



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 2 OF 2018

DANIEL MUEMA MAITHYA.....PLAINTIFF

VERSUS

MICHAEL MALOMBE.....1ST DEFENDANT

MWENDWA KAKAI.....2ND DEFENDANT

RULING

1. The Notice of Motion dated 5th January, 2018 was filed by the Plaintiff. In the Application, the Plaintiff is seeking for the following orders.

a. That pending the hearing and determination of this suit, the Honourable Court be pleased to issue a temporary injunction to restrain the Defendants and or their agents and or servants and or employees and or representative from entering and or trespassing into and or Evicting or in any manner whatsoever interfering with the plaintiff's right to ownership, possession and use of land reference number Kyangwithya/Kaveta/161, Kyangwitha/Kaveta/169 and Kyangwitha/Kaveta 1018 situated at Kyangwitha Location, Kitui County.

b. That the Officer Commanding Kitui Police Station do assist in the execution of this order.

c. That the costs of this application be borne by the Defendants.

2. The Plaintiff has stated in his Affidavit that parcel of land known as Kyangwithya/Kaeveta/161 is their ancestral land; that the land is situated in Kyangwithya location where his father and himself hail from and that the Defendant hails from Yungutu location which is situated 30km away from the suit land, while the 2nd Defendant is from Yungutu location which is more than 5km away from the suit land.

3. It was the deposition of the Plaintiff that he has no blood relationship with the Defendants; that on 24th July, 2017, he received a letter from the Chief of Mutuune location ordering him to stop grazing or constructing on the suit land and that he has a house and two boreholes on the suit land.

4. According to the Plaintiff, the land which the Defendant claims to be parcel number 169 has been in his exclusive possession for more than 30 years and that the Defendants trespassed on the land in the company of ten (10) armed youths claiming that the land was theirs.

5. The 1st Defendant deponed that he is the nephew of the late Malombe Mutua who died on 18th December, 1988; that his late uncle is still the registered proprietor of parcel of land known as Kyangwithya/Kaveta/1018; that the Plaintiff is his neighbor and is a beneficiary of his father's land being Kyangwithya/Kaveta/161; that he has always used his uncle's land for grazing and that in the year 2017, he discovered that the Plaintiff had put a structure on his uncle's land.

6. In response, the 2nd Defendant deponed that he is one of the survivors of the late Ruth Mwikali Kakai; that at the time of her death, her mother was the registered proprietor of land known as Kyangwithya/Keveta/169 and that the Plaintiff, who is his neighbor, is the beneficiary of his father's land which is Kyangwithya/Keveta/161.

7. According to the 2nd Defendant, the registry Index Map clearly shows the two suit properties and that he has never interacted with the Plaintiff at all.

8. In the Supplementary Affidavit, the Plaintiff deponed that the 1st Defendant has no legal capacity to represent the Estate of his late uncle; that a title which was not properly obtained cannot be protected by the law and that he has always had a house on the suit land.

9. In his submissions, the Plaintiff's advocate submitted that the Defendants have not explained how their relatives acquired the suit properties; that the process of how one acquires a title is paramount and that the Defendants have no legal capacity to defend the suit. Counsel submitted that the rights of a person in possession of land is one of equitable rights which ought to be protected by the court and the law.

10. The Defendants' advocate submitted that the Plaintiff has not adduced evidence to prove that he has a right over parcel numbers 1018 and 169; that the Plaintiff does not have superior rights over these properties and that the Plaintiff cannot evict the Defendants.

11. The Plaintiff is seeking for an injunctive order restraining the Defendants from entering parcel of land number 161, 169 and 1018 situated in Kyangwithya Location on the ground that the three suit properties are his ancestral parcels of land. The Plaintiff annexed on his Affidavit an official search for parcel of land number 161.

12. According to the land search, the Plaintiff's late father was registered as the proprietor of Kyagwithya/Kaveta/161 measuring 13.4Ha(approximately 33.5 acres) on 17th July, 1984. The Defendants have produced searches showing that the late Malombe Mutua(the 1st Defendant's Uncle) was registered as the proprietor of Kyangwithya/Kaveta/1018 measuring 0.7Ha(approximately 1.75acres) while the 2nd Defendant's late mother was registered as the proprietor of parcel of land number measuring 2.4Ha(approximately 6 acres) on 14th February, 1992.

13. The Defendants also exhibited the Registered Index Map(RIM) for Kaveta Registration Section, Diagram No. 4, which shows the location of the three properties. Indeed, this three properties abutt each and are identifiable.

14. It is not clear to this court if the Plaintiff's house and boreholes are on the land registered in the name of his father or the other two parcels of land. The Plaintiff did not file a surveyors report to point out the location of his house viz-a-viz the three suit properties.

15. If indeed the Plaintiff's house is on any of the two parcels of land, that is 1018 and 169, then he is the one who should give way pending the hearing of the suit. I say so because until the Plaintiff proves at the hearing that the two title documents were obtained fraudulently by the 1st Defendant's mother and the 2nd Defendant's uncle, he cannot restrain them from utilizing the suit properties.

16. The Plaintiff's claim is not for a declaration that he is entitled to parcel number 1018 and 169 by way of adverse possession. Consequently, he cannot succeed in the current Application just because he has been utilizing this land for many years. In any event, the photograph annexed on the Plaintiff's Affidavit shows that the house he alleges to be on one of the suit properties was recently built.

17. Consequently, as regards to an injunctive order in respect to parcel numbers 1018 and 169, I find that the Plaintiff has not established a prima facie case with chances of success. However, the injunctive order would issue in respect to parcel number 161 which is registered in favour of the Plaintiff's late father.

18. For those reasons, I shall allow the Application dated 5th January, 2018 in the following terms;

a. **That pending the hearing and determination of this suit a temporary injunction be and is hereby issued to restrain the Defendants and or their agents and or servants and or employees and or representative from entering and or trespassing into and or Evicting or in any manner whatsoever interfering with the plaintiff's right to ownership, possession and use of land reference number Kyangwithya/Kaveta/161,Kyangwithya/Kaveta/169 and Kyangwithya/Kaveta 1018 situated at Kyangwithya Location, Kitui County.**

b. **Each party shall bear his own costs.**

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF MAY, 2018.

O.A. ANGOTE

JUDGE