



REPUBLIC OF KENYA



**Mpusia & another v Sakisho & 6 others (Environment & Land Case E013 of 2022) [2023] KEELC 20884 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20884 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE E013 OF 2022  
CG MBOGO, J  
OCTOBER 24, 2023**

**BETWEEN**

**KUTITI OLE MPUSIA ..... 1<sup>ST</sup> PLAINTIFF**

**MUMEITA OLE MPUSIA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MESENKA OLE SAKISHO ..... 1<sup>ST</sup> DEFENDANT**

**JACKSON OLE MARPE ..... 2<sup>ND</sup> DEFENDANT**

**KANTAI OLE SEKUT ..... 3<sup>RD</sup> DEFENDANT**

**KOISIKIR OLE MPUSIA ..... 4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**HOSEA KERAI SAKISHO ..... PROPOSED DEFENDANT**

**RULING**

1. Before this court for determination is the Notice of Motion Application dated 8<sup>th</sup> May, 2023 expressed to be brought under Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules, Sections 1,1A,3,3A and 63 (e) of the Civil Procedure Act and Sections 45,47,71,76, 86 and 94 of the Law of Succession Act and Rules 44 (1),59(6) of the Probate and Administration Rules seeking the following orders: -
  1. Spent.
  2. Spent.



3. That this honourable court be pleased to order the Director Criminal Investigations Narok to file a report pertaining the reports made vide OB Number 36/18/03/23 and letter dated 6<sup>th</sup> March, 2023 by the applicant's advocate.
  4. That this honourable court be pleased to order the Land Registrar Narok to avail the respective parcels of the parcel of land formerly registered as CisMara/Olkinyei/880 and the appropriate registry index maps to aid the hearing and determination of the suit herein.
  5. That this honourable court be pleased to order the Officer in Charge Narok police station to provide security for compliance of the aforementioned orders.
  6. That this honourable court be pleased to enjoin the proposed 7<sup>th</sup> defendant to this proceeding herein.
  7. That this honourable court be pleased to grant leave to the plaintiff/applicants to amend the plaint herein and the attached amended plaint be deemed as duly filed upon payment of the requisite fees.
  8. That the court do make any other or further orders in the interest of justice.
  9. That the costs of this application be provided for.
2. The application is premised on the grounds set out on its face. The application is also supported by the affidavit of the 2<sup>nd</sup> plaintiff/applicant sworn on even date. The 2<sup>nd</sup> plaintiff/ applicant deposed that the 1<sup>st</sup> defendant/ respondent disappeared in the year 2018 and has never been seen nor heard but the proposed 7<sup>th</sup> defendant/respondent has a title deed emanating from CisMara/Olkinyei/880.
  3. The 2<sup>nd</sup> plaintiff/applicant further deposed that he filed a report with the Directorate of Criminal Investigations but no report or action has ever been taken. Further, that the family reported a missing person with the Narok Police Station and were shocked to learn that the 1<sup>st</sup> defendant/respondent had appointed an advocate to represent him. Further, that on 8<sup>th</sup> July, 2019, the 2<sup>nd</sup> plaintiff/ applicant placed a caution which has not been removed to date but the 5<sup>th</sup> defendant/respondent has continued to allow dealings in the said property without following due process. He further deposed that the proposed 7<sup>th</sup> defendant is a vital party to the proceedings as he is listed as the buyer of CisMara/Olkinyei/880 vide the sale agreement dated 21<sup>st</sup> June, 2022.
  4. The 2<sup>nd</sup> plaintiff/applicant further deposed that the 1<sup>st</sup> defendant/respondent did not sign the sale agreement dated 21<sup>st</sup> June, 2022 and he has reasons to believe that the said 1<sup>st</sup> defendant/respondent hasn't signed any instructions appointing the advocate on record. Further, that the family is still searching for the 1<sup>st</sup> defendant/respondent and demands that all the illegal transactions with respect to the land be revoked and title reverts back to its original owners.
  5. The application was opposed by the replying affidavit of the proposed 7<sup>th</sup> defendant sworn on 5<sup>th</sup> June, 2023. The proposed 7<sup>th</sup> defendant with the authority of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants/respondents deposed that the application is frivolous, incompetent, misconceived and an abuse of the court process for the reason that the orders sought are not on the sections of the law and the statutes founded on. The proposed 7<sup>th</sup> defendant deposed that the original parcel of land Cis-Mara/ Olkinyei/ 880 was owned by the 1<sup>st</sup> defendant/respondent who thereafter sold to the 2<sup>nd</sup> respondent on 19<sup>th</sup> October, 2010 and subsequently, to the 3<sup>rd</sup> defendant/respondent. He further deposed that the 2<sup>nd</sup> defendant/respondent sold his 50 acres to the 2<sup>nd</sup> plaintiff/applicant vide a sale agreement dated 10<sup>th</sup> December 2015 who



- defaulted payment. Further, that the 2<sup>nd</sup> plaintiff/applicant having not complied with the demand letters, the 2<sup>nd</sup> defendant/respondent returned the money and the agreement was revoked.
6. The proposed 7<sup>th</sup> defendant deposed that he has never interfered with the plaintiffs/applicants' quiet enjoyment on their parcels of land which parcel numbers are not indicated in the application. He deposed that after the sale agreement, the process of subdivision for CisMara/Olkinyei/880 was initiated and parties got their new independent parcel numbers being Cis-Mara/Olkinyei/4181 and 4182 and former was closed for subdivision on 5<sup>th</sup> August, 2022.
  7. He further deposed that the caution by the 2<sup>nd</sup> applicant/plaintiff claiming 70 acres was directed to the 1<sup>st</sup> defendant/respondent and not the 100 acres which belonged to the 3<sup>rd</sup> defendant/ respondent who sold it to him.
  8. The proposed 7<sup>th</sup> defendant deposed that the plaintiffs/applicants have no locus against the parties herein and have not attached any proof of ownership to the suit property. Also, that this court does not have the jurisdiction to indulge in constitutional issues raised by the plaintiffs/applicants on the disappearance of their kin.
  9. The application was canvassed by way of written submissions. On the 21<sup>st</sup> July, 2023 the plaintiffs/applicants filed their written submissions dated 20<sup>th</sup> July, 2023. They raised seven issues for determination as listed below: -
    - i. Whether the applicants have met the threshold for grant of the temporary injunction sought.
    - ii. Whether the proposed 7<sup>th</sup> defendant should be enjoined as a party to the suit.
    - iii. Whether the DCI Narok should be ordered to file a report regarding the OB number 36/18/03/23.
    - iv. Whether the land registrar Narok County should be ordered to avail the registry index maps to aid the hearing and determination of this suit.
    - v. Whether the officer commanding station Narok should provide security for compliance with the above orders.
    - vi. Whether the applicant should be granted leave to amend the plaint.
    - vii. Who should bear the costs of this application.
  10. On the first issue, the plaintiffs/applicants submitted that it is not in dispute that they are in occupation of the suit parcel of land as purchasers in the sale agreement dated 10<sup>th</sup> December, 2015 and have satisfied the conditions set in the agreement. Also, that the 2<sup>nd</sup> defendant/respondent is in breach of the contract as he has not complied with his contractual obligations which form the basis of their argument. The plaintiffs/applicants relied on the cases of *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] eKLR and *Isaac Musyoki Komoni v Sammy Kaumbulu Mbuvi* [2022] eKLR.
  11. On the second issue, the plaintiffs/applicants submitted that it has come to light that the proposed 7<sup>th</sup> defendant has a title deed dated 17<sup>th</sup> August, 2022 and it would be necessary to add him as a party to this suit. The plaintiffs/applicants relied on the case of *Wanyoike Mungai v Beatrice Karanja & another* [2021] eKLR.



12. On the third issue, the plaintiffs/applicants submitted that they wrote a letter dated 6<sup>th</sup> March, 2023 to the Directorate of Criminal Investigations regarding fraudulent dealings on the suit property but no investigations have been carried out and no report has been filed to date. They pleaded with this court to intervene by compelling the DCI Narok to file a report on their complaint after investigations.
13. On the fourth issue, the plaintiffs/applicants submitted that the order requesting that the Land Registrar to avail the file for CisMara/Olkinyei/880 is necessary to aid the hearing and determination of the suit for the transactions leading to the transfer of the land between the defendants/respondents all the way to the 7<sup>th</sup> defendant raises eyebrows. Also, that it is suspicious that the original proprietor of the suit parcel is nowhere to be found.
14. On the fifth issue, the plaintiffs/applicants submitted that they are in compliance with the sale agreement dated 10<sup>th</sup> December, 2015 but unfortunately, the 2<sup>nd</sup> defendant/ respondent has decided to sell the property to third parties putting their ownership and quiet possession at great risk and it is necessary that they are provided security in compliance with the orders.
15. On the sixth and seventh issues, the plaintiffs/applicants submitted that the amendments are with regard to the inclusion of the 7<sup>th</sup> proposed defendant as a party to the suit and all other amendments only seek to include circumstances that necessitate the addition of the proposed 7<sup>th</sup> defendant. Reliance was placed in the case of *Lewar Ventures Limited v Equity Bank (Kenya) Limited* [2022] eKLR. On costs, the plaintiffs/applicants submitted that they have satisfied the conditions for grant of injunction against the defendants/respondents and there are entitled to costs.
16. On the 7<sup>th</sup> August, 2023 the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> defendants/respondents filed their written submissions of even date. They raised four issues for determination as listed below: -
  1. Whether the applicants' motion for temporary injunction is merited.
  2. Whether the honourable court has jurisdiction to indulge into the constitutional issues raised by the applicants in relation to the disappearance of their kin.
  3. Whether the court can order the Director of Criminal Investigations Narok to investigate and file a report on the reports made vide OB Numbers 36/18/03/23 and letter dated 6<sup>th</sup> March 2023 by the applicant's advocate.
  4. Who bears the cost of this application?
17. On the first issue, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> defendants/respondents submitted that the plaintiffs/applicants are not the registered proprietors of Cis-Mara/Olkinyei/88 which was subdivided and have also not brought any evidence to show ownership or claim of the suit property. Also, that the circumstances emerging in lieu of the fact that the registered owner's title is challenged on the grounds that they feel that the 1<sup>st</sup> defendant/respondent has disappeared is laughable and makes the application frivolous, devoid of merit and ought to be dismissed. Reliance was placed in the cases of *Wilfred Ogero Mosigisi v Julius Ogero Mosigisi & another* [2016] eKLR, *Showing Industries Limited v Guardian Bank Limited & another* [2002] eKLR and *Vic Preston Murithi Ruchabi v Mary Wangari & 3 others* [2018] eKLR.
18. On the second issue, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> defendants/respondents submitted that the prayer to investigate and file a report on the whereabouts of the 1<sup>st</sup> defendant is under habeas corpus which can only be brought before a constitutional court in the nature of judicial review. On the third issue, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> defendants submitted that the party in which the order is sought (pertaining the



reports made in OB No 36/18/03/23) is not a party to these proceedings and the plaintiffs/applicants ought to have listed the party as a defendant to enable them have audience before the court and to ventilate the issues raised by the plaintiffs/applicants. They submitted that the plaintiffs/applicants' contentions amount to violation of the Director of Criminal Investigations Narok rights as outlined under Articles 25,47 and 50 of *Constitution*. They relied on the case of the *Catherine Chepkemoi Mukenyang v Evanson Pkemei Lomaduny & another* [2022] eKLR.

19. I have carefully analysed and considered the application, the replying affidavit and the written submissions filed by both parties. Before I delve into the merits or otherwise of the case, and upon perusal of the pleadings herein, I note that the dispute herein revolves around property known as CisMara/Olkinyei/880 which the plaintiffs/applicants claim to have acquired through purchase. Paragraph 8 of the 2<sup>nd</sup> plaintiff/applicant deposed that the 1<sup>st</sup> defendant/respondent did not sign the agreement dated 21<sup>st</sup> June, 2022 and has also has not signed any instructions appointing the advocate on record. In their reply, there has been contention arising out of the subsequent sale of the suit property.
20. The plaintiffs/applicants argued in their submissions that the 2<sup>nd</sup> defendant/respondent is in breach of the contract and has not complied with the contractual obligations contained therein.
21. With this in mind, I hold the view that the sale agreement may be an issue for determination amongst any other issues and in light of that fact and looking at the consideration of the suit property, it is best that the application and main suit is heard and determined by the Magistrates' Courts.
22. Arising from the above, this file is hereby transferred to the Magistrates' court for hearing and determination on a priority basis. The orders issued on 9<sup>th</sup> May, 2023 are hereby vacated. I make no orders as to costs. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 24<sup>TH</sup> DAY OF OCTOBER, 2023.**

**HON. MBOGO C.G.**

**JUDGE**

**24/10/2023**

