



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 238 OF 2017**

**ONESMUS MUSYOKI.....1<sup>ST</sup> PLAINTIFF**

**JENNIFER K. MUSYOKI .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MATHIAS KITIVI .....1<sup>ST</sup> DEFENDANT**

**JAMES KITIVI .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In their Application dated 22<sup>nd</sup> May, 2017, the Plaintiffs are seeking for the following orders:

***a. That an order of temporary injunction do issue restraining the 1<sup>st</sup> Defendant/Respondent his servants and/or agents from encroaching, alienating and/or interfering with Land Parcel No. Machakos Town Block 3/797 by digging any grave and/or burying the remains of her deceased wife on 24<sup>th</sup> May, 2017 and/or committing any other acts of waste therein pending the hearing of this Application interparties.***

***b. An order of permanent injunction do issue to the 1<sup>st</sup> Defendant/Respondent his servants and/or agents from interfering with Land Parcel No. Machakos Town Block 3/797 by committing any acts of waste therein by alienating and/or putting any illegal structures therein until this case is heard and determined.***

***c. The OCS Machakos Police Station to oversee the compliance of this order.***

***d. Costs of this Application be provided for.***

2. The Application is supported by the 1<sup>st</sup> Plaintiff's Affidavit who has deponed that the Plaintiffs are the registered proprietors of a parcel of land known as Machakos Town Block 3/797 (*the suit land*); that they purchased the suit land from Kimuyu Mbondo and that they have been enjoying quiet occupation of the land.

3. It is the Plaintiffs' case that in the year 2015, the Defendants entered the suit land and started committing acts of waste; that the Respondents are squatters on the suit land and that the Defendants had promised to vacate the land but never did so.

4. According to the Plaintiffs, the 1<sup>st</sup> Defendant is threatening to bury his wife on the suit property and

that the 1<sup>st</sup> Defendant does not have any known rights on the suit land.

5. In response, the 1<sup>st</sup> Defendant deponed that they are the sons of Nzisa Kitivi who was a co-allotee of plot number 2085 in Katelembo Athiani Muputi Co-operative Society Limited; that their mother settled on a portion of plot number 2085 in 1989 and that they have lived on the said land since then.

6. The Defendants deponed that the 1<sup>st</sup> Defendant's first wife and their child who died in 1990 were buried on the said portion and that the Plaintiff only started occupying his father's portion of land in 1999.

7. It is the Defendants' case that when their mother died in the year 2006, she was buried on the suit land and that following incessant disputes between the Plaintiffs and the Defendants, they requested Joseph Kimuyu Mbondo to demarcate the land and hand to them their portion of land, which was done vide the agreement of 31<sup>st</sup> May, 2014.

8. According to the 1<sup>st</sup> Defendant, the land dispute was escalated to the Katelembo Land Task Force and that the 1<sup>st</sup> Plaintiff acknowledged in writing that the Defendants have an interest in the suit land.

9. Joseph Kimuyu Mbondo filed a Replying affidavit in which he deponed that he is a member of Katelembo Athiani Muputi Co-operative Society Ltd; that Nzisa Kitivi was his shadow member; that when he was allocated plot number 2085 measuring 2.04 acres, he was supposed to share the land equally with Nzisa Kitivi and that Nzisa Kitivi settled on the land with her family in the year 1989.

10. It is the deposition of Kimuyu Mbondo that in 1999, his son, the 1<sup>st</sup> Plaintiff, requested to put his homestead on his portion of land which he agreed and that he reminded the 1<sup>st</sup> Plaintiff that the other portion belonged to Nzisa's family.

11. Kimuyu Mbondo finally deponed that due to numerous disputes between his son's wife and the family of Nzisa, he handed to Nzisa's family their portion of land vide an agreement dated 31<sup>st</sup> May, 2014 and that he was not aware of the agreement dated 20<sup>th</sup> October, 2014 which the Plaintiff is relying on.

12. According to Mr. Kimuyu, the Plaintiffs were issued with a Title Deed for the entire parcel of land illegally.

13. In his Further Affidavit, Mr. Kimuyu Mbondo deponed that all along, his intention was to sub-divide the land between his son and Nzisa's family, which land is already demarcated by way of sisal plants and that he signed the transfer documents to actualize the said sub-division.

14. According to Mr. Kimuyu, his son duped him into transferring the entire parcel of land to him.

15. The advocates for both parties appeared before me on 29<sup>th</sup> June, 2017 and made oral submissions.

16. The Plaintiffs' advocate submitted that the Plaintiffs are the registered proprietors of the suit land; that they acquired the land after buying it; that after the land was transferred to them, they were issued with a membership card and a Title Deed and that the rights of Mr. Kimuyu Mbondo were extinguished when he transferred the land to them.

