



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 239 OF 2017

NGALA MUSAU.....PLAINTIFF

VERSUS

WAMBUA SYENGO.....DEFENDANT

RULING

1. In his Application dated 23rd May, 2017, the Plaintiff is seeking for the following orders:

a. That an order of injunction do issue pending hearing and determination of the suit herein restraining the Defendant, his agents and/or servants from entering parcel of land known as Plot No. 22 Kitui Municipality (038(81)22) and constructing structures thereon or in any other way interfering with the said parcel of land.

b. That costs of this Application be paid by the Defendant/Respondent.

2. The Application is based on the ground that the Plaintiff is the legal owner of the suit land having purchased it from Davis Kamuti Mwangangi; that in the year 2017, the Defendant illegally encroached on the suit land and that the Defendant has refused to stop the acts of waste on the suit land.

3. According to the Plaintiff, vide his letter dated 4th April, 2017, the Defendant declined to stop the ongoing construction alleging that he was developing his own plot.

4. In response, the Defendant deponed that he is not developing Plot No. 22, Kitui Municipality, but Plot No. 44; that he bought Plot No. 44 from one Alfred Muema Kitheka by an Agreement dated 5th February, 2016 and that Mr. Kitheka had been allocated the land by the then Municipal Council of Kitui.

5. It is the Defendant's deposition that he was given approval to develop the suit land and that as of 26th May, 2017, he had made substantial development for the land.

6. In the Supplementary Affidavit, the Plaintiff deponed that Plot No. 22 is on the ground in the same position as the alleged plot number 44.

7. According to the Plaintiff, plot number 22 was allocated to the original owner in 1993 while plot number 44 was allocated in 1998; that the approval of the development that was granted to the Defendant refers to a different plot and that a temporary injunction should issue.

8. The Plaintiff's advocate submitted that in view of the discrepancies in the Defendant's ownership documents, the Plaintiff has established a prima facie case with a probability of success.

9. The Defendant's advocate on the other hand deponed that the Defendant has shown that he is developing Plot No. 44 and not Plot No. 22.

10. The evidence before me shows that Robert Nzambau was allocated an unsurveyed Plot No. 22 – Kitui Municipal Council, vide a letter of allotment dated 22nd July, 1993.

11. According to the Agreement of Sale dated 10th April, 2012 and an informal transfer dated 11th January, 1999, plot number 22 was transferred to the Plaintiff.

12. The Defendant's claim is that he is developing Plot No. 44 and not Plot No. 22.

13. Neither the Plaintiff nor the Defendant produced duly attested and approved Part Development Plans to enable the court ascertain if indeed the two plots were the same on the ground or not.

14. Although the Defendant has exhibited an approved building plan, the said plan does not indicate that the construction should be carried out on Plot No. 44.

15. The only person who can identify the two plots on the ground, if at all they exist, is either a surveyor or a physical planer.

16. Considering that the court is unable to state at this stage whether indeed the two plots are distinct and who between the Plaintiff and the Defendant is entitled to the suit plot, the prevailing status quo should be maintained pending the hearing and determination of the suit.

17. For those reasons, I make the following orders:

a. The prevailing status quo to be maintained, meaning that neither the Plaintiff nor the Defendant and or their agents, servants and employees should continue developing, transferring or alienating the suit land until the suit is heard and determined.

b. Each party to bear his or her own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF NOVEMBER, 2017.

O.A. ANGOTE

JUDGE