



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 286 OF 2017

MARGARET NZILANI MUSAU.....PLAINTIFF

VERSUS

JOSEPH MBAU KIOKO.....DEFENDANT

RULING

1. In the Application dated 4th July, 2017, the Defendant is seeking for the following orders:

a. That an order of injunction do issue restraining the Defendant, his agents, servants and contractors, and each and every one of them, from entering land parcel no. Mbiuni/Makiliva/387 and commencing any form of works and/or developments thereon, selling, charging, transferring or in any other way dealing with the said parcel of land or interfering with the Plaintiff's peaceful occupation and use thereof until the suit herein is heard and determined.

b. That costs of this Application be paid by the Defendant/Respondent.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that a parcel of land known as Mbiuni/Makiliva/387 is registered in the name of the Defendant; that she (*the Plaintiff*) has occupied the suit land exclusively since the year 1970 after purchasing it and that she filed a claim against the Defendant in Land Disputes Tribunal (*Machakos*) in Tribunal Case No. 20 of 2001.

3. When she lost the case in the Tribunal, the Plaintiff has deponed that she filed an Appeal with the Appellate Committee in Appeal No. 161 of 2001; that the Appellate Committee awarded the land to her and that the Defendant never appealed to the High Court against the decision of the Appellate Committee.

4. The Plaintiff finally deponed that the Defendant has threatened to evict her from the suit land and that the orders of injunction should issue.

5. In reply, the Defendant deponed that he is the registered proprietor of the suit land which he purchased from his late father Kioko Kamau in 1979; that the Plaintiff has trespassed on the suit land and that the Plaintiff was ordered in Machakos SPMCC No. 108 of 2001 to cease trespassing on the suit land.

6. According to the Defendant, the Plaintiff's husband sued his father in Machakos HCCC No. 153 of 1981 which suit he withdrew and that the Defendant's late husband efforts to revive the suit was dismissed by the court of 6th July, 2010.

7. The Defendant finally deponed that he sold the suit land to Ambrose Musau Wambua in 2001; that the proceedings before the Provincial Land Appeal's Tribunal were a nullity because this court was already ceased of the matter and that this suit is *res judicata* and should be struck out.

8. Both the Plaintiff's and the Defendant's advocates filed their submissions which I have considered. I have also considered the authorities filed by the parties in this matter.

9. The Land Certificate annexed on the Plaintiff's Affidavit shows that the suit land was registered in favour of the Defendant on 31st October, 1980. The Plaintiff has annexed on her Affidavit the proceedings of the Mwala District Land Tribunal held on 13th July, 2001. The Tribunal found that it is the Defendant who was entitled to the suit land. This decision of the Tribunal was overturned by the Provincial Land Appeal Committee in Appeal Case No. 161 of 2001.

10. It would appear that after the decision of Appellate Committee in Appeal Case No. 161 of 2001, or around the same time, the Plaintiff herein filed another matter in Machakos CMCC No. 108 of 2001. An order has been annexed on the Defendant's Affidavit showing that the court ordered that the Plaintiff should be evicted from the suit land.

11. It is not clear to this court how the order of 14th November, 2006 in Machakos CMCC No. 108 of 2001 was issued in view of the decision of the Appellate Committee which had decreed that the land should be given to the Plaintiff. Indeed, it is not clear if the said suit has been heard and a Judgment issued.

12. The Defendant has not denied that it is the Plaintiff who is in possession of the suit land. The evidence before me shows that the Appellate Committee made a finding that the suit land belongs to the Plaintiff. However, in view of the order that was made in favour of the Defendant in Machakos CMCC No. 108 of 2001, this court can only arrive at a conclusion as to the proprietorship of the suit land after hearing both sides.

13. Considering that it is the Plaintiff who is in possession of the suit land, she will suffer irreparable damage if she is evicted from the land at this stage. Indeed, the balance of convenience tilts in her favour.

14. For those reasons, I allow the Notice of Motion dated 4th July, 2017 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7TH DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE