



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 359 OF 2017

(Formerly ELC. CASE NO. 1276 OF 2015 –Nairobi)

MUIA KITHOKOI.....PLAINTIFF

VERSUS

RAPHAEL NZINGI.....DEFENDANT

RULING

1. In the Notice of Motion dated 10th December, 2015, the Plaintiff is seeking for the following orders:

a. An order of temporary injunction do issue against the Defendant by himself and or his agents, servants or any other persons claiming under or through him restraining them from entering, trespassing upon, grazing livestock, cultivating and felling down trees or vegetation, erecting any structures or otherwise in any other manner whatsoever interfering with the Plaintiff's/Applicant's land parcel Plot No. Muthetheni/Ngamba/653 pending final hearing and determination of this suit.

b. The costs of this Application be provided for.

2. According to the Affidavit of the Plaintiff, he inherited parcel of land known as Muthetheni/Ngamba/653 from his father; that during adjudication, he was registered as the proprietor of the suit land and that in the year 2010, the Defendant trespassed on the said land and started cultivating and grazing his livestock on the land.

3. In response, the Defendant deponed that in 1974, his wife, Sabina Mwelu approached the Plaintiff intending to lease him the suit land which he accepted; that in 1976, the Plaintiff approached him with the intention of purchasing the land and that he bought the land for Kshs. 4,500 and executed an Agreement to that effect.

4. According to the Defendant, after paying the Plaintiff a deposit of Kshs. 3,000, the Plaintiff disappeared and that when he returned, he refused to accept the balance of the purchase price; that the clan observed that he had been on the land since 1974 and that indeed he has cultivated and extensively developed the land since 1974.

5. The Plaintiff's advocate submitted that by virtue of Sections 27, 28 and 143 of the Registered Land Act, he holds an indefeasible legal title to the suit land; that the alleged Agreement between him and the Defendant is void by operation of the Land Control Act for want of the mandatory consent of the Board and that the allegations in the Replying Affidavit do not set up a valid Defence.

6. The Defendant's advocate submitted that under Section 30 of the Registered Land Act (*repealed*), one of the overriding interests that can defeat a title is the right of a person in possession or actual occupation of land; that the Defendant settled on the land in 1976 following a Sale Agreement and that the Application should not be allowed.

7. According to the official search in respect of parcel of land known as Muthetheni/Ngamba/653, the Plaintiff was registered as the owner of the land on 8th November, 1983. It is on the basis of the fact that he is the registered owner of the land that the Plaintiff is seeking for injunction orders.

8. The Defendant has deponed that although the suit land is registered in favour of the Plaintiff, he has been in possession and occupation of the said land since 1974 when he purchased the land. The Defendant exhibited on his Affidavit the Agreement of 1st October, 1976 in respect of Plot No. 655. The said Agreement, according to the Defendant, was entered into with the Plaintiff.

9. It is the Defendant's case that he paid to the Plaintiff a deposit of Kshs. 3,000 leaving a balance of Kshs. 1,500. Although plot number 655 is what is indicated in the Agreement of 1st October, 1975, it is possible that the said number changed to the present parcel number during the adjudication process that culminated in the registration of the land in favour of the Plaintiff in 1983.

10. The Plaintiff deponed that the Defendant took possession of the suit land in the year 2010. However, the Minutes of the clan of Mumo dated 11th October, 2015 shows that the Defendant has been in occupation and possession of the suit land since 1974.

11. Considering that the Plaintiff did not deny that he signed the 1976 Agreement, and in view of the Minutes of the clan, the Defendant can validly raise the Defence of adverse possession in respect of the suit land. Indeed, having been issued with the title document in 1983, it was upon the Defendant to evict the Plaintiff from the suit land before the lapse of twelve (12) years pursuant to the provisions of Section 7 of the Limitation of Actions Act.

12. If indeed the Defendant has been in actual occupation and possession of the suit land since 1983, it will not matter that the Sale Agreement is null and void for want of the consent of the Board. The Plaintiff will be locked out from recovering the suit land. In the circumstances and on the basis of the Agreement of 1976 and the Minutes of the clan of Mumo, I find and hold that the Plaintiff has not established a prima facie case with chances of success. The Plaintiff has also not shown the irreparable loss that he is likely to suffer if the injunctive order is not granted.

13. For those reasons, I dismiss the Application dated 10th December, 2015 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE