



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC. CASE NO. 801 OF 2017**

**SARPHINE OLE NTEKA.....PLAINTIFF**

**VERSUS**

**LENDEKI OLE SOKOYIONI.....DEFENDANT**

**RULING**

What is before court for determination is the Defendant's Notice of Motion application dated 17<sup>th</sup> February, 2020 brought pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act including Order 28 Rule 7 of the Civil Procedure Rules, where he seeks the following orders:

- 1) That this Honourable Court be pleased to issue a Commission directed at the Director, Land Adjudication/District Land Adjudication Officer, Kajiado to INVESTIGATE, ASCERTAIN and DELIVER to this Honourable Court a report with finding as to the historical and present ownership of ALL THAT PROPERTY known as LR Number KAJIADO/OL CHORO ONYORE/282.
- 2) That this Honourable Court do limit the time within which the Director, Land Adjudication/District Land Adjudication Officer, Kajiado should comply with the terms of the commission sought in prayer 1 hereinabove.
- 3) That there be liberty to appeal.
- 4) That the costs of this application be in the cause.

The application is premised on the supporting affidavit of LENDEKI OLE SOKOYIONI and the grounds that the Defendant is the registered owner of land parcel number KAJIADO/OL CHORO ONYORE/282, hereinafter referred to as the 'suit land', which the Plaintiff alleges belonged to their late father hence he has beneficial interest to it. The Plaintiff further alleges there was subdivision in 1982 which the Defendant unfairly and without reasonable justification, apportioned himself large portion of the suit land. He contends that the dispute is over survey and demarcation of the suit land. Further, the Director, Land Adjudication/District Land Adjudication Officer, Kajiado are officers mandated by the law to survey and demarcate immovable property within the jurisdiction of this court as well as retain adjudication records. He explains that the issuance of the commission sought, shall enable the court to utilize its resources in a just and fair manner and ensure efficient disposal of the business before it.

The Plaintiff opposed the application and filed a replying affidavit sworn by SARPHINE OLE NTEKA who deposes that the issues sought cannot be granted at an interlocutory stage as the same is the gist of the main suit. Further, the Defendant has also done a similar report in 2019 regarding Kajiado/Ol choro Onyore/282 and therefore the instant application is unnecessary. He insists since the Defendant filed an undated Notice of Appeal which was received on 8<sup>th</sup> November, 2011, Order No. (3) in the application cannot be granted by this Court as the same can be sought before the Court of Appeal. Further, that no appeal has been preferred and the said Order (3) intends to delay prosecution of the main suit. He avers that the issues in the instant application are the same as in the main suit and proceeded to highlight them. He reiterates that if the Court is pleased, it should order an investigation into the ownership of land parcel number KJD/OL CHORO ONYORE/59 as opposed to KJD/OL CHORO ONYORE/ 282 or KJD/OL CHORO ONYORE/283 separately.

The Defendant/Applicant filed a further affidavit where he reiterates his claim and insists his application is meritorious. He contends that the orders given on 30<sup>th</sup> October, 2019 did not place him in a position of advantage and therefore he does not derive any benefit during the pendency of this matter. He insists the orders sought in the instant application can be granted in an interlocutory stage to allow parties a chance to interrogate the report filed by the Director, Land Adjudication/District Adjudication Officer, Kajiado and no party will suffer prejudice. Further, that the Director, Land Adjudication/District Adjudication Officer is best placed to ascertain the Plaintiff's claim for customary trust from the documents in his custody. He confirms he has no intention of pursuing an appeal.

The application was canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 17<sup>th</sup> February, 2020 including the respective affidavits and rivaling submissions, the only issue for determination is whether a Commission should be issued directed at the Director, Land Adjudication/ District Land Adjudication Officer, Kajiado to present a report on the historical and present ownership of the suit land.

The Defendant/Applicant in his submissions provided a history of the suit land and heavily relied on section 23 of the Land Adjudication Act. To support his arguments, he relied on the case of **Ecobank Kenya Limited V Attain Enterprises Limited & Another (2014) eKLR**.

