



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 11 OF 2017

JOSEPHAT MULWA MUKIMA *alias*

JOSPHAT MULWA MUKIMA.....PLAINTIFF

VERSUS

JESSE NG'ANG'A GAKOBO.....1ST DEFENDANT

CHRISTOPHER MUTURI KURIA.....2ND DEFENDANT

HENRY KURIA KINUTHIA.....3RD DEFENDANT

PIUS MATINGI.....4TH DEFENDANT

MBATHI MUTISYA.....5TH DEFENDANT

ANAH KALUKI KITHYOI.....6TH DEFENDANT

CHRISTOPHER MBATHA MUIA.....7TH DEFENDANT

AFYA INVESTMENT CO-OPERATIVE

SOCIETY LIMITED.....8TH DEFENDANT

WINNIE MUTHONI MARU, TABITHA MUGURE

NJOROGE & ROSEMARY NJAMBI NGUGI *(Being trustees*

***of* MWITHIGE SELF HELP GROUP.....9TH DEFENDANT**

HAZINA HOUSING CO-OPERATIVE

SOCIETY LIMITED.10TH DEFENDANT

SAWA SAVINGS AND CREDIT CO-OPERATIVE

SOCIETY LIMITED.....11TH DEFENDANT

THE LAND REGISTRAR, MACHAKOS.....12TH DEFENDANT

RULING

1. In the Notice of Motion dated 23rd April, 2019, the Plaintiff has prayed for the following orders:

a. That pending the hearing and determination of this Application inter-partes, the Plaintiff/Applicant be and is hereby allowed

to forthwith deposit into the recently found original Title Deed to the suit property being Title No. Donyo Sabuk/Komarock Block 1/373 (original).

b. That the Judgment scheduled for 28th June, 2019 be and is hereby suspended pending the hearing and determination of this Application.

c. That the Plaintiff/Applicant be and is hereby allowed to re-open his case.

2. The Application is premised on the ground that he is the owner of land known as Donyo Sabuk/Komarock Block 1/373 (*the suit property*); that he was allocated the suit property by Komarock Ranching and Co-operative Society Limited in the year 1993 and that he remained the registered owner of the suit property from 28th September, 1993 until September, 2013 when the register of the land was closed upon sub-division of the same by the 1st - 7th Defendants without his knowledge and consent.

3. The Plaintiff has deponed that the 1st to 7th Defendants fraudulently sub-divided the suit property and transferred the resultant plots to the 8th to the 11th Defendants and that all along, during the hearing of the suit, he believed that the original Title Deed had been stolen from his house owing to the numerous robberies that had occurred.

4. According to the Plaintiff, he was unable to produce the original mother Title Deed in evidence as he verily and inadvertently believed that the same was lost and or stolen; however, on 19th April, 2019, the original Title Deed was traced in his house amongst his documents and that the original Title Deed to the mother title is relevant to this suit as it will corroborate his testimony that his property was fraudulently transferred to the Defendants.

5. The Plaintiff deponed that there is need that the Judgment in this matter scheduled for 28th June 2019 be suspended and the Plaintiff's case be re-opened for the production of the Original Title Deed to the mother property and cross-examination thereof to add value to the Judgment in this matter.

6. The Plaintiff finally deponed that his claim as to the ownership of the mother property is not new as evidenced by the previously produced Certificate of Ownership; that taking into consideration the sensitivity of this matter and the huge number of people having an interest in the resultant parcels from the sub-division of the mother property, it is prudent that the original Title Deed to the mother property be deposited in this court for safe keeping pending the conclusion of the suit.

7. In his Replying Affidavit, the 11th Defendant's advocate deponed that the Application is bad in law and is meant to mislead the court as it cites Gloria Ndunge Mulwa as the deponent yet the Supporting Affidavit is sworn by the Plaintiff; that it defeats logic that so many sub-divisions would have been conducted on the suit property without his knowledge and that the Plaintiff had full knowledge of the sub-division and even participated in the sale.

8. According to the 11th Defendant's advocate, the 11th Defendant exercised due diligence before purchasing land known as Donyo Sabuk/Komarock Block 1/43349 and that the sudden retrieval of the original title is an afterthought by the Plaintiff in an attempt to fill gaps in his evidence.

9. The 11th Defendant's advocate finally deponed that although the Plaintiff informed the court that he had lost the original Title Deed, he never produced a Police Report to that effect; that the Plaintiff's assertion that he has since retrieved the original Title Deed cannot be true due to the fact that parties have already given evidence and that the scheduled Judgment should therefore not be suspended.

10. In his submissions, the Plaintiff's advocate submitted that the Plaintiff commenced this suit as against the Defendants after it came to his notice that his land being title number Donyo Sabuk/Komarock Block 1/375 had fraudulently been sub-divided and transferred to the 1st-7th Defendants who subsequently sold the sub-divisions to the 8th to the 11th Defendants.

