



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CONST. PETITION NO. 1 OF 2017

KAMENE KALEVE.....1ST PETITIONER

KATHAMA KALEVE.....2ND PETITIONER

VERSUS

PETER MUSYOKI KATHAMA.....1ST RESPONDENT

MARY MUTILE MUSYOKI.....2ND RESPONDENT

NORAH KATINDA MUSYOKI.....3RD RESPONDENT

MULUMO NZAI4TH RESPONDENT

RULING

1. In the Notice of Motion dated 19th January, 2017, the Petitioners are seeking for the following orders:

a. That the court file in Kitui Chief Magistrate's Court Civil Case No. 336 of 2014: Peter Musyoki Kathama vs. 1. Kamene Kaleve and 2. Kathama Kaleve be and is hereby transferred to this Honourable Court.

b. That pending the hearing of this instant Application inter partes, a conservatory order be and is hereby issued restraining and/or preventing the Respondents jointly and severally by themselves or through their agents and/or servants or by any persons claiming to act under them from entering, occupying or trespassing into the Petitioners/Applicants' parcel of land known as Mutonguni/Kauwi/750 situated in Kabati, Kitui West Sub-County in Kitui County.

c. That pending the hearing and full determination of this Petition an interim injunction be and is hereby issued restraining the Respondents jointly and severally by themselves or through their servants agents or any persons claiming to act under them from commencing or preparing to commence construction works on the said parcel of land known as Mutonguni/Kauwi/750 situated in Kabati, Kitui West Sub-County in Kitui County.

d. That the Officer Commanding Police Station, Kabati Police Station Kitui be and is hereby ordered to maintain and supervise peace at land parcel No. Mutonguni/Kauwi/750 when and if the need arose.

e. That the Respondents be and are hereby jointly and severally condemned to pay costs of this Petition.

f. Such other orders as this Honourable Court shall deem just.

2. In his Supporting Affidavit, the 1st Petitioner has deponed that the 1st Respondent is a step brother to her late husband, Kaleve Kathama; that the 2nd and 3rd Respondents are his adult daughters while the 4th Respondent was his employee.
3. It is the 1st Petitioner's case that she was appointed the administrator of the Estate of her late husband on the 23rd January, 2015 and that parcel number Mutonguni/Kauwi/750 (*the suit land*) was registered in the name of the deceased.
4. The 1st Petitioner deponed that on 3rd January, 1983, her husband purchased a portion of Mutonguni/Kauwi/758 measuring 1.5 acres from the 1st Respondent and that later on, he sued his late husband in respect to the said sale in Kitui SRMCC Nos. 223 of 1997 and when he lost, he lodged an appeal in Machakos High Court Civil Appeal No. 160 of 2006 which was also dismissed on 29th September, 2014.
5. According to the 1st Petitioner, the 1st Respondent sued her again in Kitui CMCC No. 336 of 2014 and that the said suit is *res judicata*.
6. It is the Applicant's deposition that the 1st Respondent's claim in the pending Kutui Civil Suit N0. 336 of 2014 is in respect to Mutonguni/Kauwi/758 and is not related to Plot No. 750 and that the Respondents trespassed on the suit land on 24th December, 2016.
7. The person who witnessed the Agreement of 3rd January, 1983, Samson Ngui Kathama swore an Affidavit in support of the Application.
8. According to the said witness, the agreement was in respect of 1.5 acres which was hived from the 1st Respondents land being Plot No.758 which boarded the suit land.
9. The Affidavits of the other witnesses to the Agreement and the clan members were annexed on the Application. I have considered those Affidavits.
10. In response, the 1st Respondent deponed that he leased a portion of Plot No. 758 to the late Hannington Kaleve Kathama; that he never entered into any lease agreement with the late Hannington; that the High Court annulled the agreement between himself and the late Hannington and that even after the said annulment, the Applicants continued grazing on the portion of land number 758 whereafter he sued them in Kutui CMCC No. 336 of 2014 seeking eviction orders.
11. According to the 1st Respondent, Kitui CMCC No. 336 of 2014 is not *res judicata* and that he filed the suit so as to enforce the Judgment of the High Court.
12. The Applicants' and the Respondents' advocates filed submissions which I have considered.
13. In the Petition and the Notice of Motion before me, the Petitioners have averred that the late Hannington purchased 1.5 acres from the 1st Respondent's land being parcel number Mutonguni/Kauwi/758 which boarded Plot No. 750 belonging to the deceased. According to the Petitioners, the said portion was added on Plot No. 750.
14. The Petitioner is seeking for a declaration that parcel number 758 does not exist; that Kitui CMCC No. 336 of 2014 is *res judicata* and should be dismissed and that the Respondents have violated their rights to privacy and to own property.
15. In the meantime, the Petitioners are seeking for an order to transfer Kitui CCMC No. 336 of 2014 to this court and for an injunctive order.

16. Although the Petitioners are seeking for the transfer of Kitui CMCC No. 336 of 2014, no reason has been given as to why the said file should be transferred to this court.

17. Indeed, Section 26(3) of the Environment and Land Court Act mandates the Chief Justice to appoint certain Magistrates to preside over cases involving environment and land matters. I am aware that the Chief Magistrate's court in Kitui has been gazetted to hear land disputes in accordance with its pecuniary jurisdiction. This position has been reiterated by the Court of Appeal in the case of ***Law Society of Kenya, Nairobi Branch vs. Malindi Law Society & others (2017) eKLR.***

18. In their Affidavits, the Petitioners have averred that the land that was curved from the 1st Respondent's land is what is in dispute.

19. Indeed, the Petitioners have conceded that Kitui CMCC No. 336 of 2014 should not have been filed because it is *res judicata*.

20. Considering that no basis has been laid as to why Kitui CMCC No. 336 of 2014 should be transferred to this court, the issue as to whether indeed that suit is *res judicata* or not should be raised by the Petitioners in that matter.

21. I have perused the Petition and the Application and I have come to the conclusion that the matters raised in the entire Petition, including the issue of whether the Petitioners are entitled to the injunctive order on the ground that there is already a final Judgment can and should be raised in Kitui CMCC No. 336 of 2014 and not by way of an independent Petition.

22. For those reasons, I find that the filing of the current Petition and the Notice of Motion to be an abuse of the court process. I therefore dismiss the Application dated 19th January, 2017 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF NOVEMBER, 2017.

O.A. ANGOTE

JUDGE