



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 61 OF 2011

PHERUS ARORI MONDA.....1ST PLAINTIFF

AGNES NASIANOI RIANO..... 2ND PLAINTIFF

VERSUS

KISHIL OLE NKARE SAIRE.....1ST DEFENDANT

JULES INVESTMENTS LIMITED.....2ND DEFENDANT

ABEL MUNGATHIA MURIUNGI.....3RD DEFENDANT

KIENDE LUCYANNE MUNGATHIA.....4TH DEFENDANT

RULING ON PRELIMINARY OBJECTION

(1) On the 7th March 2011, (1) Pherus Arori Monda and (2) Agnes Nasiano Riario (“the Plaintiffs”) filed suit against (1) Kishil ole Nkare Saire,

(2) Jules Investments Limited, (3) Abel Mungathia Muriungi and (4) Kiende Lucyenne Mungathia (“the Defendants”).

Paragraphs 5 – 29 of their detailed statement of claim contend as follows:-

“5. The Plaintiffs aver that in the year 1988 the 1st Defendant caused his parcel of land Title No. Kjd/Kaputiei-North/655 measuring approximately 143.6 Ha to be subdivided into two new parcels Title No. Kjd/Kaputiei-North/1218 measuring 80.94 Ha approximately and Title No. Kjd/Kaputiei-North/1219 measuring 62.66 Ha approximately.

- 6. The Plaintiffs aver that on 4th April, 1989 the 1st Defendant transferred land Title No. Kajiado/Kaputiei-North/1218 to the 1st Plaintiff and Simon Sikoyo Riano, late husband to the 2nd Plaintiff, as tenants in common in equal shares.**
- 7. On the Plaintiffs' application the parcel of land comprised in Title No. Kajiado/Kaputiei-North/1218 was partitioned into two parcels Title No. Kjd/Kaputiei-North/22232 and Kjd/Kaputiei-North/22233 each measuring 40.47 Ha approximately.**
- 8. Upon the partition the 1st Plaintiff was registered as proprietor of parcel Title No. Kjd/Kaputiei-North/22232 while the 2nd Plaintiff was, following confirmation of Grant of the estate of Simon Sikoyo Riano, deceased, registered as proprietor of parcel Title No. Kjd./Kaputiei-North/22233 and the separate Title Deed were issued.**
- 9. The Plaintiffs aver that in the year 2006 the 1st Defendant made a claim against the Plaintiffs at the Land Disputes Tribunal at Kajiado in Claim No. TC.324/2006 seeking revocation of Title No. Kjd/Kaputiei-North/22232 and Title No. Kjd/Kaputiei-North/22233 and the said Disputes Tribunal, though lacking jurisdiction, purported to deliberate on the matter in absence of the Plaintiffs who were the respondents therein and to give an award on 21.12.06 directing without power to do so, the District Register, Kajiado to revoke the two Titles.**
- 10. On 13.2.2007 the said award was read to the parties by the Honourable R. A Onganyo, SRM at the Senior Resident Magistrate's Court at Kajiado in Land Tribunal Case No. 3 of 2007 and the parties were then advised to appeal against the same within 30 days thereof.**
- 11. By a Memorandum of Appeal dated 5th March, 2007 and lodged at the Provincial Land Disputes Appeal Committee at Nakuru on 7th March, 2007 being Appeal No. 16 of 2007 the Plaintiffs appealed against the whole award of the Kajiado Land Disputes Tribunal delivered on 21.12.2006 in Claim No. TC. 324/2006.**
- 12. On 14.3.2007 the 1st Defendant made an application at the Senior Resident Magistrate's Court in Land Tribunal Case No. 3 of 2007 seeking an adoption of the Kajiado Land Disputes Tribunal award aforesaid on the basis that no appeal had been filed within the 30 days.**
- 13. The Plaintiffs aver that the 1st Defendant's un-served, un-signed and un-commissioned application was, notwithstanding, heard on 27.3.2007 in the absence of the Plaintiffs and the orders therein sought granted.**
- 14. On 17.8.2007 the Plaintiffs applied for the review and setting aside of the orders made on 27.3.2007 aforesaid which application was granted in its entirety in a ruling delivered on 9.10.2007 and the Honourable R. A. Onganyo, SRM ordered a stay of execution of the orders dated 27.3.2007 pending the hearing and determination of the Appeal No. 16 of 2007 filed at the Provincial Lands Disputes Appeals Committee.**
- 15. The Plaintiffs aver that on 21.8.2007 the Chairman of the Provincial Land Disputes Appeals Committee wrote a letter notifying the Kajiado District Land Control Board, The Kajiado District Land Registrar and the Kajiado Senior Resident Magistrate that there was indeed pending before it an appeal between the Plaintiffs herein and the 1st Defendant.**
- 16. The Plaintiffs aver that despite being served with the Memorandum of Appeal and several hearing notices the 1st Defendant failed, and has to date failed, to object to the appeal or even appear before the Provincial Land Disputes Appeals Committee at Nakuru for the hearing of the appeal.**
- 17. The 1st Defendant having failed to appear before the said Tribunal on 22.8.2007 and on**

2.10.2007 the said Tribunal issued another hearing notice on 2.10.2007 for hearing of the appeal on 6.11.2007 which notice they directed be served upon the 1st Defendant through the Kajiado District Commissioner's office and through the Kaputiei North Chief's office.

18. In addition the 1st Defendant was also served by the 1st Plaintiff with the hearing notice dated 2.10.2007.

19. The Plaintiffs aver that on 6.11.2007 the 1st Defendant once again failed to appear before the Provincial Land Disputes Appeals Committee at Nakuru for the hearing of the appeal but instead sent his son, David Ole Kishil, to appear on his behalf and the Committee being dissatisfied with such appearance adjourned the hearing of the appeal and promised to issue notice of the next hearing date.

20. The Plaintiffs aver that on 31.1.08 the 1st Defendant, without any formal application and without notifying the Plaintiffs herein, appeared before the Honourable R. A Onganyo at the Senior Resident Magistrate's Court at Kajiado in Land Tribunal Case No. 3 of 2007 in the absence of the Plaintiffs and informed the Magistrate that he had never been supplied with any documents from the Provincial Land Disputes Appeals Committee at Nakuru and therefore sought that the court do lift cautions lodged against Title No. Kjd/Kaputiei-North/22232 and Title No. Kjd/Kaputiei-North/22233 to enable him sub-divide the same which orders were granted by the Honourable Court without any compunction.

21. On 13.5.08 the 1st Defendant was wrongfully issued with a title deed to parcel of land Title No. Kjd/Kaputiei-North/22232 which title was closed on 4.7.08 when the said parcel was subdivided into three new parcels Title No. Kjd/Kaputiei-North/26723, Title No. Kjd/Kaputiei-North/26724 and Title No. Kjd/Kaputiei-North/26725.

22. A Title Deed to parcel Title No. Kjd/Kaputiei-North/26723 was wrongfully issued to the 1st Defendant on 17.7.08 and the same was closed on 15.10.09 when the said parcel was further subdivided into six new parcels Titles No. Kjd/Kaputiei-North/31809-31814.

23. The Plaintiffs aver that the 1st Defendant is currently attempting to dispose of the parcels of land comprised in Titles No. Kjd/Kaputiei-North/31809-31824.

24. A Title Deed to parcel Title No. Kjd/Kaputiei-North/26724 was wrongfully issued to the 1st Defendant on 4.7.08 subsequent to which he transferred the same to the 3rd and 4th Defendants who were then registered as proprietors thereof on 23.7.08 and Title Deed issued to them on 31.7.08.

25. A Title Deed to parcel Title No. Kjd/Kaputiei-North/26725 was wrongfully issued to the 1st Defendant on 4.7.08 subsequent to which he transferred the same to the 2nd Defendant who was then registered as proprietor thereof on 23.7.08 and Title Deed issued on the same date.

26. On 5.5.08 the 1st Defendant was wrongfully issued with a title deed to the 2nd Plaintiff's parcel of land Title No. Kjd./Kaputiei-North/22233 which title was closed on 21.7.09 when the said parcel was subdivided into forty three (43) new parcels Titles No. Kjd./Kaputiei-North/29437-29480.

27. The Plaintiffs' appeal at the Provincial Land Disputes Appeals Committee at Nakuru is still pending hearing and determination and the subject of the appeal are the parcels of land Title No. Kjd/Kaputiei-North/22232 and Title No. Kjd/Kaputiei-North/22233 which the 1st Defendant has grossly interfered with *pendent lite* as aforesaid.

28. The Plaintiff contend that the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party.

29. The Plaintiffs aver that there have been several proceedings between the Plaintiffs and the 1st Defendant over the subject matter in Claim No. TC. 324/2006 at the Land Disputes Tribunal at Kajiado, Land Tribunal Case No. 3 of 2007 at the Senior Resident Magistrate's Court at Kajiado and Appeal No. 16 of 2007 at the Provincial Land Disputes Appeals Committee at Nakuru."

(2) The Plaintiffs further aver that the first Defendant's re-acquired the titles to the parcels of land comprised in Title No. Kjd./Kaputiei-North/22232 and Title No. Kjd./Kaputiei-North/22233 fraudulently and go on to particularize the fraud alleged as including:

“(a) Falsely bringing a claim to the Kajiado Land Disputes Tribunal at Kajiado seeking to revoke titles issued to the Plaintiffs after he duly transferred the mother title of the said parcels of land 17 years previously to the 1st Plaintiff and the 2nd Plaintiff's late husband.

(b) Referring the alleged dispute to the Land Disputes Tribunal at Kajiado knowing or being deemed to know that it had no jurisdiction to hear and determine the issue concerning titles to registered land.

(c) Prosecuting his claim before the Land Disputes Tribunal at Kajiado in absence of the Plaintiffs whom he knew to be interested persons who would be affected by the decision of the Tribunal.

(d) Seeking to have the Senior Resident Magistrate's Court at Kajiado adopt the award of the Land Disputes Tribunal on the false basis that no appeal had been made against the award.

(e) Failing, refusing or neglecting to participate in the appeal lodged at the Provincial Land Disputes Committee despite being served and generally delaying and frustrating the hearing of the appeal.

(f) Somehow moving the Senior Resident Magistrate's Court without any formal application or service upon or involvement of the Plaintiffs or the cautioners to lift the cautions lodged against the suit parcels of land and actually getting the cautions lifted on the basis of the misrepresentations and withholding of pertinent facts.

(g) Procuring the registered and enforcement of the order of the Court revoking the titles to parcels of land comprised in Title No. Kjd/Kaputiei-North/22232 and Title No. Kjd/Kaputiei-North/22233 while fully aware that the award of the Tribunal giving rise to that order was the subject of appeal to the Provincial Land Disputes Committee at Nakuru.

(h) Procuring his registration as the proprietor of the said parcels comprised in Title No. Kjd/Kaputiei-North/22232 and Title No. Kjd/Kaputiei-North/22233 and proceeding to subdivide each of them; and

(i) Seeking and transferring to the 2nd, 3rd and 4th Defendants the parcels comprised in Title No. Kjd/Kaputiei-North/26725 and Title No. Kjd/Kaputiei-North/26724 respectively while fully aware that the same were part of the lands the subject of the said appeal to the Provincial Land Disputes Committee."

(3) The Plaintiffs further content that the Land Disputes Tribunal and the Provincial Land Disputes Appeals Committee had no jurisdiction to entertain any dispute concerning title to land registered under the Registered Land Act [Cap. 300] and as such the proceedings therein do not constitute a bar to their suit herein.

The Plaintiffs therefore seek the following reliefs:-

“(a) an order of injunction restraining the 1st, 2nd, 3rd and 4th Defendants/Respondents, jointly and/or severally, by themselves, their servants and agents or otherwise howsoever from in any

manner transferring or alienating, subdividing, wasting, damaging, disposing of or in any other manner howsoever interfering with the whole or any part of the parcels of land comprised in Title Numbers Kjd/Kaputiei-North/26724, Kjd/Kaputiei-North/26725, Kjd/Kaputiei-North/31809-31824 and Kjd/Kaputiei-North/29437-29480 until the final determination of Appeal No. 16 of 2007 at the Provincial Land Disputes Appeals Committee at Nakuru and/or this suit.

(b) an order inhibiting the registration of any dealing with the parcels of land comprised in Title Numbers Kjd/Kaputiei-North/26724, Kjd/Kaputiei-North/26725, Kjd/Kaputiei-North/31809-31824 and Kjd/Kaputiei-North/29437-29480 until the final determination of Appeal No. 16 of 2007 at the Provincial Land Disputes Tribunal at Nakuru and/or this suit.

(c) an order for rectification of the registers of parcels of land comprised in Title No. Kjd/Kaputiei-North/26724, Title No. Kjd/Kaputiei-North/26725, Title No. Kjd/Kaputiei-North/31809-31824 and Title No. Kjd/Kaputiei-North/29437-29480 by directing the cancellation of the registers and any registrations made therein.

(d) an order for rectification of the registers of parcels of land comprised in Title No. Kjd/Kaputiei-North/22232 and Title No. Kjd/Kaputiei-North/22233 by directing the reinstatement of the said registers and of the 1st and 2nd Plaintiffs as the respective proprietors thereof and the issuance of Title Deeds to parcels of land comprised in Title No. Kjd/Kaputiei-North/22232 and Title No. Kjd/Kaputiei-North/22233 to the 1st and 2nd Plaintiff respectively as they were as at 7th March 2007.

