



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC.NO.125 OF 2016**

ANGELA MUENI MWANDIA.....PLAINTIFF/APPLICANT

-VERSUS-

JOSEPHAT KAVATI MUIA .....1<sup>ST</sup> DEFENDANT/RESPONDENT

ALLOYS MUTISYA MUIA.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

The matter for determination is the Plaintiff/Applicant's *Notice of Motion* application dated **15<sup>th</sup> February 2016**, brought under Order 40 Rule 1, 2,4 & 8 and Order 51 Rule 1 of the Civil Procedure Rules, Section 1, 1A, 1B, 3, 3A, 63(c) and (e) of the Civil Procedure Act.

The Plaintiff/Applicant has sought for the following orders:-

*i. Spent*

*ii. Spent*

*iii. That pending the hearing and determination of this suit, the Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from entering, remaining upon, grazing their cattle, farming or in any way interfering with the Plaintiff's quiet possession of property known as Machakos/Mua Hills/492.*

*iv. Costs of this application to be provided for.*

The application is based on the grounds stated on the face of the application and on the **Supporting Affidavit** of **Angela Mueni Mwandia**, the Plaintiff/ Applicant herein. The grounds in support are:-

*a. That the Plaintiff purchased property Machakos/Mua Hills/492 from Maundu Muia and Ancient Mailu Muia and was issued with a title deed for the suit property.*

*b. That the Plaintiff's attempts to fence her property have been met by resistance from the Defendants who chased the Plaintiff away and prevented her access to the suit property.*

**c. That the Defendant had without authority and consent entered and invaded the suit property by grazing their cattle and planting crops therein. Demands to stop trespassing went unheeded and the Defendants threatened to cause physical harm on the Plaintiff.**

**d. The illegal actions of the Defendants have prevented the Plaintiff's quiet possession of the suit property.**

**e. That the Defendants/Respondents have threatened to continue trespassing on the suit property if not restrained by the Honourable Court.**

The Plaintiff/Applicant's case is that she **purchased** the property **Machakos/Mua Hills/492**, but has been unable to enjoy quiet possession of her investment due to the actions of the Defendants/Respondents. It is her contention that the Defendants/Respondents without any justifiable reasons denied her access to the suit property by chasing her away anytime she sought to fence the suit property. Further that the Defendants/Respondents have without authority or consent trespassed on the suit property by grazing their cattle and planting crops. Despite demands to cease trespassing the Defendants/ Respondents continue to do so and have remained hostile towards the Plaintiff/Applicant, threatening physical harm on her.

The application is **opposed** by both Defendants/Respondents. The 1<sup>st</sup> Defendant/Respondent, **Joseph Anthony Muia** swore a Replying Affidavit on **14<sup>th</sup> March 2016**, on behalf of both Defendants/Respondents. He avers he is the registered owner of the property **Machakos/Mua Hills/392** from which **Machakos/Mua Hills/492** was subdivided from. He alleges that the subdivision was a subject of **Machakos CMCC No.415 of 2014** and **Machakos High Court Appeal Number 205 of 2015** which are attached. The Defendants therefore raise a Preliminary Objection that this matter is subjudice. Further, he avers that he and the 2<sup>nd</sup> Defendant/Respondent are in occupation of the suit property and that orders sought in this application if issued would amount to an eviction. The Defendants/Respondents denied claims that they were hostile to the Plaintiff/Applicant and area Chief.

The Plaintiff/Applicant herein filed a further affidavit dated **6<sup>th</sup> April 2016**, and averred that the claim by the Defendants/Respondents that **they hold** the title for the property **Machakos/Mua Hills/392** are not correct. She claims that the correct position is that the title for property known as **Machakos/Mua Hills 392**, was closed on **28<sup>th</sup> April 2013**. The two subdivisions bore properties **Machakos/Mua Hills/492**, which the Plaintiff/Applicant owns and **Machakos/Mua Hills 491**. She further averred that she was not party to **Machakos CMCC No.415 of 2014**, and that as far as she knew the case was filed by someone who no longer has any interest in the property. She claimed that **Machakos High Court Civil Appeal Number 205 of 2015**, does not fetter this Court's jurisdiction to hear and determine this case. She pointed out that the Defendants/Respondents were not in occupation of the suit property but rather were in possession of **Machakos/Mua Hills/491**. She reiterated that she had demonstrated that she was the registered owner of the suit property and that she should enjoy quiet possession of the same.

