



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 444 OF 2017

MUSA MUSYIMI1ST PLAINTIFF

ERASTUS MUIA MUSYIMI2ND PLAINTIFF

MUTIE MUSYIMI.....3RD PLAINTIFF

VERSUS

MARTIN MATI MULINGE

JOSHUA MUEKE MULINGE (*Sued in their capacity as*

Legal Representatives of the Estate of

MULEWA MULINGE (*deceased*).....**DEFENDANTS**

RULING

1. In the Notice of Motion dated 10th November, 2017, the Plaintiffs are seeking for the following reliefs:

a. That this Honourable Court be pleased to issue an order of injunction restraining the Defendants jointly and severally herein either by themselves, their servants, employees, agents and/or any other persons working under their instructions from selling, transferring, alienating, disposing, interfering and/or dealing with the suit property Muputi/Kiima-Kimwe/526 pending the hearing and determination of this Application.

b. That this Honourable Court be pleased to issue an order of inhibition inhibiting any dealings in the suit property being Muputi/Kiima-Kimwe/526 pending the hearing and determination of this suit.

c. That this Honourable Court be pleased to issue an order of nullification of the title of the suit property being Muputi/Kiima-Kimwe/526 pending the hearing and determination of this suit.

d. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 1st Plaintiff who has deponed that the Defendants have fraudulently and unlawfully denied the Plaintiffs the right to bury the remains of their late mother on parcel of land known as Muputi/Kiima-Kimwe/526 which was held in trust by the Defendants' father.

3. According to the deposition of the 1st Plaintiff, the Defendants' father fraudulently registered the suit land in favour of his two wives; that Mulewa Mulinge (*deceased*) unlawfully registered the suit land in her name and that they have been unable to bury their mother on the suit land.

4. In response, the 2nd Defendant deponed that the Plaintiffs have no legally sustainable claim against the Defendants or the Estate of Mulewa Mulinge; that the suit herein is *Res judicata* and that the allegation of fraud regarding the acquisition of title to the suit land were dismissed by the High Court over fifteen (15) years ago and similar allegations cannot arise.

5. The 1st Plaintiff swore a Further Affidavit in which he deponed that Machakos HCCC No. 181 of 1998 was between their late mother and the Defendants' mother; that the issues raised in the current suit are different from Machakos HCCC No. 181 of 1998 and that the

Application should be allowed.

6. The advocates for both parties filed brief submissions which I have considered.

7. It is not in dispute that the Plaintiffs herein are the sons of the late Philes Mutio Musyimi while the Defendants are the sons and legal representatives of the late Mulewa Mulinge, the registered proprietor of the suit land.

8. The copy of the Plaint annexed on the Defendants' Replying Affidavit shows that the Defendants' late mother sued the Plaintiffs' late mother in Machakos HCCC No. 181 of 1998.

9. In the said suit, the Plaintiffs' mother raised a Counter-claim in which she alleged that the Defendants' mother had the suit land registered in her favour fraudulently. In its Judgment, the court allowed the Defendants' mother claim in respect to the suit land and dismissed the Plaintiffs' mother's Counter-claim. The court ordered the Plaintiffs' mother to vacate the suit land.

10. After the Judgment in Machakos HCCC No. 181 of 1998 was delivered, the Plaintiffs' mother died. The Plaintiffs then lodged in this court ELC. Suit No. 248 of 2009 (O.S) seeking to be declared the owners of the suit land by way of adverse possession. In the Judgment of this court, the court held as follows:

“For those reasons, I find that the Plaintiffs have not proved their claim on a balance of probabilities. Consequently, I dismiss the Originating Summons dated 13th August, 2009 with costs. Finally, I hope that the soul of the late Philes Mutio Musyimi, whose body has been lying in the morgue since the year 2008, will rest in peace next to where her late husband Musyimi Mueke, was interred.”

11. It would appear that the Plaintiffs, despite the Judgment of this court in ELC. No. 248 of 2009(O.S) and HCCC No. 181 of 1998 have never buried their late mother, for reasons known to themselves. Considering that the claim by the Plaintiffs' mother in Machakos HCCC No. 181 of 1998 that the Defendants' mother had the suit land registered in her name fraudulently was dismissed by the court, I find that the claim before me is *Res judicata*.

12. Consequently, the Application dated 10th November, 2017, together with the entire suit, are dismissed with costs to the Defendants.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2018.

O.A. ANGOTE

JUDGE