



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 420 OF 2017

ALEX KYALO MUTUA.....PLAINTIFF

VERSUS

FRANCIS MAKAU NGULASA.....DEFENDANT

RULING

1. In the Application dated 9th October, 2017, the Plaintiff is seeking for the following orders:

a. That pending the inter-partes hearing and determination of this suit, the Defendant, his servants, agents, family members and or in any manner howsoever be restrained from farming on, grazing on, building on, entering, trespassing, advertising, leasing, charging, selling, dealing with, conveying, sub-dividing, encroaching on and/or remaining on the Plaintiff's land title number Machakos Town Block 3/696 ("the Land") and/or interfering with the Plaintiff's registered, legal, contractual, equitable interests and/or rights of quiet ownership, possession, occupation and enjoyment thereof.

b. That pending the inter-partes hearing and determination of this suit, the Defendant, his servants and/or agents including his family members be restrained from chasing and/or denying the Plaintiff/Applicant access to his land parcel No. Machakos Town Block 3/696 ("the Land").

2. The Application is premised on the grounds that the Plaintiff is the registered proprietor of a parcel of land known as Machakos Town Block 3/696 (*the suit land*); that the Plaintiff purchased the land from Katelembo Athiani Muputi Farming and Ranching CO-operative Society Limited (*the Society*) and that in the year 2014, the Defendant trespassed on the suit land and erected illegal structures thereon.

3. The Defendant deponed that he has settled on the suit land; that the Plaintiff's Title Deed is suspect and that the Plaintiff has not availed any Sale Agreement between him and the Society to prove that he bought the suit land from the Society as alleged.

4. In response, the Defendant's father deponed that the Defendant was born on the suit land in 1972; that the suit land was handed down to him by his father and that they live on the suit land as a Community. The Defendant's father finally deponed that the suit land is their ancestral land and that the Application should be dismissed.

5. The Defendant finally deponed that he has been in possession of the suit land since 1972; that the suit property is his ancestral land and that there is an existing Petition in respect to the suit land in which the Petitioners are seeking to be declared the owners of the suit land.

6. The Plaintiff filed a Further Affidavit in which he deponed that the Defendant has not laid any basis to claim the suit land as his ancestral land; that there are no graves on the suit land and that he is not a party to the Petition that is pending in this court.

7. In his submissions, the Plaintiff's advocate submitted that the Plaintiff's Title Deed has neither been impugned nor challenged in any way; that the Defendant's buildings have not been approved and that the Plaintiff has shown that he has a prima facie case with chances of success.

8. The Defendant's counsel submitted that on 21st June, 2017, this court granted the Petitioners in Petition No. 76 of 2017 conservatory orders; that the Plaintiff has not availed any Sale Agreement to show that he purchased the suit land from the Society; that the Plaintiff did not obtain the consent of the Land Control Board and that the Defendant is in occupation of the suit land.

9. The Plaintiff is seeking for an order of injunction on the basis that he is in possession of a Title Deed in respect to the suit land. According to the Plaintiff, he purchased the suit land from Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited and made all the requisite payments.

10. Other than the Title Deed that was issued to the Plaintiff on 14th January, 2016, the Plaintiff did not annex any other conveyancing

document that gave rise to the said Title Deed. It is trite that a Title Deed is an end product of a process. The process in the acquisition of a Title Deed arising out of a sale includes signing of a Sale Agreement; obtaining the consent of the Land Control Board and lodging of a duly executed and attested Transfer document.

11. Indeed, pursuant to Section 3(3) of the Law of Contract, a suit cannot be sustained upon a contract for the disposition of an interest in land unless the contract is in writing; the contract is signed by all the parties, and the signature of each party signing has been attested by a witness. The Plaintiff has not produced a copy of the contract that he entered into with the Society as required by the law.

12. In the absence of a document to show that the Plaintiff purchased the suit land for consideration, and in the absence of a copy of the consent of the Land Control Board authorizing the sale, I find that the Plaintiff has not established a prima facie case with chances of success.

13. In any event, the photographs annexed on the Defendant's Affidavit shows that the Defendant has developed the suit land. Being in occupation, the Plaintiff will not suffer any irreparable injury that cannot be compensated by damages if the orders are not granted. The balance of convenience also tilts in favour of the Defendant because he is the one in occupation and possession of the land.

14. For those reasons, I dismiss the Plaintiff's Application dated 9th October, 2017 but with no order as to costs.

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

O.A. ANGOTE

JUDGE