



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT KILGORIS
ELC APPEAL NO.16 OF 2021.

LETUTUI NKEDIANYE

CHARLES NKEDIANYE

MOSES KIPENO

FRANCIS KIPENO.....APPELLANTS/APPLICANTS

-VERSUS-

JOHN SAKAJA NTUKUSOI.....RESPONDENT

RULING

The Present Application before this Honourable Court is the Notice of Motion dated 16th September 2021 filed by the Advocates for the Appellant/Applicant under a Certificate of Urgency thereof.

The present Application is premised on Section 1,1A,3A of the Civil Procedure Act, Cap 21, Section 13 of the Environment & Land Court Act, No.19 of 2011, Section 3(1) of the Judicature Act, Cap 8, Order 50 Rules 6 of the Civil Procedure Rules,2010, Order51 Rules 1 & 10 of the Civil Procedure Rules, 2010, Articles 40,47,50(1), & 159 (2) of the Kenyan Constitution 2010 as well as Order 9 Rule 13 of the Civil Procedure Rules 2010.

The Present Application is seeking inter-alia;-

1. Pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant an Order of inhibition, directed to and/or against any dealings, transaction and/or disposition, relating and/or concerning truncations in respect of the LR.No. TRANSMARA/NKARARO/959 & 960 respectively.
2. The Honourable Court be pleased to enjoin one NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI in the suit herein for hearing and determination of the instant Application ONLY.
3. The Honourable Court do issue a Declaration that the sub-division of Plot Number 212 Nkararo Adjudication Section into L.R.No. TRANSMARA/NKARARO/959 and L.R.NO. TRANSMARA/NKARARO/660 and the resultant titles issued by the Respondent to one NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI during the pendency of the instant suit was/is null and void.
4. The Honourable Court be pleased to revoke, rescind and/or cancel the titles of the subsequent sub-divisions namely L.R.NO. TRANSMARA/NKARARO/959 & 960 respectively and restore and/or rectify the register in respect of the suit property that is Plot Number 212 in Nkararo Adjudication Section.

The above prayers are supported by an affidavit of one FRANCIS KIPENO sworn on the 16th September 2021 which provide the grounds of the present Application as follows;-

- a) The Respondent was registered as the beneficial owner of a property known as Plot Number 212 within Nkararo Adjudication Section which is under the Adjudication Process.
- b) Being dissatisfied by the above decision, the Applicant's father namely Nkedianye Ole Kipeno (now deceased) filed and/or

lodged an objection challenging the adjudication process vide Objection Cause Number 24 of 1990 which was dismissed.

c) Again being dissatisfied with the dismissal of the objection herein the Applicant's father namely Nkedianye Ole Kipeno (now deceased) filed an Appeal of the Land Adjudication Committee to the Minister vide Appeal Case Number 139 of 1998 which resulted in a Ruling dated 30th March, 2004 setting aside the earlier decision of the Land Adjudication Committee and directed that the said Parcel of Land be sub-divided equally between the parties therein.

d) Unfortunately, the decision of the Minister dated 30th March 2004 was never implemented by the Government Departments and the entire parcel known as Plot Number 212 within Nkararo Adjudication Section was registered in the name of the Respondent.

e) The Respondent thereafter instituted proceeding against the Appellants/Applicants herein i.e KILGORIS PMCC ELC NO.13 OF 2018 alleging trespass on his parcel of land and which proceeding is still pending for determination.

f) The Appellants/Applicants on the other hand filed a Defence and Preliminary Objection in the said proceeding known as KILGORIS PMCC ELC NO.13 OF 2018 with one ground being that the Honourable Court did not have jurisdiction of properties that are under adjudication.

g) On the 24th of September 2019, the Honourable Court handling the proceeding known as KILGORIS PMCC ELC NO.13 OF 2018 dismissed the Preliminary Objection on the issue of jurisdiction.

h) The Appellants/Applicants being dissatisfied with the said Ruling of 24th September 2019, filed a Memorandum of Appeal on the 23rd of October 2019 but have not filed any Record of Appeal until now.

