



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 662 OF 2017

(Formerly Nairobi ELC No. 290 of 2013 – OS)

IN THE MATTER OF LAND TITLE NO. KAJIADO/ KAPUTIEI SOUTH/ 44 KAJIADO

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA

SAMUEL KIMINTAE MPARO.....1ST PLAINTIFF /APPLICANT

WANGUI KIMINDAI JOSEPH.....2ND PLAINTIFF/APPLICANT

ANNA MBENEK.....3RD PLAINTIFF/APPLICANT

ALBERT MPARO.....4TH PLAINTIFF/APPLICANT

RICHARD TURERE MPARO.....5TH PLAINTIFF/APPLICANT

ANDREW SAIBULU KIMINTAE.....6TH PLAINTIFF/APPLICANT

VERSUS

ARVIND KANJI PATEL (Being Sued as the Administrator of the Estate of

KANJI NARAN PATEL – Deceased)DEFENDANT/RESPONDENT

RULING

What is before Court for determination are two Notice of Motion Applications dated the 13th May, 2020 and 14th May, 2020 filed by the Plaintiffs and Defendant respectively. In the Plaintiffs' application dated the 13th May, 2020, they seek orders restraining the Defendant by himself or his agents/ servants from evicting, demolishing any structures, trespassing into or interfering with possession, selling, transferring or in any other way disposing of land parcel number Kajiado/ Kaputiei South/ 44, hereinafter referred to as the 'suit land' pending the hearing and determination of this application and the intended Appeal against this Court's judgement. The Application is premised on the grounds on the face of it and the supporting affidavit of the 1st Plaintiff SAMUEL KIMINTAE MPARO where he deposes that they have been residents on the suit land from 1969 and carried out substantial developments thereon. He contends that they were aggrieved by the judgement of this Court and instructed their lawyer who lodged a Notice of Appeal on 6th May, 2020. Further, that their Appeal has good prospects of success. He confirms having applied for certified proceedings including judgement which proceedings are yet to be typed. He highlights the grounds of Appeal in his supporting affidavit. He is apprehensive that unless an injunction is granted albeit for a limited period, to enable them file another application in the Court of Appeal upon receipt of certified copies of proceedings herein, the Defendant may evict them from the suit land and render the Appeal nugatory. Further, that they have no other home and unless an injunction is granted, they will be rendered homeless. The Defendant opposed the application by filing a replying affidavit where he deposes that he had not applied for execution of the Decree herein nor taxed his costs. He contends that the Applicants have not annexed a Memorandum of Appeal to show that they have appealed. He explains that the gist of the judgement was that the Applicants had not acquired his land by adverse possession and the Court cannot therefore allow this application. He avers that the photographs of houses attached to the application were not produced in evidence and it amounts to introducing fresh evidence. Further, from the judgement there is no evidence the Applicants stay on the suit land. He reiterates that the allegation that the Appeal will be rendered nugatory cannot stand since there is no appeal.

In the Defendant's Application dated the 14th May, 2020, he seeks for an order compelling the Land Registrar Kajiado to reconstruct the Green Card for land parcel number Kajiado/ Kaputiei South/ 44. It is premised on the grounds on the face of it and the supporting affidavit of

ARVIND KANJI PATEL where he deposes that this matter was filed in 2013 and a certified copy of the Green card for the said parcel of land was attached to the Originating Summons. He claims after the judgement, he tried to carry out a search but was shocked to learn the Green Card was missing. Further, the Land Registrar was unable to issue a search and could not reconstruct the Green Card without permission of the Court. He seeks the Land Registrar to be compelled to reconstruct the Green Card.

Both parties filed their respective submissions to canvass the two Notice of Motion applications.

Analysis and Determination

Upon consideration of the two Notice of Motion applications, rivaling affidavits and submissions, the following are the issues for determination:

- Whether the Plaintiffs are entitled to orders of injunction against the Defendant in respect to land parcel number Kajiado/ Kaputiei South/ 44, pending the intended Appeal.
- Whether the Land Registrar should be directed to reconstruct the Green Card for Land parcel number Kajiado/ Kaputiei South/ 44.

As to whether the Plaintiffs are entitled to orders of injunction against the Defendant in respect to land parcel number Kajiado/ Kaputiei South/ 44, pending the intended Appeal. The Plaintiffs have sought for orders of injunction against the Defendant in respect to the suit land, pending appeal. The Plaintiffs contend that they have resided thereon from 1969 to date. Further, that the Defendant should be restrained from evicting them or disposing of the suit land pending the outcome of the Appeal. They confirm having lodged a Notice of Appeal against the Judgement of this Court and applied for Certified typed proceedings which are not ready. Further, that they have an arguable appeal which will be rendered nugatory if the Defendant is not restrained from interfering with the suit land. In their submissions they have reiterated their claim and relied on the decisions of **Erinford Properties Ltd Vs Cheshire County Council (1974) All ER 448; Beatrice Mumbe Ndwiwa Vs David Muimi Mwinzi (2008) eKLR; George Otieno Gachie & Another V Judith Akinyi Bonyo & 5 Others (2017) eKLR and Christopher Kioi & Another (suing on behalf of the estate of Mwangi Kioi – Deceased) Vs Winnie Mukolwe, Julia Kirira & Hope Mutua (sued as administrators of the estate of David Nyamu Jonathan Kituri – deceased) & Another (2017) eKLR.** The Defendant in his submissions contended that the Applicants had not filed their Appeal hence the Court cannot determine whether the said Appeal is arguable or will be rendered nugatory. Further, the Applicants did not acquire the suit land adversely hence the Court cannot allow them to continue staying thereon. He reiterates that the Applicants have not proved there is imminent eviction and the photographs annexed in the supporting affidavit were not produced in evidence.