The application was **canvassed** by way of **Written Submissions** which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. The Court will make the following findings;

There is no doubt that suit property herein **Machakos/Mua Hills/492** is a resultant subdivision of **Machakos/Mua Hills/392**, which was initially registered in the name of **Joseph Anthony Muia**, on **20<sup>th</sup> June 1996**.

There is also no doubt **LR.No.Machakos/Mua Hills/392**, was a subject of **Machakos Land Dispute Tribunal Case no.28 of 1997** wherein a **Decree** of the Court was **issued** to the effect that **Machakos/Mua Hills/392** be **divided** into equal portions for the **two parties**- Applicant and Respondent. It is not clear whether the said Decree was appealed against. However, it is evident that the said **Machakos/Mua Hills/392**, was subdivided into **Machakos/Mua Hills/492**, for **Maundu Muia Ndua** and **Machakos/Mua Hills/493**, for **Josephat Kavati Muia** and **Alloys Mutisya Muia**.

It is also evident that on **15<sup>th</sup> December 2012**, the said **Maundu Muia Ndua** and **Ancent Mailu Muia** sold their parcel of land **Machakos/Mua Hills/492**, to the Plaintiff herein vide a Sale Agreement attached to the instant application. It is also evident that the Plaintiff/Applicant got registered as the proprietor of the suit property on **18<sup>th</sup> June 2013**, as evident from the title deed attached to the application.

Further, the **Chief Magistrate's Court** at **Machakos** issued a **temporary order of injunction** against the Defendants/Respondents in **CMCC No.415 of 2014** and restrained the Defendants/Respondents from interfering with the suit property **Machakos/Mua Hills/492**.

The Plaintiff/Applicant has alleged that the Defendants/Respondents have prevented her from using her parcel of land even after purchasing the same from the previous owner **Maundu Muia Ndua**. The Defendants/Respondents have alleged that they have been in possession of the suit land since time in memorial.

However, from the above history, it is evident that the suit property which is a resultant subdivision of **Machakos/Mua Hills/392**, was owned by **Maundu Muia Ndua** and **Ancent Mailu Muia** who later sold it to the Plaintiff/Applicant. The Plaintiff/Applicant's title deed has not been cancelled or revoked. As provided by Section 26(1) of the Land Registration Act, the Plaintiff/Applicant is absolute and indefeasible owner of the said parcel of land. Section 26(1) provides that:-

***"The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-***

***a. On the ground of fraud or misrepresentation to which the person is proved to be a party: or***

***b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

Since the Plaintiff's/Applicant's title has not been cancelled, then she is the absolute and indefeasible owner of the suit property and she is entitled to enjoy her rights as proprietor as provided by Section 24(a) of the Land Registration Act. Her right can only be defeated by operation of law as provided by Section 25(1) of the Land Registration Act.

Since the Plaintiff's/Applicant's title has not been impugned yet, the Court finds that she has established that she has a prima-facie case with probability of success as was held in the case of **Giella..Vs..Cassman Brown & Co.Ltd 1973 EA 358**.

On the second limb, the Court finds that the Plaintiff/Applicant has spent about **Kshs.5.1 Million** on purchase of the suit land. She has not been allowed to utilize the same by the Defendants/Respondents. The Court finds that she continues to suffer loss which might not be adequately compensated by an award of damages.

On the balance of convenience, the Court finds that it tilts in favour of the Plaintiff/Applicant who is the title holder of the suit property.

For the above reasons, the Court finds that the Plaintiff's/Applicant's **Notice of Motion** dated **15<sup>th</sup> February 2016**, is **merited**. The same is **allowed** entirely in terms of **prayer no.4** with **costs being in the cause**.

Further, the Court finds that this **suit property falls under the jurisdiction of Machakos Environment and Land Court**. Consequently, the **Court directs** that this case be **transferred to Machakos, Environment and Land Court** forthwith for final hearing and determination.

It is so ordered.

**Dated, Signed and Delivered at NAIROBI this 31<sup>st</sup> day of August, 2017.**

**L. GACHERU**

**JUDGE**

**31/8/2017**

In the presence of

M/S Kwene holding brief for Mr. Anzali for Plaintiff/Applicant

Mr. Mageto holding brief for Mr. Musya for Defendants/Respondents

Catherine - Court clerk.

**L. GACHERU**

**JUDGE**

**31/8/2017**