i) Nevertheless, it has now come to the knowledge of the Appellants/Applicants that the Respondent has sub-divided a portion of the parcel of land known as Plot Number 212 within Nkararo Adjudication Section and created new properties known as L.R.No. TRANS-MARA/NKARARO/ 959 and L.R.NO. TRANS-MARA/NKARARO/960 in the names of NICHOLAS MONKI NTUKUSOI & CECILIA SOIPANO NTUKUSOI who are the son and wife of the Respondent herein.

j) The Appellants/Applicants allege that the said sub-division of the Parcel Number 212 within Nkararo Adjudication Section into the new properties known as L.R NO.TRANS-MARA/NKARARO/959 and L.R.NO.TRANS-MARA/NKARARO/960 was done during the pendency of the Court proceedings hence null and void thereof.

k) Appellants/Applicants therefore seek for the cancellation, revocation, rectification and/or deleting of the said titles known as L.R.NO. TRANS-MARA/NKARARO/959 and L.R.NO. TRANS-MARA/NKARARO/960 thereof.

The Respondent on the other hand opposed this present Application by way of a Replying Affidavit sworn on the 22nd of September 2021 and filed in Court on the same day.

The Respondent opposes this present Application on the following grounds:-

a) The Respondent is the registered and beneficial owner of the property known as TRANS-MARA/NKARARO/212.

b) Being the duly registered and beneficial owner of the property known as TRANS-MARA/NKARARO/212, the Respondent elected to sub-divide the same to create properties number TRANS-MARA/NKARARO/959 AND TRANS-MARA/NKARARO/960 which he willingly registered the same in the names of his children NICHOLAS MONKI NTUKUSOI & CECILIA SOIPANO NTUKUSOI.

c) There was no Court Order and/or any other lawful prohibition barring the Respondent to carrying out the said sub-division and therefore the two properties namely TRANS-MARA/NKARARO/959 AND TRANS-MARA/NKARARO/960 in the names of NICHOLAS MONKI NTUKUSOI & CECILIA SOIPANO NTUKUSOI are legitimate and lawful titles.

d) The Respondent further avers that the proceeding still pending in the Lower Court relate to the property known as TRANS-MARA/NKARARO/212 and therefore it will be a drastic step to cancel the titles of the properties known as TRANS-MARA/NKARARO/959 AND TRANS-MARA/NKARARO/960 belonging to NICHOLAS MONKI NTUKUSOI & CECILIA SOIPANO NTUKUSOI without giving them a chance to participate and get a fair hearing before this Court or the Lower Court.

e) Consequently, the Respondent seeks that the present Application be and is hereby dismissed with costs.

ANALYSIS OF FACTS & THE LAW.

It is a settled fact that the Respondent herein is the registered and beneficial owner of the property known as TRANS-MARA/NKARARO/212 having been acquired the same through an adjudication process of the Nkararo Adjudication Area.

It is also an agreed fact that there is a pending suit in the Lower Court inter-alia KILGORIS PMCC ELC NO.13 OF 2018 between the Appellants/Applicants and the Respondent herein.

Further, it is also clear that before the hearing and determination of the proceeding in the Lower Court namely KILGORIS PMCC ELC NO.13 OF 2018, the Respondent herein being the registered owner of Land Reference Number TRANS-MARA/NKARARO/212 subdivided the said property and created Land Reference Number TRANS-MARA/NKARARO/959 AND TRANS-MARA/NKARARO/960 registered in the names of NICHOLAS MONKI NTUKUSOI & CECILIA SOIPANO NTUKUSOI respectively.

The present Application before the Honourable Court has been filed in this Appeal file which was created pursuant to a Memorandum of Appeal filed on the 23rd October 2019 by the Appellants/Applicants.

