



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 69 OF 2015

DOMINIC KYULI KATIKUPLAINTIFF/APPLICANT

VERSUS

JOYCE MUKULU MUKUNADEFENDANT/RESPONDENT

RULING

1. The two Applications before me are dated 5th March, 2015 and 12th March, 2015.
2. In the Application dated 5th March, 2015, the Plaintiff is seeking for the following reliefs:
 - a. That an interim order of injunction be issued restraining the Defendant and/or his agents/servants/employees from entering into or in any way interfering with the Applicants' use, enjoyment, possession and occupation of the parcel of land known as Masii/Mbaani/40 pending hearing and determination of the main suit.*
 - b. That the costs of this Application be borne by the Defendants.*
 - c. Any other and/or further relief that this Honourable Court may deem fit.*
3. The Application is supported by the Plaintiff's Affidavit in which he has deponed that he is the Chairman of Mutua Katiku's family; that the suit property is land belonging to the family of Mutua Katiku; that the Defendant is not a member of the family and that the Defendant has encroached on the suit land.
4. In her Replying Affidavit, the Defendant deponed that the Plaintiff is his brother-in-law since 31st January, 1990 when she wedded his brother, the late Bernard Kolonzo Katiku; that she established her matrimonial home on the suit land and that by the time the late Katiku Mutua died, she had established the said matrimonial home on the land.
5. In the Notice of Preliminary Objection dated 12th March, 2015, the Defendant has averred that the suit property is registered in favour of a deceased person; that the Plaintiff is not the legal representative of the registered proprietor and that the Application and the suit are incompetent and an abuse of the court's process.
6. The Plaintiff's advocate submitted that under the principle of *jus tertii*, the Defendant cannot justify entitlement to possessory rights over the suit land; that a legal owner may successfully assert the principle *jus tertii* and that the Defendant cannot rely on that principle because she is not the agent of the legal owner.

7. The Plaintiff's counsel submitted that as the son of the deceased, it is the Plaintiff who is entitled to the suit property and that he has the *locus standi* to institute the suit.
8. The Defendant's advocate submitted that the Plaintiff has not demonstrated that he is the deceased's legal representative; that the Application and the suit offends the provisions of Section 82 of the Law of Succession Act and that the Plaintiff does not have the legal capacity to file the suit.
9. In his Plea, the Plaintiff averred that parcel of land known as Masii/Mbaani/40 is registered in the name of Katiku Mutua (*deceased*); that he has been in occupation of the suit land with his brother and that the Defendant trespassed on the land in the year 2015.
10. According to the Affidavit of the Plaintiff, the Defendant does not have any legal interest in the suit property.
11. The Defendant on the other hand deposed that she was married to the Plaintiff's brother and that she has a matrimonial home on the suit property.
12. The deposition by the Defendant that she has a matrimonial home on the suit property has not been rebutted by the Plaintiff. Indeed, the Plaintiff has not rebutted the deposition by the Defendant that the said matrimonial home is also the home of the Defendant's four (4) children.
13. Consequently, the Plaintiffs' assertion that the Defendant trespassed on the suit property in the year 2015 has not been proved.
14. In any event, the suit property is registered in the name of the late Katiku Mutua.
15. According to the certificate of official search, the land certificate was issued to the late Katiku Mutua on 11th May, 1977.
16. Although the Plaintiff has deposed that he is one of the sons of the late Katiku, there is no evidence of such an assertion.
17. In any event, the mere fact that the Plaintiff is the son of the late Katiku does not in itself give him the legal standing to file and prosecute this suit without the letters of administration, and more so against another member of the family of the deceased.
18. Having admitted that the suit property is registered in the name of the late Katiku Mutua, it is only the personal representative of the Estate of the late Katiku that can enforce a suit, which survived the death of the deceased (*See Section 82 of the Laws of Succession Act*).
19. The Plaintiff, not being the executor or administrator of the Estate of the late Mr. Katiku, has no legal capacity to file this suit.
20. Both the suit and the Application were filed contrary to the law and are therefore incompetent and bad in law.
21. For those reasons, the Defendant's Notice of Preliminary Objection dated 12th March, 2015 is allowed. The Plaintiff's entire suit and the Application dated 5th March, 2015 are hereby struck out with costs to the Defendant.

DATED AND DELIVERED AT MACHAKOS THIS 24TH DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE