



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. 12 OF 2020

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40
OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ARTICLE 22, 23 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLE 27 AND 28 OF THE LAND ADJUDICATION ACT

AND

THE MATTER OF THE LAND REGISTRATION ACT

BETWEEN

JOSEPH KITHURE..... PETITIONER

AND

EDWARD KITHARIA.....1ST RESPONDENT

PURITY MWONTONE.....2ND RESPONDENT

JOHN KOBIA MWENDA.....3RD RESPONDENT

BENARD KIRIINYA NGONGAITI.....4TH RESPONDENT

LAND ADJUDICATION AND

SETTLEMENT OFFICER..... 5TH RESPONDENT

RULING

1. The notice of motion dated 15.9.2020 seeks a temporary order of injunction barring and restraining the respondent from developing, trespassing, surveying or in any other way interfering with **Parcels No's Tigania/Antuamburi/8145, 4357, 4162 and 4367** pending hearing and determination of this petition. The application is supported by an affidavit by Joseph Kithure sworn on the even date.
2. The grounds upon which the application is brought are that, the petitioner is the original owner and occupier of the parcel of land **L.R Tigania/Antuamburi/5449**, whereof a portion was curved out by the 1st respondent in collusion with the 5th respondent leading to objection **No's 1023, 1924, 1925 and 2254** which were determined on 11.6.2010.
3. The petitioner states no appeal was lodged against the ruling. However the 1st and 2nd respondents colluded with the 5th respondent to make illegal changes on the survey maps include **Parcels No's 8145, 4357, 4162 and 4367**. The sketch map attached to the supporting affidavit.

4. It is stated the land adjudication officer has not implemented the decision of 11.6.2010. In the process, however, the 1st respondent sold **Parcel No. 4357** to the 2nd respondent whereas the 3rd respondent has sold **Parcel No. 8145** to the 4th respondent. He has attached copies of green cards showing those developments.
5. The petitioner states the 1st – 4th respondents are yet to step into their portions on the ground but are scouting for potential buyers which would gravely prejudice him and his children who he has already subdivided the land to.
6. Further the petitioner says he is fearful the respondents are likely to take away his land without the alleged subdivision do not exist anywhere in the land register.
7. The petitioner brought his claim dated 15.9.2020 based on fraudulent subdivision of his original land **Parcel No. 5449** into the named subdivisions **No's 8145, 4357, 4162 and 4367**. He seeks for their cancellation and or the rectification of the survey map to reflect the decision of the land adjudication officer and a mandatory injunction against the respondents from trespassing or interfering with his quiet possession.
8. The 1st respondent opposes both the motion and the petition through a replying affidavit sworn on 11.6.2021. He states the land was governed by the **Land Consolidation Act Cap 283**, he bought two parcels of land in 1992 from one Joachim and Silas Muriuki which were amalgamated to form **Parcel No. 4357 Tigania/Antuamburi** which borders the petitioner's No. 5823 and has been in occupation throughout.
9. Further, the 1st respondent states he subdivided his parcel in 1992 to two portions namely 8145 and 4357. He sold the latter to Gervasio M'Imuti and 8145 to Africa Evangelical Presbyterian church, who exchanged it with the 3rd respondent's 4367 and in which the 3rd respondent sold No. 4387 to the 4th respondent with no objection from anybody especially the petitioner who was then serving as a land adjudication committee member between 2002 to 2017.
10. Additionally, the 1st respondent title deeds have already been issued and is unaware of the alleged objection proceedings which he believes are a forgery. Further the 1st respondent avers **Parcel No's 4357 and 8145** are clearly indicated in the maps, with title deeds and that it is the petitioner, though owing a big chunk of land as **Parcel No. 5623**, who has been trying to import 0.02 acres and displace **Tigania/Antuamburi/4357 and 8145**. He has never occupied or owned the aforesaid parcels and which have never formed part of **Parcel No. 5449** as alleged or at all.
11. In sum, the 1st respondent alleges the adjudication process was completed eliciting no objection at the committee, arbitration appeal stages or appeal to the Minister hence paving way for the issuance of title deed.
12. With leave of court parties agreed to dispose the application through written submissions dated 22.10.2021 and 5.11.2021 respectively.
13. The petitioner submits he has established a prima facie case with a probability of success that he stands to suffer irreparable loss and damage which cannot be compensated by way of damages and that the balance of convenience tilts in favour of granting the temporary orders of injunction.
14. He relies on *Mrao Ltd –vs- First American Bank of Kenya Ltd [2002] eKLR, Solomon Too & Another –vs- Zipporah Jebichi Soloney & Another [2018] eKLR, Robert Mugo Wa Karanja –vs- Eco Bank (K) Ltd & Another [2019] eKLR, Thomas Mungiria –vs- Joseph Mutuma & 4 Others [2013] eKLR, Amir Suleiman –vs- Amboseli Resort Ltd [2004] eKLR, Cecilia Karuru Ngayu –vs- Barclays Bank of Kenya & Another [2016] eKLR.*
15. On their part the 1st – 3rd respondents submit the petitioner has failed to establish any prima facie case given the contents of replying affidavit dated 11.6.2021 establishing the history of the acquisition of their parcels and subsequent issuance of title deeds without any opposition by the petitioner.
16. Secondly, it is submitted the petitioner has not demonstrate any irreparable damage and rely on *Pius Kipchirchir Kogo –vs- Frank Kimeli Tenai [2018] eKLR and Kenleb Cons. Ltd. –vs- New Gatitu Service Station Ltd & Another [1990] eKLR.*
17. On the issue of a prima facie case, the petitioner has the duty to establish if he has a right which has been legitimately interfered with by the respondents so as to call upon the latter to answer to the claim. (See *Mrao Ltd Supra.*)
18. The petitioner claim is that he was the original actual and registered owner of **Parcel No. 5449** where he lives and which he subdivided into five portions namely **5449, 13533, 13534, 13535 and 13536**. He claims and which he says he established 0.20 acres had been illegally taken out through collusion by the respondents.
19. The petitioner has not attached any supporting documents in terms of title deeds, copies of search, adjudication record and or consents to demonstrate he has any proprietary rights as alleged or at all.
20. Secondly, the applicant states his original **No. 5449** is less 0.20 acres. There is no report or copy of the said title deed or an adjudication register extract attached so as to enable this court make a preliminary finding that indeed the applicant's land was interfered with by the respondents contrary to the law.
21. Regarding the issue of irreparable loss and damage which cannot be compensated by way of damages, the 1st – 4th respondents have

provided copies of title deeds to their parcels of land which under **Section 25** of the **Land Registration Act** is prima facie evidence of ownership except on account of illegality, collusion and or fraud.

22. Whereas the petitioner is alleging fraud and collusion the court will have to hear the petition on merits and determine the issues one way or the other.

23. Third the applicant's own demand letter dated 23.9.2020 clearly indicated the issue was regarding the re-establishment of boundaries between the disputed parcels of land which jurisdiction is bestowed upon the County Surveyor and not this court under **Sections 18 and 19** of the **Land Registration Act** as read together with the **Survey Act Cap 299 laws of Kenya**.

24. In *Azzuri Ltd –vs- Pinks properties Ltd [2018] eKLR* the Court of Appeal held boundary disputes pertaining to land falling within general boundary areas must be referred to the Land Registrar for resolution. In *George Kamau Macharia –vs- Dexka Ltd [2019] eKLR* the court held even if it was to hear and determine the case, it still needed the input of the Land Registrar who has the technical expertise and resources of the district surveyor to determine and ascertain the boundaries.

25. The law has given the survey department the power and mandate to deal with general boundaries. The letter dated 3.9.2020 to the area chief and the parties herein can only be seen in that light. The petitioner received the letter. Instead of submitting to the jurisdiction of the County Surveyor under **Sections 18 and 29** of the **Land Registration Act** he petitioner jumped the gun and filed the petition.

26. In *Willis Ochola –vs- Mary Ndege [2016] eKLR*, it was held the court has a duty to remind a party who has moved in the wrong way that he has prematurely come to court. Similarly, in *Estate of Sonrisa Ltd & Another –vs- Samuel Kamau Macharia & 2 Others [2020] eKLR* the Court of Appeal held the Registrar has wide investigative power under **Sections 14 (1), 16 – 19** of the **Land Registration Act** after which report, any aggrieved party can move to court under **Sections 79 (2) A, 80, 86 and 91 (a)** of the **Land Registration Act**. See *Reuben Kioko Mutyane –vs- Hellen Kiunga Miriti & 4 Others; Ntalala Eric Mutura & Another (Interested Parties) [2021] eKLR*.

27. In the premises, I find the application dated 15.9.2020 lacking merits. The same is dismissed with costs to the respondents.

28. Regarding the main petition, the same is hereby stayed for a period of six months. The parties are directed to submit themselves before the Land Registrar and the Land Surveyor as per summons issued on 3.9.2020 and a report shall be filed before court for further orders.

29. Status quo as at the delivery of this ruling to be maintained.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 19TH DAY OF JANUARY, 2022

In presence of:

Karatu for petitioner

Atheru for 1st – 4th respondents

Kieti for 5th – 7th respondents

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE