



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 127 OF 2018

FREDERICK MUSAU MWANIKI.....PLAINTIFF

VERSUS

BOSCO NTHENGE NZIOKI.....DEFENDANT

RULING

1. In the Application dated 21st June, 2018, the Plaintiff is praying for the following orders:

a. That temporary injunction do issue restraining the Defendant/Respondent by himself, his relatives, servants and/or agents from demolishing the Plaintiff's/Applicant's property (building) on the Plaintiff's/Applicant's land parcel plot no. 757A part of 757 within Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited (suit premises) and/or dealing in any way with the suit premises pending the hearing and determination of the main suit herein.

b. That the orders herein be executed by the O.C.S, Machakos Police Station.

c. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has stated that he bought plot number 757A part of 757 within Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited (*the suit land*); that he bought the suit land from one Manthei Muema who was a member of the Society and that she developed the suit land after obtaining the change of user.

3. The Plaintiff deponed that the Defendant trespassed on the suit land on 21st June, 2018 and that the Defendant intends to demolish the permanent house that he has built on the land.

4. In reply, the Defendant deponed that he purchased plot number 757 within Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited; that the suit land belonged to Peter Kivanga Mutiso who was member number 562 of the Society and that after he purchased the land from Mr. Mutiso, he took possession of the same.

5. It is the Defendant's case that when he embarked on developing it, one Wayua Muema encroached on the land and put a structure thereon; that in its letter dated 25th October, 2016, the Society confirmed that Peter Kivanga Mutiso was the registered owner of the suit land and that he filed Machakos ELC. No. 204 of 2016 which was heard and determined in his favour.

6. The Defendant finally deponed that the eviction process that was carried out on the suit land was pursuant to an order of the court; that he has been in possession of the suit land since the year 2015 and that the execution of the order in Machakos ELC. No. 204 of 2016 is now complete.

7. In his submissions, the Plaintiff's advocate submitted that the Plaintiff was not a party to the eviction orders that the Defendant is relying on to demolish the property on Plot No. 757A; that the Defendant did not produce any documents in ELC. No. 204 of 2016 to prove ownership of the suit land and that the Plaintiff has shown that he has a right to be heard in respect of the suit land.

8. The Defendant's advocate submitted that the suit land was hived from the Defendant's land and that the demolition having already taken place, an order of injunction cannot issue.

9. The Plaintiff's claim is that Plot No. 757A was part of Plot No. 757 within Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited (*the Society*) which he bought from Manthei Muema who was member No. 1714 of the Society. The Plaintiff exhibited the Transfer Form dated 19th June, 2017 which shows that "*Plot No. 757A part of 757*" was transferred by Manthei Muema to the Plaintiff.

10. The Defendant on the other hand has deponed that his plot is number 757 which he purchased from Peter Kivanga Mutiso, who was Member No. 562 of the Society. When Wayua Muema purported to trespass on the suit land, the Defendant sued him in Machakos ELC. No. 204 of 2016. The said matter proceeded ex-parte and a Judgment was delivered by this court on 23rd February, 2018. In the said Judgment, the court ordered for the eviction of Wayua Muema from Plot No. 757.

11. It is on the basis of the orders of this court in Machakos ELC. No. 204 of 2016 that the Defendant demolished the structures that were standing on Plot Number 757 (*which includes plot number 757A*). Although it is not clear if indeed the Defendant in Machakos ELC. No. 204 of 2016 (*Wayua Muema*) is the same person who sold to the Plaintiff Plot No. 757A (*Manthei Muema*), it is obvious that by the time the Plaintiff purportedly purchased the suit land, there was pending in this court ELC. No. 204 of 2016.

12. Considering that this suit is dealing with a portion of land that was the subject of Machakos ELC. No. 204 of 2016, the Plaintiff should have moved the court in Machakos ELC No. 204 of 2016 to set aside or stay its Judgment. Indeed, in view of the existence of the orders in ELC. No. 204 of 2016, it will be contradictory and a mockery of justice for this court to issue the orders of injunction as claimed.

13. In any event, the photographs annexed on the Plaintiff's Affidavit shows that the impugned actions have been completed pursuant to a valid court order. In the circumstances, and in view of the existence of the orders in Machakos ELC. No. 204 of 2016, I find that the orders of injunction cannot issue.

14. For those reasons, I dismiss the Application dated 21st June, 2018 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 14TH DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE