



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 159 OF 2017**

**PRISCILLA KAVUU MUTISO.....PLAINTIFF**

**VERSUS**

**JAMES MUTISO MUTOONU.....1<sup>ST</sup> DEFENDANT**

**DANIEL MUINDI MUTISO.....2<sup>ND</sup> DEFENDANT**

**SAMMY MUMO MUTISO.....3<sup>RD</sup> DEFENDANT**

**CO-OPERATIVE BANK OF KENYA LTD.....4<sup>TH</sup> DEFENDANT**

**KENYA COMMERCIAL BANK.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 5<sup>th</sup> April, 2017, the Plaintiff has sought for the following orders:

***a. That a temporary injunction be issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, from withdrawing any monies held in Account Number [...] in Kenya Commercial Bank, Machakos Branch and Account Number [...] at Co-operative Bank of Kenya, Machakos Branch pending the hearing and determination of this suit.***

***b. That a temporary injunction do issue restraining the 4<sup>th</sup> and 5<sup>th</sup> Defendants from releasing any monies to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents pending the hearing and determination of this suit.***

***c. That a mandatory injunction be issued directing the 4<sup>th</sup> and 5<sup>th</sup> Defendants to release to the Plaintiff any monies being held by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in Account number [...] at Kenya Commercial Bank, Machakos Branch and Account Number [...] at Co-operative Bank of Kenya, Machakos Branch.***

2. In her Affidavit, the Plaintiff stated that she is the wife of the 1<sup>st</sup> Defendant while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are her sons; that she owned a share at Katelembo Athi River Farming and Ranching Co-operative Society Limited which was allocated Plot No. 1492 also known as Athi River/Athi River 1/197 (*the suit land*) and that the 1<sup>st</sup> Defendant transferred the suit land without her knowledge.

3. It is the Plaintiff's deposition that on 12<sup>th</sup> July, 2016, the 1<sup>st</sup> Defendant transferred the suit land to Abdurahaman Hussein and Ismail Ali Mohamed for Kshs. 20,400,000; that Kshs. 1,640,000 was deposited in the accounts of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants based in the 4<sup>th</sup> Defendant's bank and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have continued to misuse the said funds.

4. It is the Plaintiff's claim that she is entitled to the monies deposited in the 4<sup>th</sup> and 5<sup>th</sup> Defendants' bank and that in any event, she is entitled to 50% of the proceeds of the sale of the suit land.

5. In response, the 4<sup>th</sup> Defendant filed an Application dated 3<sup>rd</sup> August, 2017 together with a Supporting Affidavit. The 4<sup>th</sup> Defendant sought for the striking out of its name on the grounds that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants hold a joint account with it and that it is a stranger to the issues in dispute; that the pleadings do not disclose any reasonable cause of action against it and that the 4<sup>th</sup> Defendant will abide by any court order. The 4<sup>th</sup> Defendant also filed Grounds of Opposition in which it repeated the depositions in the Affidavit of its Customer Service Manager.

6. The 5<sup>th</sup> Defendant's Service Quality and Compliance Manager deponed that the 5<sup>th</sup> Defendant does not have any proprietary rights over

the bank account operated by the 2<sup>nd</sup> Defendant and that the 5<sup>th</sup> Defendant is willing to comply with the orders of the court.

7. In his Affidavit, the 3<sup>rd</sup> Defendant deponed that the current Application is premature because the family has not decided on how to disburse the proceeds of the sale of the suit land; the suit land is family land and a claim for 50% of the proceeds by the Plaintiff negates the social family fabric and that in any event, the Plaintiff does not have *locus standi* because the land is registered in favour of the 1<sup>st</sup> Defendant.

8. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants also filed a Notice of Preliminary Objection in which they averred that this court does not have jurisdiction to entertain the Plaintiff's claim and that the Application must fail.

9. In her Further Affidavit, the Plaintiff deponed that the account where the proceeds of sale of the suit property was deposited is not a family joint account; that she has sought for funds and her request has been declined and that she has the requisite *locus standi*.

10. The Plaintiff's advocate submitted that the 4<sup>th</sup> Defendant is properly enjoined because the prayers being sought in the Application are against it; that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have not denied having opened bank accounts with the 4<sup>th</sup> and 5<sup>th</sup> Defendants and deposited in those accounts the proceeds of the sale of the suit land and that the Applicant's right over the suit land has been infringed upon by the Defendants.

11. In his submissions, the advocate for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that the dispute herein is about the monies obtained from the sale of the suit land; that the court does not have jurisdiction to entertain the Application and that the Application should be dismissed.

12. The 4<sup>th</sup> Defendant's advocate submitted that the 4<sup>th</sup> Defendant does not need to be a party to these proceedings; that the 4<sup>th</sup> Defendant is merely a banker to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and that the 4<sup>th</sup> Defendant has been wrongly sued.

13. The 5<sup>th</sup> Defendant's advocate submitted that the 5<sup>th</sup> Defendant was not privy to the alleged sale between the parties; that the 5<sup>th</sup> Defendant was only custodian of the bank account to the 2<sup>nd</sup> Defendant and that in any event, the 5<sup>th</sup> Defendant is not a legal entity capable of being sued on the date the suit was filed.

14. It is not in dispute that parcel of land known as Athi River/Athi River Block 1/197 was sold by the 1st Defendant. It is also not in dispute that the Plaintiff is the 1<sup>st</sup> Defendant's wife while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are their children.

15. According to the "*consent for sale of Athi River/Athi River Block 1/197*," the Plaintiff acceded to the sale of the suit land to Abdurahaman Hussein and Ismail Ali Mohamed on 12<sup>th</sup> July, 2015. The Plaintiff has not contested the legality of the said sale in her pleadings. Rather, the Plaintiff wants this court to direct the parties on how the proceeds of the sale should be utilized by the family members.

16. It is trite that the jurisdiction of a court emanates from the Constitution or the Statutes. The jurisdiction of this court is provided for under Article 165(2) (b) of the Constitution and Section 13(1) of the Environment and Land Court Act. The two provisions of the law provide that the court shall have power to hear and determine disputes relating to the environment and the use and occupation of, and title to land. The court is not clothed with the jurisdiction of determining how family members or any other party would share the proceeds of the sale of land.

17. Considering that the Plaintiff is not contesting the sale of the suit land to the purchasers, I find and hold that the court does not have the jurisdiction to entertain the claim. Having found that the matter was filed in the wrong court, I shall not delve into the merits of the suit, or if indeed the 4<sup>th</sup> and 5<sup>th</sup> Defendants were wrongly enjoined in the suit.

18. For those reasons, the Plaintiff's Application dated 5<sup>th</sup> April, 2017 is struck out with costs to the Defendants.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19<sup>TH</sup> DAY OF OCTOBER, 2018.**

**O.A. ANGOTE**

**JUDGE**