The Plaintiff in his submissions outlined the dispute before court and insists the Defendant is not entitled to the orders sought in the instant application as the same is vague, frivolous as well as unmerited. He insists the prayers sought will delay justice as well as the expeditious disposal of legal actions. He urged the Court to take note of the age of the witnesses. He further submitted that the relief sought by the Defendant can only be granted after hearing and determination of the suit on merits including where the relief had initially been sought. To buttress his arguments, he has relied on Article 159(2) of the Constitution, Section 3(1) of the Environment and Land Court Act as well as the following decisions: **Joseph Ndungu Kagiri V Republic Criminal Appeal 69 of 2012 (2016) eKLR**; **Njeri Kuru V Gitau Kuru (2004) eKLR**; **Titus Kiragu V Jacksom Mugo Mathai (2015) eKLR**; **Lawrence Kinyua Mwai V Nyariginu Farmers Company Limited & Another (2016) eKLR**; **Republic V Stephen Mutwiri Ngae & Another (2018) eKLR**; **Deynes Muriithi & 4 Others V Law Society of Kenya & Another (2016) eKLR**; **Lucy Wangui Gachara V Minudi Okemba Lore (2015) eKLR**; **Oksana Investment Supplies Ltd V Alice Wanjiru Wamwea (2019) eKLR**; **Mpaka Road Development Limited V Kana (2004) 1EA 124 and Marangu Rucha & Another V St. Mary's Mission Hospital Nairobi (2015) eKLR**.

Order 28 Rule 7(a) of the Civil Procedure Rules stipulates that: **'the application of any party or of its own motion in any suit, the court may issue a commission to any person to make an investigation and report to the court for the purpose of ascertaining - (a) any matter in dispute in the suit, whether or not the matter is substantially the whole matter in dispute between the parties;'**

In the current scenario, the Defendant has sought for a commission to issue to the Director Land Adjudication/District Land Adjudication Officer to provide a report in respect to the history and current ownership of the suit land. In the case of **Bernard Mwangi Nderitu & 5 Others V Ndiara Enterprises Limited [2012] eKLR**, the Court while dealing with an application under Order 28 Rule 7 held as follows: **'I have considered the application, and affidavits filed in Court. I have also considered the oral submissions made by both counsels. The issue for determination is the procedure for determining the authenticity of a Title document, and whether this Court should issue a commission to the Director Criminal Investigation Department, and Commissioner of Lands to investigate and establish the authenticity of the Title referred herein. Counsel for the Applicants brought this application under Order 28 Rule 7(a) which empowers the Court upon an application, or on its own motion to issue a commission to any person to make an investigation and report to the Court, for purposes of ascertaining any matter in dispute in the suit. It is apparent that that applicant has not detailed the fraud alleged. I do agree with the respondent's submission that the applicant should move to the lands registry and do an official search on the title as the same is conclusive. Granting prayer no. 2 would setting a dangerous precedent for parties in land matters wherein a procedure has been laid down on how a document can be authenticated. I therefore find no merit in the application and dismiss it with cost to the respondent.'**

I note the Defendant relied on the case of **Ecobank Kenya Limited V Attain Enterprises Limited & Another (2014) eKLR** where a commission had been allowed but I opine that this decision is persuasive and not binding on this court. Based on the legal provisions cited above while associating myself with the quoted decision, it is my view that this case does not qualify for the issuance of a commission as the Defendant has failed to demonstrate whether the Director of Land Adjudication/District Adjudication Officer, Kajiado is unavailable or has declined to provide the documents in respect to the suit land. Further, there is already a clear legal procedure in authenticating a title which I opine the Defendant can adhere to. I note the suit land was actually registered under the repealed Registered Land Act and to my mind, I deem the Land Register to be sufficient in providing the history of the said suit land. I opine that since the parties had been directed on 30<sup>th</sup> October, 2019 to comply with Order 11 of the Civil Procedure Rules and the Defendant has not indicated whether he has done so, at this juncture, it is my view that the orders being sought are premature. Further, the issues the Defendant is raising are matters set to be determined once the suit is set down for hearing and evidence presented. I believe that if the Defendant sought to call the Land Adjudication Officer, Kajiado as his witness, he can seek for issuance of witness summons to that effect. Further, I note the Defendant filed a Notice of Appeal on 8<sup>th</sup> November, 2019 but he claims he does not intend to proceed with the Appeal but there is no Notice of withdrawal filed. It is my considered view that the Defendant seeks to delay this matter and that is the reason why filed the instant application.

In the circumstances, I find the Defendant's Notice of Motion application dated 17<sup>th</sup> February, 2020 unmerited and will disallow it.

Costs are awarded to the Plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25<sup>TH</sup> DAY OF OCTOBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**