In this present Application, the Honourable court has been invited to make a determination of the issues outlined herein below;-

1. Whether or Not this Honourable Court should issue an Order of inhibition, directed to and/or against any dealings, transaction and/or disposition, relating and/or concerning truncations in respect of the LR.No. TRANSMARA/NKARARO/959 & 960 respectively.
2. Whether or not this Honourable Court should enjoin one NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI in the suit herein for hearing and determination of the instant Application ONLY.
3. Whether or not this Honourable Court do issue a Declaration that the sub-division of Plot Number 212 Nkararo Adjudication Section into L.R.No. TRANSMARA/NKARARO/959 and L.R.NO. TRANSMARA/NKARARO/660 and the resultant titles issued by the Respondent to one NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI during the pendency of the instant suit was/is null and void.
4. Whether or not this Honourable Court be pleased to revoke, rescind and/or cancel the titles of the subsequent sub-divisions namely L.R.NO. TRANSMARA/NKARARO/959 & 960 respectively and restore and/or rectify the register in respect of the suit property that is Plot Number 212 in Nkararo Adjudication Section.

ISSUE NUMBER 1.

On this issue, the Appellants/Applicants are seeking the Honourable Court to exercise its powers and Order an Inhibition to be registered against the Titles of the Properties known as TRANS-MARA/NKARARO/959 and TRANS-MARA/NKARARO/690 which are a sub-division of the original property known as TRANS-MARA/NKARARO/212 belonging to the Respondent herein.

Section 68 (1) (2)(3) of the Land Registration Act, 2012 provides as follows; -

Sub-Section (1)- The Court may make an Order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.

Sub-Section (2) – A copy of the inhibition under the seal of the Court, with particulars of the land, lease and or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.

Sub-Section (3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.

Section 69 provides that; -

“So long as an inhibition remains registered, any instrument that is inconsistent with the inhibition shall not be registered.”

Looking at the provisions of Section 68 (1) of the Land Registration Act, any Order of Inhibition must be couched in terms of any of three eventualities namely **a particular time, or until the occurrence of a particular event, or generally until a further order**

However, looking at the Prayer Number 2 of the present Application herein, the same provides as follows;-

“Pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant an Order of inhibition, directed to and/or against any dealings, transaction and/or disposition, relating and/or concerning truncations in respect of the LR.No. TRANSMARA/NKARARO/959 & 960 respectively.”

The operating words underlined hereinabove expressly provide that this Order of Inhibition was meant to be granted only pending the hearing and determination of this instant Application and not the substantive Appeal.

The interpretation of this Honourable Court in terms of the eventualities provided for in Section 68 (1) of the Land Registration Act, 2012 is the hearing and determination of this instant Application which determination is the pronouncement of this Ruling.

This Honourable Court has no jurisdiction and/or mandate to amend any parties' pleadings and/ or assume that there is an error in the manner in which pleadings filed by parties have been drawn.

Consequently therefore, the Appellants/Applicant's prayer Number 2 in the Notice of Motion dated 16th September 2021 will have been

overtaken by events and/or spent at the time of pronouncing this Ruling and the Honourable Court does not find any reason to grant the same.

ISSUE NUMBER 2.

On this issue, the Appellants/Applicants are seeking for an Order to **ENJOIN NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI in this suit herein for the hearing and determination of this INSTANT APPLICATION ONLY.**

Any applicant who seeks to enjoin someone and/or a party who is not in any existing proceeding must demonstrate sufficient cause of action and/or a potential remedy that the applicant might seek against the party the Applicant would want to be enjoined in the proceedings.

In this proceeding, the matter to be canvassed at the main hearing after many applications is an Appeal from the Ruling delivered on the 24th September 2019 in the proceedings known as KILGORIS PMC ELC CASE NO.13 OF 2018.

A careful perusal of the Grounds of Appeal as well as the Remedies sought in the Memorandum of Appeal filed on the 23rd October 2019 does not establish any sufficient cause of action and/or a potential remedy against the persons namely NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI.

The Remedies in the Memorandum of Appeal are strictly seeking to set-aside, review, vary and/or quash the Ruling and Order delivered by the Learned Trial Magistrate dated 24th September 2019.

