



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 204 OF 2015

MICHAEL MAKUMBI.....1ST PLAINTIFF
JOSEPH MUTUKO KIMEU.....2ND PLAINTIFF
SIMION NDETI KIMEU.....3RD PLAINTIFF
ONESMUS MUSAU.....4TH PLAINTIFF
TITUS MASILA KIMEU.....5TH PLAINTIFF
LAWRENCE MBITHI.....6TH PLAINTIFF
CHRISTOFER MUTINDA.....7TH PLAINTIFF

VERSUS

SADIQUE ENTERPRISES.....1ST DEFENDANT
HYLINE KWAMBOKA.....2ND DEFENDANT
ISSAC KIMEU MUTUKU.....3RD DEFENDANT

RULING

1. In the Notice of Motion dated 16th September, 2015, the Plaintiffs are seeking for the following orders:

a. That the Honourable Court be pleased to restrain the 1st and 2nd Defendants/Respondents from evicting the person living on the said parcel of land Mbooni/Ilani/40 and their families pending the hearing and determination of the Application.

b. That the court be pleased to compel the 1st and 2nd Respondents/Defendants who are in possession of the Original Title of land parcel No. Mbooni/Ilani/40 to hand over the said title to the Plaintiffs herein.

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

2. The Application is premised on the grounds that the 1st Respondent, acting at the behest of the 2nd Respondent, served upon the Plaintiffs a notification of intention to sell the suit land; that the intended

sell is illegal because the 3rd Respondent is not the actual owner of the suit land and that an order of injunction should issue.

3. In the Affidavit, the 1st Plaintiff deponed that he is the son of Issac Kimeu Masila who had three (3) wives; that his father died on 21st February, 2001 while his mother died in the year 2009; that at the time of his death, their father owned the suit land and that each of the Plaintiffs had been allocated their respective portions of land in the suit land.

4. According to the 1st Plaintiff, the suit land is the home of seven (7) families and that the 3rd Respondent's portion measures 8.8 acres out of the 28.8 acres.

5. The Plaintiffs' case is that the Original Title Deed to the suit land went missing upon the death of their mother and that unknown to them, the 3rd Respondent had given out the original title to the 2nd Defendant as security for settling a debt.

6. It is the Plaintiffs' case that the 1st Defendant has no right to dispose of the said land to recover the 2nd Defendant's debt.

7. In response, the 2nd Defendant deponed that the 3rd Defendant owes him Kshs. 442,000; that his family members agreed to repay the said debt when the 3rd Defendant was charged in Criminal Case No. 562 of 2013, Mavoko, and that the family members declined to honour the said agreement.

8. The Plaintiffs and the advocates filed their respective submissions and authorities which I have considered.

9. It is not in dispute that the suit property is registered in favour of Issac Kimeu Masila, the Plaintiffs' father.

10. It is also not in dispute that the said Issac Kimeu Masila died on 21st February, 2001.

11. The 1st and 2nd Defendant's claim is that the 2nd Plaintiff and the 3rd Defendant handed over to them the title document in respect of the suit land as security in case the 3rd Defendant defaulted in paying the debt of Kshs. 442,000.

12. I have perused the certificate of official search in respect of the suit land. The said search does not indicate that a formal or an informal charge was ever registered against the suit land by the 2nd Defendant.

13. Even if the 2nd Defendant was holding the Title Deed in respect to the suit land on account of money owed to him by the 3rd Defendant, he cannot purport to auction the said property considering that the registered owner never consented to have the suit land auctioned in the event the 3rd Defendant defaulted in repaying the loan.

14. In any event, by the time the 2nd Defendant purported to take the original Title Deed as security, the registered proprietor of the suit land had already died.

15. Section 45 of the Law of Succession provides that no person shall, for any purpose, take possession or dispose of or otherwise intermeddle with, any free property of a deceased person except as authorized by the Act.

16. In view of the above provision of the law, and considering that the suit property was not charged, the 1st and 2nd Defendants' option is to sue the 3rd Defendant for recovery of the said debt. They cannot purport to sell the suit property which ought to be administered by the legal representative of the Estate of

the deceased.

17. For those reasons, I find and hold that the Plaintiffs have established a prima facie case with chances of success.

18. The Application dated 16th September, 2015 is therefore allowed as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2017.

O.A. ANGOTE

JUDGE