In the judgement, this Court held that the Plaintiffs' had not acquired the suit land by way of adverse possession. In conducting my research in the Kenya Law Website, I came across a Judgement by Justice Angote dated the 15th May, 2020 in **Machakos ELC Case No. 318 of 2009 (OS) Samuel Kimintae Mparo & 5 others v Mathare Investments & Properties Limited.** On perusal of the said Judgement, I noted that the Plaintiffs therein were the same as the Plaintiffs herein. In the said suit the Plaintiffs were seeking to be declared owners of land parcel number Kajiado/ Kaputiei South/ 45 which they had acquired by adverse possession. Further, that they had been on the said land from 1969 and buried their father thereon. I wish to reproduce an excerpt of the said judgement, which contained evidence of the 1st Plaintiff who is the deponent herein:'

13. PW1 informed the court that Melton Ole Shani sub-divided parcel number 35 into parcels known as Kajiado/Kaputiei-South /44 and 45 respectively; that the Defendant was registered as the proprietor of parcel of land known as Kajiado/Kaputiei-South/45 (the suit property) on 3rd September, 1982 and that they have all lived, occupied and been in possession of the suit premises since 1969 without any hindrance, objection, authority or permission of the Defendant.....16. It was the evidence of PW1 that the Plaintiffs have never left the suit premises even after the purported sale of the land by the Agricultural Finance Company Limited; that the photographs annexed on the Originating Summons shows the developments that they have made on the land and that he is not aware that the suit land was sub-divided. According to PW1, when his father died in 1994, he was buried on the suit property.18. In cross-examination, PW1 stated that his father originally owned parcel of land number Kajiado/Kaputiei-North/35 which was sub-divided into parcels number 44 and 45; that he does not know in whose name parcel number 44 was registered and that the Plaintiffs have never been evicted from the suit property. 19. It was the evidence of PW1 that they have sub-divided and allocated the suit land amongst themselves using hedges and that not the entire land measuring 1000 acres has hedges. It was the evidence of PW1 that their homestead is spread on the entire land and that it is not true that they have only developed a small area of the suit land.'

From this excerpt, it is evident that the said parcel of land together with the suit land were resultant subdivisions of Kajiado/ Kaputiei South/ 35. During the hearing of this matter, the Plaintiffs also claimed they were residing on the suit land since 1969 and even buried their father thereon. In the aforementioned Machakos matter, I note they indicated they only reside in Kajiado / Kaputiei South/ 45. It is trite that injunction is an equitable remedy and he who comes to equity must come with clean hands. The Plaintiffs now seek an injunction claiming they will be rendered homeless, yet they were also claiming Kajiado/ Kaputiei South/ 45 as their home. To my mind, the Plaintiffs are not being candid and even proceeded to annex photographs in the instant application which they had not presented as evidence during hearing. I find that the Plaintiffs have not fully disclosed to this Court where they indeed reside and actually seek to abuse the Court process. Insofar as the authorities cited above provide for injunction pending appeal, I opine that in this scenario the Applicants have not come to court with clean hands hence not entitled to the orders sought. In the circumstances, I will proceed to dismiss the instant application with costs to the Defendant.

As to whether the Land Registrar should be directed to reconstruct the Green Card for Land parcel number Kajiado/ Kaputiei South/ 44. The Defendant in his submissions reiterated his claim above. The Plaintiffs did not file a response to this application.

Section 33 (5) of the Land Registration Act provides that:'

The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.'

In the current scenario, I note the Plaintiffs produced a Certified copy of the Green Card when they filed their Originating Summons. It is not in dispute that the Defendant is the registered proprietor of the suit land. The Defendant claims he was unable to conduct a Search after the judgement as the Green Card was missing and the Land Registrar was unable to reconstruct it unless there is a Court Order. According to section 9 of the Land Registration Act, it is the Land Registrar who is mandated to keep all land records in respect to particulars of the proprietors including previous proprietors, actual size of the land, user, as well as reference number. At section 10 of the Land Registration Act, the Land Registrar is further expected to furnish this information to the public. In this instance, the Land Registrar failed to provide this information to the Defendant.

Based on the facts as presented and the legal provisions cited above, I find that the Defendant is entitled to obtain a reconstructed Green Card in respect to his land. Further, that the law mandates the Land Registrar to do so. It is against the foregoing that I find the Defendant's application merited and will allow it. I direct the Land Registrar to reconstruct the Green Card in respect LR No. Kajiado/ Kapatiei South/ 44 within ninety (90) days from the date hereof. Costs will be in the cause.

Dated Signed and Delivered in Open Court at Kajiado this 29th Day of July, 2020

CHRISTINE OCHIENG

JUDGE