Consequently, the Honourable Court finds that the persons known as NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI are not necessary parties to this suit and decline to enjoin them in this Application and/or Appeal as filed on the 23rd of October 2019.

ISSUE NUMBER 3

Whether or not this Honourable Court do issue a Declaration that the sub-division of Plot Number 212 Nkararo Adjudication Section into L.R.No. TRANSMARA/NKARARO/959 and L.R.NO. TRANSMARA/NKARARO/660 and the resultant titles issued by the Respondent to one NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI during the pendency of the instant suit was/is null and void.

It is a settled fact that the Respondent herein is the registered and beneficial owner of the property known as TRANS-MARA/NKARARO/212 acquired through a complete adjudication process.

The Respondent has averred that indeed the property known as TRANS-MARA/NKARARO/212 was sub-divided and two other properties namely L.R.NO. TRANS-MARA/NKARARO/959 & L.R. NO.TRANS-MARA/NKARARO/960 created and registered in the names of NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI.

The Respondent submits that there has been no Order prohibiting him from transacting with the title known as L.R.No. TRANS-MARA/NKARARO/212 and therefore the said sub-divisions and creation of the two titles known as L.R.NO. TRANS-MARA/NKARARO/959 & L.R. NO. TRANS-MARA/NKARARO/960 in the names of NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI was lawful.

This Honourable Court has only been moved in terms of its Appellate jurisdiction as regards the Memorandum of Appeal filed on the 23rd of September 2019 only and not any other matter.

The Honourable Court is alive to the fact that the suit known as KILGORIS PMC ELC NO.13 OF 2018 is still pending for hearing and determination.

It is clear from the pleadings by the Appellants/Applicants and in particular Paragraph 9 of the Supporting Affidavit which annexes the Plaint of the Lower Court Suit known as KILGORIS PMC ELC NO.13 OF 2018 that a dispute of ownership and occupation of the property known as L.R.NO.TRANS-MARA/NKARARO/212 is pending hearing and determination in the Lower Court.

The properties known as L.R.NO. TRANS-MARA/NKARARO/959 & L.R. NO. TRANS-MARA/NKARARO/960 in the names of NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI which are a creation of the disputed property known as L.R. NO. TRANS-MARA/NKARARO/212 will be directly affected and/or adjudicated thereupon during the hearing of the Lower Court proceedings.

The Order prayed for under Prayer 4 of the present application if granted would in effect compromise the Respondent's case to the effect that a determination will have been made by this Court to the effect that the Respondent had no powers, mandate and/or ownership to transact with the property which is an issue of facts of determination in the Lower Court proceeding.

Similarly, in the absence of a valid Court Order from a Court of Competent Jurisdiction after being appropriately moved, this Honourable Court sitting as an Appellate Court in accordance to the Memorandum of Appeal dated 23rd September 2019 does not have jurisdiction to issue a Declaration that the titles known as TRANS-MARA/NKARARO/959 & L.R. NO. TRANS-MARA/NKARARO/960 in the names of NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI are null and void.

The Honourable Court therefore finds the Appellants/Applicants prayer number 4 not merited.

ISSUE NUMBER 4.

On this issue, the Honourable Court again sitting as an Appellate Court pursuant to the Memorandum of Appeal dated 23rd September 2019 does not have jurisdiction to make a determination of the legality and/or validity of the properties known as TRANS-MARA/NKARARO/959 & L.R. NO. TRANS-MARA/NKARARO/960 in the names of NICHOLAS MONKI NTUKUSOI and CECILIA SOIPANO NTUKUSOI.

Prayer Number 5 of the Present Application is also not merited and is dismissed accordingly.

In Conclusion thereof, the Notice of Motion Application dated 16th September 2021 is and is hereby dismissed with costs

SIGNED AND DELIVERED IN KILGORIS ELC COURT ON THE 14TH DAY OF OCTOBER, 2021.

EMMANUEL.M.WASHE

JUDGE

In the Presence of:-

1. Court Assistant – Matiko
2. Kipngetich for the Appellant/Applicant