



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 43 of 2009

JAMES LENGOTUA OLE LUARI.....1ST PLAINTIFF
SIMEI NAGOL.....2ND PLAINTIFF
VERSUS
THE COMMISSIONER OF LANDS & 44 OTHERS....DEFENDANTS

RULING

The plaintiffs claim in their amended plaint that on or before October 2008 the 2nd to 45th defendants in collusion with the 1st defendant unlawfully and fraudulently surveyed and excised 46 parcels of land from their parcels of land known as Plot Nos. 735 and 797 (the original parcels of land). They left the parcel numbers of the original parcels of land intact to conceal their fraudulent act. They therefore seek an order declaring the resulting excised parcels illegal and nullification of their respective Title Deeds.

Contemporaneous with the filing of the suit the plaintiffs applied under **Order 39 Rules 1, 2, 3, 7 and 9** and **Order 1 Rule 8** of the **Civil Procedure Rules** as well as **Section 34 and 63** of the **Civil Procedure Act** for a “mandatory injunction” to restrain the defendants their servants, agents or assignees from subdividing the original parcels of land or causing the eviction of the plaintiffs’ families from those pieces of land or any parts of them or in any way from interfering with the plaintiffs’ families’ lives until this suit is heard and determined. They also seek an order to nullify the Title Deeds resulting from the alleged excision “and” to restrain the defendants from using those Title Deeds in any transaction.

The application is supported by the affidavit of the 1st plaintiff sworn on his own behalf and on behalf of the 2nd plaintiff in which he has deposed that the two plaintiffs hold the original parcels of land for themselves and in trust for their respective families. He further claims that on a random check at the District Survey Office in the year 2002 his brother one Musenya Ole Luari discovered that officers of County Council of Narok were interfering with their parcels of land. In the years 2004 they wrote to the adjudication office to complain of the interference with no response and they have been unable to access any adjudication records due to the influence and fraudulent activities of the defendants.

In the year 2008 after hearing rumours that several parcels of land had been excised from the original parcels of land they carried out a search and to their horror they discovered that Parcel Nos. 804 to 817, 819, 821, 838, 861, 862, 893, 600, 638, 641, 789, 790, 791, 792, 793, 907 had been excised from Parcel No.735 and Parcel Nos.794, 798, 799, 800, 801, 802, 803, 825, 857, 867 and 874 had been excised from Parcel No.797 and Title Deeds issued to the 2nd to 45th defendants who are strangers in the area. In the circumstances he prayed that the same be nullified.

Presenting the application on behalf of the plaintiffs, their counsel Mr. Bosire submitted that as the defendants are not ancestral land owners in the area they must have, with the assistance of the 2nd and 24th defendants who were adjudication officials, corrupted the other adjudication officials to allocate land to them. In the circumstances he prays that the application be allowed.

In their defences, grounds of opposition and the replying affidavits the defendants not only challenged the competence of this suit but also denied the allegations of fraud and stated that they were issued with their respective Title Deeds after due adjudication process. They further aver that as their Title Deeds result from first registrations, they are absolute and indefeasible. In the circumstances this suit has no chance of success and the application for injunction should therefore be dismissed.

Mrs Sunkuli for the 2nd, 14th, 18th, 23rd, 24th, 25th, 35th, 36th and 37th defendants submitted that there was nothing wrong

with the 2nd and 24th defendants being adjudication officials. The adjudication process was carried out openly and records were posted in public places. The plaintiff should have therefore raised their objections during that period. She said that if the defendant's titles resulted from excisions of the original parcels of land the latter's numbers would have disappeared. As the defendants' Title Deeds result from a first registration she submitted that under **Section 143(1)** of the **Registered Land Act Cap 300 of the Laws of Kenya** this suit has no chance of success and the application should be dismissed.

Mr. Agina for the 7th, 39th, 42nd, 43rd and 44th defendants started by challenging the competence of this application and the suit itself. He submitted that this is a representative suit which has been brought without leave of the court and that the affidavit in support fouls the provisions of **Order 1 Rule 12(i)** and **(ii)** of the **Civil Procedure Rules** as well as **Rule 9** of the **Oaths and Declarations Act Rules**. On the merits of the application itself he submitted that the plaintiffs are guilty of laches. As is clear from the annexures to the replying affidavits the plaintiffs are the owners of the original parcels of land. There is no evidence that the defendants' parcels have been excised from the plaintiffs' pieces of land.

Mr. Kagucia for the 6th, 9th, 10th, 15th, 17th, 26th, 28th, 31st, 32nd, 34th, 38th, 39th and 45th defendants relying on the Notice of Preliminary objection he had filed submitted that this suit does not disclose any or any reasonable cause of action. He said equity does not aid the indolent. The plaintiffs having waited for over 16 years they are guilty of laches and this suit cannot be the basis of granting the injunction orders sought and the application must therefore fail.

Mr. Mugambi for the 12th and 23rd defendants associated himself with the submissions of Messrs Sunkuli, Agina and Kagucia and called for the dismissal of this application with costs.

I have considered these rival submissions and read the averments in the parties' respective pleadings. I agree with counsel for the defendants that the plaintiffs have not placed before court any evidence to show that the defendants' pieces of land were excised from the plaintiffs' parcels of land. Even if there was any such evidence and fraud was proved **Section 143(1)** of the **Registered Land Act** ties my hands and there is not much I could do. In the circumstances I find that the plaintiffs have not made out a prima facie case with a probability of success. This being my view of the matter I need not go into the other issues raised by counsel for the defendants. Consequently I dismiss this application with costs.

DATED and delivered this 20th day of January, 2010.

D. K. MARAGA
JUDGE.