



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 194 OF 2015

MILCAH MUNYIVA KYEVAAPPLICANT

VERSUS

ANCENT WAMBUA KITONYIRESPONDENT

RULING

1. In the Application dated 18th August, 2015, the Plaintiff is seeking for the following orders:

a. That the restriction on Title No. Matungulu /Katine/350 be removed.

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

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the registered proprietor of a parcel of land known as Matungulu/Katine/350; that in the year 2014, he noted that a restriction had been registered on the suit land and that when he inquired from the Land Registrar, he was informed that the said restriction had been registered by mistake.

3. In response, the Defendant deponed that Kituku Kyevea (*deceased*) was the initial owner of the suit land; that he purchased a portion of the suit land measuring “2 benches” in the year 1981 from the said Kituku Kyevea and that the land was later adjudicated in the name of Kituku’s son, Peter Mwanzia Kituku.

4. The Defendant has further deponed that in 1984, Peter Mwanzia Kituku demarcated the boundary between his portion of land and his land and that in 1990, Peter Mwanzia sold him an additional “one bench” of land and that after being issued with a Title Deed in 1995, Peter Mwanzia died in the year 1996.

5. When the Applicant started chasing the wife of Peter from the suit land, and also encroaching on his portion, the Defendant has deponed that he reported the matter to the clan who decided the dispute in his favour.

6. The Defendant has deponed that the Plaintiff had the suit land transferred to him fraudulently and that he filed a Citation being Machakos High Court Succession Cause No. 518 of 2013 in respect of the Estate of Peter Mwanzia which Citation is still pending before the court.

7. In his Further Affidavit, the Plaintiff deponed that the suit land initially belonged to her father; that he has three brothers and four sisters and that his late father sub-divided his land into two portions and bequeathed Kituku Kyevea a portion thereof.

8. According to the Plaintiff, his brother sold his portion of land to two families including the Defendant’s

brother.

9. The Plaintiff finally deponed that the Applicant has never lived on a portion of the suit land and that the agreements that the Defendant is relying on lack material particulars including identity cards of the alleged seller and his witnesses; that the alleged benches that he bought are unknown both in size and dimensions and that the Application should be allowed.

10. The advocates for the Plaintiff and the Defendant filed their respective submissions which I have considered. I have also considered the filed authorities.

11. The Plaintiff's suit seeks to lift the restriction that was registered in respect of the suit land.

12. According to the Certificate of Official Search annexed on the Plaintiff's Supporting Affidavit, the Registrar registered a restriction on the suit land due to the Respondents "*beneficial interest*" on the land.

13. According to the said Certificate of Official Search, the Plaintiff was registered as the proprietor of the suit land on 14th February, 2009.

14. The Plaintiff has admitted that the person who sold to the Defendant a portion of the suit land, Kituku Kyeva, is one of his brothers, and that he sold the said portion and relocated.

15. The Defendant's claim is that he is entitled to a portion of the suit land, having purchased it from the Plaintiff's brother between 1981 and 1990. The Defendant has annexed copies of the purported agreements.

16. Although the Plaintiff's advocate has submitted that the said agreements are a nullity in view of the provisions of Section 3(3) of the Law of Contract, he has not addressed this court on the provisions of the said Section of the law before the year 2003.

17. Prior to the year 2003, Section 3(3) of the Law of Contract Act provided as follows:

"No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and signed by the party to be charged or some person authorized by him to sign it.

Provided that such a suit shall not be prevented by reason only of the absence of writing where an intending purchaser or lessee who has performed or is willing to perform his part of the contract:

i. has in part performance of the contract taken possession of the property or any part thereof; or

ii. being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

18. The above provision of the law differs substantially with the amendments that were effected to Section 3(3) of the Law of Contract in the year 2003.

19. Having produced agreements to show that he bought some portions of the suit land, the Defendant should be given an opportunity to prove that indeed the said sale was not fraudulent.

20. The Plaintiff has not denied that indeed the Defendant has filed a Citation in Machakos High Court Succession Cause No. 518 of 2013 in respect of the Estate of Peter Mwanzia, which is still pending.

21. Consequently, the validity of the Defendant's claim viz-a-viz the suit land is likely to be decided in that matter.

22. For those reasons, I find the Plaintiff's Application dated 18th August, 2015 to be without merit.

23. I therefore dismiss the Application dated 18th August, 2015 with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2ND DAY OF NOVEMBER, 2017.

O.A. ANGOTE

JUDGE