(e) an order for the attachment and sale of any property belonging to the 1st Defendant in mitigation of any loss occasioned by the 1st Defendant upon the 1st and 2nd Plaintiffs or any party to this suit in regard to the subject properties.

(f) A supervisory order directed at the Provincial Land Disputes Tribunal at Nakuru to expeditiously hear and determine the pending Appeal No. 16 of 2007.

(g) or in alternative to (f) above a declaration that the proceedings and award of the Kajiado Land Disputes Tribunal in Claim No. TC. 324/2006 and proceedings subsequent thereto in Senior Resident Magistrate's Court at Kajiado in Land Tribunal Case No. 3 of 2007 and in Appeal No. 16 of 2007 at the Provincial Land Disputes Appeals Committee at Nakuru are a nullity."

(4) Simultaneously with the filing of the Plaint, the Plaintiffs also brought a Notice of Motion under Order 40 rule 1(a) and (b) and rule 4 of the Civil Procedure Rules, sections 1A, 1B, 3A and 63 of the Civil Procedure Act and other enabling provisions of the law. In addition to seeking orders of temporary injunction and inhibition pending the hearing and final determination of the suit, the Plaintiffs also seek an order to furnish security directed against the first Defendant as well as an order directing the Land Registrar, Kajiado not to release any Title to the first Defendant.

The application is supported by the Plaintiffs' own affidavits both made on the 4th March 2011 respectively. The Plaintiffs each reiterate the averments made in their Plaint and produce various documents in support of their contentions.

(5) Before the date of hearing of the Plaintiffs' application *inter partes*, the first Defendant filed a Notice of Preliminary Objection dated the 21st March 2011 on the 22nd March 2011. The first Defendant contends that —

“... the application and the entire suit on which it is premised is incompetent and bad in law in that the award by the Kajiado Land Disputes Tribunal in TC 324 of 2006 made on 21st December 2006 and adopted by the Senior Resident Magistrate's Court at Kajiado in Land Tribunal Case No. 3 of 2007 remains valid and undisturbed. There are clear legal provisions on how to challenge both an

award by the Land Disputes Tribunal and a decree by a Magistrate court adopting the award as a judgment and not by filing of suit through a Plaintiff as the Plaintiff has done in this case. The 1st Defendant/Respondent shall therefore pray that this application and the entire suit be struck out with costs for being incompetent and bad in law.”

(6) At the hearing of the Preliminary Objection, Mutua Muthua, Esq., learned counsel for the first Defendant, argued that the Plaintiffs, being dissatisfied with the judgment and decree of the learned Senior Resident Magistrate’s court in Land Tribunal application No. 3 of 2007, ought to have preferred an appeal against it or moved the High court either by way of judicial review or constitutional reference. The procedure by which the Plaintiffs have come to court is alien to the law and does not lie. All the other Defendants supported these sentiments.

The Plaintiffs, through their learned counsel Mr. Ernest Githuka, contended that they are properly before the court inasmuch as they have already filed their appeal before the Provincial Land Disputes Tribunal at Nakuru on the 7th March 2007 and that pending the hearing thereof, they have sought orders of this court, *inter alia*, to preserve the suit properties.

(7) Under and by virtue of Article 165(3) of the Constitution, the High Court shall have unlimited original jurisdiction in criminal and civil matters and under sub-Articles (6) and (7) thereof supervisory jurisdiction over the subordinate courts and other bodies and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

In doing so, the Constitution sets out the principles by which the courts shall be guided which included that justice shall be administered without undue regard to procedural technicalities (Article 159 (1)(d)).

(8) The principles enunciated by the Constitution all reiterated in sections 3 and 3A of the Civil Procedure Act [Cap. 21] which clearly provide that nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice.

Section 1A(1) of the Act, the overriding objective of the Act and the rules is stated to be to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Finally, Order 40 of the Civil Procedure Rules provides not only for the granting of temporary injunctions but also other interlocutory orders including an order for the preservation of any property (Order 40 rule 10(1)).

(9) The Plaintiffs have brought their suit and applications under the foregoing provisions and having made that election, I cannot see that the Defendants can challenge them on the basis that the Plaintiffs ought to have moved the court by way of either judicial review or constitutional reference.

(10) Accordingly, and for the reasons which I have given, the first Defendant’s Preliminary Objection dated the 21st March 2011 and filed on the 22nd March 2011 fails and is dismissed with costs to the Plaintiffs. The interim orders granted on the 8th March 2011 be and are hereby extended to the next hearing date for the Plaintiffs’ application dated and filed on the 7th March 2011.

Orders accordingly.

Dated and delivered at Machakos this 29th day of June , 2011.

P. Kihara Kariuki
Judge.