



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 143 OF 2020**

**JAMES MWANGI GACHERU.....PLAINTIFF**

**VERSUS**

**CHARLES NJOGU MBURU.....1<sup>ST</sup> DEFENDANT**

**MUSAN ENTERPRISES LIMITED.....2<sup>ND</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**RULING**

*(Application for injunction; plaintiff claiming ownership of disputed land and displaying title to it; 2<sup>nd</sup> defendant also displaying title to the same land after purchase from the 1<sup>st</sup> defendant and subsequently subdividing it; 1<sup>st</sup> defendant claiming to have properly acquired title to the land after transfer from the previous owner who was not the plaintiff and later transferring title to the 2<sup>nd</sup> defendant; 2<sup>nd</sup> defendant obtaining transfer from 1<sup>st</sup> defendant and subsequently subdividing the land into various sub-plots; all parties putting up strong cases to demonstrate ownership of the land; best in the circumstances that the disputed land and the titles be preserved pending hearing and determination of the suit)*

1. This suit was commenced through a plaint which was filed on 1 October 2020. Together with the plaint, the plaintiff filed an application dated 24 September 2020, and it is that application which is the subject of this ruling. The application is principally one seeking orders of injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants from dealing with, or trespassing into, the land parcel Kwale/ Galu/Kinondo/679, or what the plaintiff refers to as “its unlawful subdivisions”, being Kwale/Galu/Kinondo/2703 to 2714 (inclusive).

2. The case of the plaintiff/applicant is that he has always been the registered and absolute owner of the land parcel Kwale/Galu/Kinondo/679 (Plot No.679) measuring 1.3 Ha. He contends that on 12 September 2014, the 1<sup>st</sup> defendant/respondent, fraudulently caused to be Gazetted, the Gazette Notice No. 6382 of 12 September 2014, alleging to be the registered proprietor and that the Green Card to the said land was missing. As a result, a new register was opened, with the replacement Green Card showing the 1<sup>st</sup> respondent as proprietor since 3 May 2002. The applicant further avers that there had been previous attempts to fraudulently dispossess him of the land which led to him filing the suit *Mombasa HCCC No. 11 of 2007 James Mwangi Gacheru vs Hewan Investments Limited & The Chief Land Registrar*. He explains that in that case, a third party purported to have purchased the land from Barclays Bank of Kenya Limited through a private treaty at a time that the property was charged to the bank. He states that it was discovered that the bank had never sold the property and still held the title in the name of the applicant, and in the said case, the Court, in a judgment delivered on 14 May 2010, upheld his title and ordered the rectification of the register to have his name re-inserted as proprietor. It is further the applicant’s case that once the 1<sup>st</sup> respondent procured registration in his favour, following the Gazette Notice, he proceeded, on 10 January 2019, to transfer the property into the name of the 2<sup>nd</sup> defendant/respondent. The 2<sup>nd</sup> respondent then subdivided the Plot No. 679 into the sub-plots Nos. 2703 to 2714 (inclusive). In the suit, the applicant seeks orders inter alia for a declaration that he is the lawful owner of the Plot No. 679, cancellation of the subdivided titles, rectification of the register, and damages.

3. The 1st defendant/respondent has opposed the motion through a replying affidavit that he has himself sworn. He has deposed inter alia that he has been the absolute owner of the Plot No. 679 since the year 2002 having got the same from one Pennina Waithera Williams. He has annexed Pennina’s copy of title, an agreement of August 1987, deed of gift transfer, and copy of green card. He contends that it is possible that the applicant may have colluded with the registry to take away his property by causing the records to disappear. That is why he caused the gazettement of a notice that his green card is lost. He avers that no objection was raised to the gazettement. He asserts that he obtained the property genuinely and deposes that he is a stranger to the suit that the plaintiff had filed.

