



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 55 OF 2013

DANIEL MUTUA KITHANGATI.....1ST PLAINTIFF

MULI KITHANGAL.....2ND PLAINTIFF

VERSUS

MUNYAO SILADEFENDANT

RULING

1. In the Application dated 13th October, 2014, the Defendant is seeking for the following orders;-

i. That the Plaintiff's suit herein be struck out, with costs, for;-

a) Being scandalous, frivolous or vexatious and/or

b) It may prejudice, embarrass or delay the fair trial of the action and/or

c) It is otherwise an abuse of the process of the court.

ii. That costs of this application and the main suit be provided for.

2. The Application is premised on the grounds that the suit land belongs to the Defendant having procedurally acquired the Title Deed; that there is a Decree from Kitui, SRMCC in favour of the Defendant and that the current suit is *res judicata*.

3. In his Affidavit, the Defendant deponed that the suit land formed part of parcel of land known as Kyangwithya/Mulundi/1191 which was subdivided and its register closed; that the larger parcel of land was registered in favour of his deceased father; that he sued the Plaintiff's father in Kitui SRMCC number 312 of 2011 and that the suit was determined in his favour.

4. The Defendant/Applicant finally deponed that the Plaintiffs should have challenged the succession proceedings; that the Plaintiffs never filed an Appeal in respect to the decision that was made in Kitui SRMCC No. 312 of 2011 and that the current suit is *res judicata*.

5. The Plaintiffs' advocate filed Grounds of Opposition in which he averred that the doctrine of *res judicata* is not applicable in the instant case; that the Plaintiffs have a valid claim against the Defendant and that the Application should be dismissed. Both the Plaintiffs' and the Defendant's advocates filed written submissions which I have considered.

6. In the Plaint dated 23rd October, 2013, the Plaintiffs alleged that the Defendant is their uncle; that the deceased, Sila Maithya Ngao, was the original registered owner of parcel of land number 1191 and that on the death of Sila Ngao, the suit land was sub-divided into several parcels of land without any succession proceedings. It is the Plaintiffs' case that as a result of the fraudulent sub-division of the suit land, the portion belonging to the Plaintiffs' mother (*deceased*) was incorporated into parcel number 2033.

7. In their prayers, the Plaintiffs are seeking for the cancellation of the title of parcel number 2033 and the sub-division thereof.

8. In his Defence, the Defendant denied the allegations of fraud. The Defendant also filed a Counter-claim in which he averred that the suit land was registered in the name of his late father and that he sued the Plaintiffs' father in Kitui SRMCC No.312 of 2011 in respect of the same land.

9. The Defendant has annexed on his Affidavit the Certificate of Confirmation of a Grant in Kitui Succession Cause No. 34 of 2005 in respect to the Estate of the late Sila Maithya Ngao. The said Certificate of Confirmation of Grant shows that parcel number 1191 was

registered in favour of Musangi Masika and the Defendant by virtue of a court order. The said land was registered in favour of the two in equal shares. The land was then subsequently sub-divided into several portions on 19th July, 2010, with the Defendant being issued with a Title Deed for parcel number 2033 on 20th July, 2010. It is therefore obvious that the Defendant's acquisition of the suit land was by virtue of the orders of the Court in Succession Cause No.34 of 2005.

10. The Plaintiffs have not denied that the Defendant sued their father in Kitui Civil Suit No.312 of 2011. In the said suit, the Defendant averred that the Plaintiffs' father has been a tenant at will in the suit land and prayed for his eviction. Consequently, the Plaintiffs' claim should have been addressed in that suit and not in a separate suit.

11. The Affidavit evidence before me shows that the Plaintiffs' claim in respect to the suit land should have been ventilated in Kitui Succession Cause No. 34 of 2005 and Kitui PMCC NO.312 of 2011. The Plaintiffs suit is therefore sub-judice Kitui RMCC No.312 of 2011. The suit is also frivolous and an abuse of the court process because the Defendant's title emanates from the order of the court in the succession proceedings. The Plaintiffs should have challenged the orders of the court in the succession proceedings instead of filling the current suit.

12. For those reasons, I allow the Defendant's Application dated 13th October, 2014 and strike out the Plaintiffs' Plaint dated 23rd October, 2013 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16TH DAY OF NOVEMBER, 2018.

O. A. ANGOTE

JUDGE