



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 413 OF 2017

BETH JOSIAH NYAMAI (suing as legal representative of the Estate of
JOSIAH NYAMAI MUSYEMI (deceased).....**PLAINTIFF**

VERSUS

KALEKYE MUTISO.....**1ST DEFENDANT**

MUSAU MUTISO.....**2ND DEFENDANT**

MUSYIMI MUTISO**3RD DEFENDANT**

ISAAC MUTHAMA KIMILU.....**4TH DEFENDANT**

RULING

1. The Application dated 19th September, 2017 is seeking for the following orders:

a. That an interim order of injunction be issued restraining the Defendants/Respondents and/or their agents/servants/employees who have invaded and constructed structures by cutting trees to erect the same, disposing of the parcel of land known as Plot No. 1 part of L.R. 355/25 West of Machakos Municipality situated at Katheka Kai pending hearing and determination of the main suit.

b. That the costs of this Application be borne by the Respondents/Defendants.

2. The Application is premised on the grounds that the Applicant is the registered proprietor of land known as L.R. No. 335/25 West of Machakos (*the suit land*); that the Defendants will invade the suit land unless restrained by this court and that the suit land was jointly owned by her mother-in-law and her late husband.

3. The Plaintiff, deponed that the 1st, 2nd and 3rd Defendants have sold a portion of the suit land to the 4th Defendant without her consent or the beneficiaries of the Estate and that an injunction should issue.

4. In a joint Replying Affidavit, the Defendants deponed that they are part of the family of Agnes Kavuli Nyamai; that the suit land belongs to the entire family; and that the suit land belonged to their late grandfather, Nyamai Musyimi Ngave.

5. It is the Respondents' case that the suit land was registered in favour of their late grandmother and the Plaintiff's late husband held the title to the land in trust for the entire family and that they have lived on the suit land for many years.

6. The Respondents finally deponed that the Plaintiff fraudulently obtained the Letters of Administration and that her intention is to disinherit them. Both the Plaintiff and the Defendants' advocates filed submissions which I have considered.

7. The evidence before this court shows that on 23rd February, 2015, the High Court in Machakos Succession Cause No. 798 of 2013 issued to the Plaintiff a Certificate of Confirmation of Grant in respect of L.R. No. 355/25 Machakos Municipality. In the said Certificate of Confirmation of Grant, the court ordered that the 1st Plaintiff should be registered as the proprietor of the suit land to hold the same in trust for herself and other beneficiaries. The Certificate of Confirmation was in respect to the Estate of the late Josiah Nyamai Musyimi, the Plaintiff's late husband.

8. The Plaintiff has also annexed the Certificate of Confirmation of Grant dated 20th March, 2015 in Machakos Succession Cause No. 838 of

2013 in respect to the Estate of the Plaintiff's late mother-in-law. In the said Certificate of Confirmation of Grant, the court directed that the suit land should be registered wholly in the name of the Plaintiff.

9. It is not clear to this court if indeed the Plaintiff disclosed to the Succession Court in Succession Cause No. 838 of 2013 that there was an order that was slightly different in Succession Cause No. 798 of 2013 in respect to the suit land. However, what is clear is that the two orders of the court in the succession matters have never been challenged by the Defendants.

10. Considering that the Succession Court decreed that the suit land should be registered in the name of the 1st Defendant, and until those orders are varied, I find that the Plaintiff has established a prima facie case with chances of success.

11. Indeed, the Plaintiff has annexed photographs of buildings showing that he is the one who is in occupation of the suit land. On the other hand, the Defendants have not produced any evidence to show that they have been in occupation of the suit land as alleged. Consequently, it is the Plaintiff who is likely to suffer irreparable damage unless the injunctive orders are issued.

12. For those reasons, I allow the Application dated 19th September, 2017 as prayed.

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

O.A. ANGOTE

JUDGE