11. Counsel submitted that the main suit has since been heard and Judgment reserved for 28th June, 2019 and that the Title Deed for parcel number Donyo Sabuk/Komarock 1/373 which the Plaintiff had all along believed had been stolen from his house was traced which prompted the filing of the Application.

12. Counsel submitted that the principles governing an Application for re-opening of a case are that the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed and that re-opening of the case will not normally be allowed if failure was deliberate. Counsel submitted that the production of the original Title Deed for the subject property in evidence will corroborate the Plaintiff's testimony that his property was fraudulently transferred.

13. Counsel submitted that the original Title Deed to the subject property is not new evidence and that the issue of ownership of the subject property by the Plaintiff is not a new matter as evidenced by the produced green cards.

14. The Plaintiff's counsel submitted that no party stands to suffer any prejudice by re-opening of the Plaintiff's case because each party will have an opportunity to cross-examine the Plaintiff in respect to the original Title Deed and that the Plaintiff has shown compelling reasons to warrant the court to exercise its discretion in his favour.

15. The Plaintiff's counsel finally submitted that the Plaintiff seeks to produce the original Title Deed for parcel number Donyo Sabuk/Komarock Block 1/373 in court; that the Plaintiff is currently admitted in the High Dependency Unit (HDU) in hospital and his presence cannot be physically secured in court due to his old age and that a person with personal knowledge of this matter ought to be called

to testify as a witness on behalf of the Plaintiff. Counsel relied on numerous authorities which I have considered.

16. The 11th Defendant's advocate submitted that it is inconceivable that the Plaintiff, after selling the suit property to several parties, suddenly and miraculously found the mother title in his house; that the Plaintiff was very much aware of all the transactions concerning the suit property and that the 11th Defendant bought the suit property lawfully and adhered to all the procedures as laid down by the Ministry of Lands.

17. The 11th Defendant's advocate submitted that the parties were given ample time and chance to prove their case and that in seeking to re-open his case, the Plaintiff is seeking to fill gaps in the evidence that he has already given.

18. This suit was commenced by way of a Plaint dated 16th January, 2017. In the Plaint, the Plaintiff averred that he is the owner of land known as Donyo Sabuk/Komarock Block 1/373 and that he has been in possession of the land since 1993 when he was issued with a Title Deed. The Plaintiff averred as follow:

“8. The Plaintiff has been in possession of the suit property since its allocation and he has always intended that the suit property be passed on to his beneficiaries from one generation to another.

9. Unfortunately, the Title Deed of the suit property got lost and/or misplaced while in the Plaintiff's possession.

10. Recently as the Plaintiff was making arrangements to apply for the replacement of his lost/misplaced title document, it recently came to his attention that someone had trespassed into his suit property, illegally and unlawfully taken possession and fenced portions thereof further to placing bill boards.

11. Further, the whole of the suit property had without the Plaintiff's knowledge and/or consent been illegally and unlawfully sub-divided into various portions.”

19. The Defendants filed their respective Defences. The 1st-7th Defendants' Defence is that they purchased the suit property from the Plaintiff whereafter they sub-divided the land into numerous portions. After the said sub-division, they sold the portions to the 8th -11th Defendants.

20. All the parties in this matter testified. The Plaintiff, PW1, informed the court that the Title Deed in respect to the original parcel of land known as Donyo Sabuk/Komarock Block 1/373 got lost and that he has never sold the suit property to the Defendants. In cross-examination, the Plaintiff informed the court that he reported the issue of the loss of the Title Deed to the police.

21. From the pleadings of the Plaintiff and his evidence, the crux of his case was that after he lost his Title Deed, the 1st to 7th Defendants fraudulently had the land sub-divided and then registered the sub-divisions in their respective names. In the current Application, the Plaintiff has changed the facts of his case by stating that the original Title Deed is in his possession and that the said Title Deed was not lost after all. The Plaintiff is seeking for an order to allow him to re-open his case to enable him produce the Title Deed for parcel number Donyo Sabuk/Komarock Block 1/373 which he had claimed was lost.

22. As I have stated above, the Plaintiff's cause of action was predicated on the fact that the 1st-7th Defendants fraudulently had parcel of land known as Donyo Sabuk/Komarock Block 1/373 fraudulently registered in their names after his Title Deed got lost. Having deponed in the current Application that he has since found the original Title Deed for Donyo Sabuk/Komarock Block 1/373, his cause of action has completely changed.

23. The re-opening of the Plaintiff's case in this matter is not just for the purpose of introducing the Title Deed, but re-engineering the whole case. If the Plaintiff's case is that despite having the Title Deed, the Defendants had the same Title Deed transferred in their names, then the only recourse for him is to withdraw the suit in its entirety and file fresh pleadings.

24. Indeed, considering that all the parties have testified in this matter and closed their respective cases, and in view of the prejudice that the Defendants will suffer due to the change of the Plaintiff's cause of action, I decline to allow the Application dated 23rd April, 2019. The Application dated 23rd April, 2019 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 1ST DAY OF NOVEMBER, 2019.

O.A. ANGOTE

JUDGE