subsequently dismissed on 24th November, 2006 and that this Application was filed within one (1) year of the Judgment herein.

6. On his part, the Plaintiff's advocate submitted that the orders being sought by the Defendant/Applicant are incapable of being granted as the Judgment herein was executed in 1995.

7. The record shows that on 4th December, 1990, P. Tank J entered a Judgment in favour of the Plaintiff after receiving the Plaintiff's evidence. In the said Judgment, the court noted that although the Defendant had been served with the Summons to Enter Appearance, he had neither entered appearance nor filed a Defence.

8. In the default Judgment, the court ordered that land known as Machakos Ulu/427 be registered in the name of the Plaintiff. The Judgment of the court was executed on 2nd August, 1995 when the same was registered against the register and a Title Deed issued to the Plaintiff on 29th January, 1996.

9. The Defendant later on moved the court and had the Judgment of the court set aside vide a Ruling that was delivered by Khamoni J (*as he was then*) on 17th December, 1998. It would appear that even after the Judgment of 4th December, 1990 and all the consequential orders were set aside, the Defendant did not take any step to have the register in respect of Plot No. 450, which is a sub-division of Plot No. 427, rectified.

10. The matter remained in abeyance until 1st November, 2006 when the suit was dismissed for want of prosecution. Indeed, it is the Defendant who applied for the dismissal of the suit.

11. Before having the suit revived, the Defendant has filed the current Application in which he wants the Deputy Registrar of this court to sign documents re-transferring Plot Nos. 450 and 451 to him on the ground that the irregular Judgment which granted the Plaintiff the suit land was set aside.

12. This Application should have been filed before the suit was dismissed. Having set aside the irregular Judgment, it was upon the Defendant to move the court to have the entries that were made in the register rectified before the suit was dismissed.

13. The suit having been dismissed, the Defendant's Application dated 23rd August, 2007 does not have "*legs*" to stand on. The Application is a nullity for the reason that there is no suit in existence.

14. For those reasons, I dismiss the Application dated 23rd August, 2007 with no orders as to costs.

15. For avoidance of doubt, the suit stands dismissed as per the orders of the court of 1st November, 2006.

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

O.A. ANGOTE

JUDGE