



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**ELC CAUSE NO. 265 OF 2017**

**FORMERLY KISII ELC NO. 39 OF 2014**

**SANAMWALA OLE MUTUA NKAIRIPIANI.....PETITIONER**

**-VERSUS-**

**THE COUNTY GOVERNMENT OF NAROK & 4 OTHERS.....RESPONDENTS**

**RULING**

The Application before me is the Notice of Motion dated 13<sup>th</sup> November, 2018 brought under Section 1A,1B,3,3A,63(e) of the Civil Procedure Act seeking for the following orders: -

1. **THAT** a conservatory order do issue restraining the Petitioner herein by himself, his servants, agents or any other person (s) whomsoever from continuing to trespass upon, lay claim to, remaining in occupation and or interfering in any way with all that land parcel TRANS-MARA/ENOOSAEN/59 measuring approximately 8.87Hectares or thereabouts situated in Trans-Mara West Sub County Narok County pending the hearing and determination of this application interparties and or further orders of the court.
2. **THAT** a conservatory order do issue restraining the Petitioner herein by himself, his servants, agents or any other person(s) whomsoever from continuing to trespass upon, lay claim to, remaining in occupation of and or interfering in any way with all that land parcel No. TRANS-MARA/ENOOSAEN/59 measuring approximately 8.87Hectares or thereabouts pending the hearing and determination of this suit and or further orders of the court.
3. **THAT** the orders issued herein be served upon the OCS Narok Police Station to ensure compliance by all the parties concerned.
4. **THAT** there be such other and or further orders that the court shall deem fit and just to grant in the circumstances of the case.

The Application was based on the grounds that the Petitioner herein has continued to trespass upon and lay claim on land parcel TRANS-MARA/ENOOSAEN/59 measuring 8.87hectares and that has unlawfully remained in occupation and possession after termination of the lease of the aforesaid parcel of land and as a result of which the Interested Party/Applicant stands to suffer.

The Application was further supported by grounds contained in the Affidavit of one John Ole Kararam who is the head teacher of Enooretet Primary School who deponed that the Interested Party herein was allocated two parcels of land under Enoosaen Adjudication Section which was subsequently registered as TRANS-MARA/ENOOSAEN/56 and 59 respectively, however the Petitioner filed objections in respect of Land Parcel No. TRANS-MARA/ENOOSAEN/59 vide Objection Case No.76 of 2002 which was decided in favour of the Interested Party and subsequent Appeal from the decision of the objection equally determined in favour of the Interested Party herein.

The Interested Party further stated that the Petition currently before the court was filed after a number of other suits before the High Court in Kisii and the Principal Magistrate's Court at Kilgoris all in respect of the subject land and that he is apprehensive that any adverse dealing on the land by the Petitioner would render the outcome of the Petition nugatory.

The Application was opposed by the Petitioner who filed a Replying Affidavit sworn on 26<sup>th</sup> November, 2018 in which he deponed that the Application is not urgent as the Interested Party had enough time to bring his case forth since the petition was filed. He further states that the orders sought cannot accrue as a result of the provisions of Limitation of Actions Act and that the Application has not been brought in good faith and that the same is an abuse of the court process and further that the Applicant lacks capacity to bring the instant Application as he is not the registered owner of the land and that there was no proof that the same was acquired compulsorily by the Government.

The Respondent further averred that the Allegation that he could interfere with the suit property is baseless and false to the extent that the

Headmaster who is acting on the matter on behalf of the school wants to use the land for his own personal gain and that there is nothing to show that the school or by extension the County Government of Narok took possession.

The Respondent contends that the suit land forms part of the estate of the deceased and with the title registered in his name and having an absolute and indefeasible title to the suit land.

The Parties filed their respective submissions in the matter and the Applicant contends that there was violation of his property by the Petitioner despite the land being allocated to them but the same registered in the name of the Petitioner and obtained fraudulently.

On whether it has met the conditions for grant of the orders sought, the Applicant contends that it has made a prima facie case with probability of success for the grant of the orders and that the Petitioner has violated its right to property and contravenes the same.

The Respondent in his submissions claims that the Application is an attack in his character and that the same is incompetent and the Applicant has not demonstrated any prejudice it will suffer if he continues and stays in possession of the suit land.

The Respondent further contends that the elements of fraud has not been proved against him and avers that the allocation, adjudication, demarcation, registration and issuance of title was done in accordance with the law.

I have read the Application before me and the submissions filed by parties and I find the issue for determination is principally one despite the parties trading accusation and counter accusation on the matter of fraud and who between them has better title to that which in my mind will remain to be litigated upon, evidence led and a finding made by this court at a full hearing and for this reasons I will leave to the hearing of the substantive Petition.

In the instant Application the Applicant contends what is not in dispute in that the Petitioner is the registered owner of the suit land and the Interested party is apprehensive that the Petitioner/Respondent might deal with the suit land adversely to its detriment.

In the submissions by the Applicant I have not seen what are the basis for apprehensive. Mere apprehension cannot be ground for the grant of the orders sought the apprehension must be real and eminent to which the applicant have failed to demonstrate.

On whether the Applicant has made a prima facie case with a probability of success I find that the Petitioner being the holder of the land the Applicant cannot say that he has better title to the suit land.

For the above reasons I find that the applicant has not demonstrated the conditions for the grant of conservatory orders and accordingly I dismiss the application as it lacks merit with costs.

**DATED, SIGNED and DELIVERED** in open court at **NAROK** on this **05<sup>th</sup>** day of **JULY, 2019**

**Mohammed Noor Kullow**

**Judge**

**05/7/19**

In the presence of: -

Mr. Kilele for interested party

Lodi for the petitioners

CA:Chuma

**Mohammed Noor Kullow**

**Judge**

**05/7/19**