



**REPUBLIC OF KENYA**

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

**ELC CASE NO. E004 OF 2021 (“OS”)**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ACQUISITION OF TITLE BY ADVERSE POSSESSION**

**AND**

**IN THE MATTER OF LAND PARCEL NO. KAJIADO/LOODARIAK/244**

**BETWEEN**

**JOEL DONKOL OLE PEJO.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ROKOMPE LEMILTO MARUNA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**NANGEENTO ENE KETUKEI.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**TIMA OLE KIKANAI.....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**JEREMIAH OLE PANATO.....5<sup>TH</sup> PLAINTIFF/APPLICANT**

**-VERSUS-**

**PIUS NYABUGA MOCHOGO.....DEFENDANT/RESPONDENT**

**RULING**

This ruling is on the Notice of Motion dated 20/4/2021. Prayers (a), (b) and (c) have already been dealt with and what remains are prayers (d), (e), (f) and (g).

Prayer (d) seeks an order of injunction to issue against the Defendant or anybody claiming through him from transferring, leasing, charging, trespassing or in any way interfering with the Plaintiff’s quiet possession of LR KAJIADO/LOODARIAK/244 pending the hearing and determination of the main suit.

Prayer (e) is that *Criminal Case No. 502 of 2019 at Ngong Chief Magistrate’s Court* be stayed or quashed pending the hearing and determination of this suit.

Prayer (f) is that the Deputy County Commissioner Kajiado County and the Officer Commanding Kiserian Police Station do implement the orders issued herein;

(g) Costs be provided for.

The application is brought under **Sections 38 of the Limitation of Actions Act, 1, 1A, 1B, 3 and 3A of the Civil Procedure Act, Orders 37 Rule 7 (1), (14), 40 Rules 1, 2, 4, 8 and 9, 50 Rule 1 Civil Procedure Rules** and all other enabling provisions of law.

Jeremiah Ole Panato the fifth Applicant/Plaintiff has sworn a Supporting Affidavit on his own behalf and on behalf of his co-Plaintiffs.

In the affidavit which has 41 paragraphs and about a dozen annexures, the Plaintiffs are saying that they have always occupied the suit land which is ancestral land and that the Respondent who may have a Title Deed to part of the land has never occupied it.

Further, they say that the Report of the Commission of Inquiry into irregular/illegal allocation of Public Land (The Ndungu Report) recognizes this land as part of fraudulently acquired land where it says in part;

***“After investigations and interviews with the local community, the Commission found that the adjudication process was fraudulent. The names of many Government Officials including those of their relatives and friends were entered on the register as owners of land. A total of 362 persons who were not local residents of the area were recorded as owners of land and issued with Title Deeds.***

***Many rightful inhabitants of the area were omitted from the register and disinherited from their ancestral land”.***

The Plaintiffs have also attached five (5) photographs showing their property on the suit land which includes houses and livestock.

The application by the Plaintiffs is opposed by the Defendant Pius Nyabuga Mochogo who has sworn a Replying Affidavit dated 17<sup>th</sup> May, 2021 in which he says that the Applicants have never lived on the suit land and that when he purchased it from George Ndichu Ngotho, it was vacant. This was in May, 2015.

In 2018, he found that the Plaintiffs had occupied the land and put up semi-permanent structures thereon. He then reported the matter to the police and the Plaintiffs were arrested and charged at Ngong Law Courts.

The Respondent concludes by saying that he is a bona fide purchaser for valuable consideration without notice of the Plaintiffs claim.

Only the Plaintiffs' Counsel filed written submissions on 8<sup>th</sup> and 14<sup>th</sup> September respectively.

The issues raised in the submissions are as follows;

- (a) Have the Applicants established a prima facie case with a probability of success?
- (b) Will the Applicants suffer irreparable loss if the orders sought are not granted?
- (c) Who does the balance of convenience favour?
- (d) Should the criminal proceedings be stayed or quashed?

I have carefully considered the application in its entirety including the affidavits, the annexures, the grounds, the submissions and all the relevant law. I make the following findings.

Firstly, I find that the applicants have established a prima facie case with a probability of success. It is certain that they are in occupation of the suit land. The respondent does not deny this fact and that is why he had to report them to the police.

In addition they have attached evidence which shows that they live on the land currently.

Secondly, I find that the applicants would suffer loss if they were evicted before the case is concluded. As to whether that loss is irreparable, I am not certain.

Thirdly, I find that the balance of convenience is in favour of the ones in occupation. There are the plaintiffs. They should remain on the suit land until the issue of ownership is determined.

Finally on the issue of the criminal proceedings at the Chief Magistrate's Court at Ngong, I find that the evidence placed before me is not sufficient to enable me interfere with those proceedings.

Section 193A of the Criminal Procedure Code provides as follows;

***“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending Civil Proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings”.***

The above statutory provision replaces the common law principle of double jeopardy. The plaintiff could only have availed themselves of this principle if **Section 193A Civil Procedure Code** did not exist and secondly if they were the respondents. Now that they filed this action, they cannot claim double jeopardy.

There is no allegation or evidence that the Plaintiffs will not be afforded a fair trial at Ng'ong Law Courts and in those proceedings, they can raise whatever defence they wish.

For the above stated reasons, I allow the application dated 20/4/2021 in terms of prayers (d) and (f). I dismiss prayer ( e). Costs in the cause.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 6TH DAY OF DECEMBER 2021.**

**M.N. GICHERU**

**JUDGE**