4. The 2<sup>nd</sup> defendant/respondent entered appearance, filed defence, a replying affidavit to the application, and a preliminary objection. In its replying affidavit, sworn by John Eric Musyoka-Annan, it is deposed inter alia that through an agreement for sale dated 14 December 2018,

the 2<sup>nd</sup> respondent purchased the Plot No. 679 from the 1<sup>st</sup> respondent at a price of Kshs. 75,000,000/=. It is deposed that prior to the purchase, a search was conducted which confirmed that title is in the name of the 1<sup>st</sup> respondent. It is thus contended that the 2<sup>nd</sup> respondent is a purchaser for value without any notice of defect in the title of the 1<sup>st</sup> respondent. It is mentioned that the 2<sup>nd</sup> respondent then proceeded to subdivide the land into the sub-plots Nos. 2703 – 2714, and while all this was being done, the 2<sup>nd</sup> respondent faced no resistance. He deposes that the applicant has abused the court process to gain possession of the 12 sub-plots and is thus depriving the 2<sup>nd</sup> respondent of its lawfully acquired property.

5. In the preliminary objection, the 2<sup>nd</sup> respondent claims that the plaint is defective for reasons that it does not bear the mandatory advocates' identification stamp required by Section 35 of the Advocates Act. He further claims that the plaint is defective as it is supported by a verifying affidavit which does not comply with the mandatory requirements of Order 4 Rule 1 (l) (f) and Order 4 Rule 2 of the Civil Procedure Act, and therefore, both the plaint and the verifying affidavit should be struck out.

6. Counsel filed submissions in respect of the application and the preliminary objection and I have taken note of these submissions. I am not in any doubt as to the decision that is best suited in the circumstances herein and I will thus make my delivery very brief.

7. First, on the preliminary objection, if there is any defect, the same is of such minute procedural significance, and no party is prejudiced, such that the same is curable under Article 159 (2) (d) of the Constitution. I am unable to strike out the plaint based on the said preliminary objection.

8. On the injunction, it is apparent that there are serious competing claims to ownership of the disputed land and it is wise not to delve too deeply into the cases of the parties at this stage of the proceedings. Given the very contested nature of the suit, it is best that those competing claims be analysed after the hearing of the suit, and not at this juncture. What I can say is that the plaintiff's suit does not appear frivolous, for he has displayed a title in his name, and has also shown that he had previous litigation over the same land which was decided in his favour. Without negating the strong positions put forth by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, we can safely say that the plaintiff has established a *prima facie* case with a probability of success.

9. It is also apparent that there is danger of the property being lost or complicated by successive transactions, unless there is made an order stopping any transactions/dealings over the disputed Plot No. 679 and/or its subdivisions. Similarly, there is need to preserve the register of the Plot No. 679 in the name of the applicant, and the register containing the Plot No. 679 and the subdivisions, which are Plots No. 2702 – 2714, in the name of the 1<sup>st</sup> and/or 2<sup>nd</sup> defendant, so that no entries are made until this case is decided. In other words, given the very strong cases put forth by both applicant and the respondents, it is best that the disputed land be preserved in the state that it is until the conclusion of this case.

10. Consequently, I make the following orders to dispose of the application dated 29 September 2020 :-

*(i) That pending the hearing and determination of this suit, there is hereby issued an order of injunction, stopping all parties herein from entering into any sale, lease, charge, or any other disposition of whatever nature, touching on the disputed land, whether described as Kwale/Galu Kinondo/679 or Kwale/Galu Kinondo/2703 to 2714 (inclusive).*

*(ii) That pending the hearing and determination of this suit, there is hereby issued an order restricting the registration of any disposition, in the register or registers of the land in dispute, whether the register/s be Kwale/Galu Kinondo/679 or Kwale/Galu Kinondo/2703 to 2714 (inclusive) and the said registers to remain intact until the conclusion of this case.*

*(iii) That no party should proceed to make any structures on the disputed land, whether it be considered the land parcel Kwale/Galu Kinondo/679 or Kwale/Galu Kinondo/2703 to 2714 (inclusive) and no occupation of it should ensue until this case is finally heard and decided, though all parties are at liberty to ensure the security of the disputed land from invaders or other third parties.*

*(iv) That costs of this application will be costs in the cause.*

11. Orders accordingly.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF MAY 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**