17. The Plaintiffs' counsel submitted that all along, the Plaintiffs were not aware that the Defendants were in occupation of a portion of the suit land until when the beacons were fixed; that there is no evidence to show that the Defendants' mother was a shadow member of the Society and that Kimuyu Mbondo is not a party to this suit and his Affidavits should be expunged from the record.

18. The Defendants' advocate submitted that Joseph Kimuyu Mbondo is well versed with the dispute herein; that his Affidavits should not be expunged from the record; that both parties were aware of the

portions that they were occupying and that the 1<sup>st</sup> Plaintiff admitted in writing the Defendants' interest in the suit land.

19. The Defendants' counsel submitted that Joseph Kimuyu only transferred half of the suit land to the Plaintiffs in the year 2014 and that both parties knew their boundaries.

20. It is not in dispute that on 14<sup>th</sup> January, 2016, parcel of land known as Machakos Town Block 3/797 was registered in favour of the Plaintiffs.

21. It is also not in dispute that parcel of land known as Machakos Town Block 3/797 is the same as Plot No. 2085 which was allocated to Kimuyu Mbondo by Katelembo Society.

22. According to the Plaintiffs, the suit property was transferred in their names after purchasing it from Kimuyu Mbondo vide an agreement dated 20<sup>th</sup> October, 2014.

23. The evidence before this court shows that Kimuyu Mbondo, who is the father of the 1<sup>st</sup> Plaintiff, transferred the land that was allocated to him by Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited (*the Society*).

24. However, according to Mr. Kimuyu Mbondo, he only allowed his son to occupy a portion of the suit land and not the whole land.

25. In the Affidavits of Mr. Kimuyu and the Defendants, it has been deposed that the Defendants' mother occupied a portion of the suit land in 1989 and when she died, she was buried on the said portion.

26. The 1<sup>st</sup> Plaintiff has not denied that by the time the suit land was transferred to them in the year 2016 the Defendants were already in occupation on a portion of the said land.

27. Indeed, the Defendants have annexed on their Affidavit Summons from the Society addressed to the 1<sup>st</sup> Plaintiff in respect to the dispute over the same land between the 1<sup>st</sup> Plaintiff and the Defendants.

28. In the said Summons, the Society's Task Force was investigating the Title Deed that had been issued to the Plaintiffs in respect to the entire parcel of land.

29. It would appear that even after being served with the Summons to appear before the Task Force, the Plaintiffs did not honour those Summons for the purpose of resolving the dispute.

30. The Defendants have also annexed on their Affidavit an agreement dated 31<sup>st</sup> May, 2014 that was signed by the 1<sup>st</sup> Plaintiff and the Defendants. The said agreement was witnessed by Kimuyu Mbondo.

31. In the said agreement, the 1<sup>st</sup> Plaintiff acknowledged the Defendants' contention that the family of Nzisa Kitivi has an interest in the suit property notwithstanding the fact that the whole land was registered in favour of the Plaintiffs.

32. Considering that the Plaintiffs have not denied that the Defendants and the family of Nzisa has been on the portion of the suit land since 1989, it cannot be true that they only realised that the said occupation was on the land they purchased after the beacons were established.

33. I say so because the Plaintiffs must have known the land they were purchasing extended only upto where the Defendants' land was.

34. Indeed, the Plaintiffs have not denied that the Defendants buried their mother and siblings on the suit land way after they had purchased their portion and that by the time the Title Deed was issued in their names, the Defendants were in occupation of a portion thereof.

35. Considering that Kimuyu Mbondo has stated in his Affidavit that he only ceded to the Plaintiffs' half a portion of the suit land, and in view of the undisputed deposition by the Defendants that their family has been in occupation of the other half since 1989 and have even buried their siblings on the land, the Defendants' submissions that they have a right over the portion they are occupying is not frivolous.

36. Indeed, the deposition by Kimuyu Mbondo that the late Nzisa was a shadow member of the Society, together with the two agreements of 31<sup>st</sup> May, 2014, shows that the Title Deed that was issued to the Plaintiffs could have been issued by misrepresentation.

37. Where it is proved that a Title Deed has been issued by misrepresentation, Section 26(1) of the Land Registration Act allows a party to challenge such a title.

38. In the circumstances I find and hold that the Plaintiffs have not established a *prima facie* case with chances of success in respect to the portion of the suit land that the Defendants are occupying.

39. For those reasons, I dismiss the Application dated 22<sup>nd</sup> May, 2017 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12<sup>TH</sup> DAY OF JULY, 2017.**

**O.A. ANGOTE**

**JUDGE**