



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 5 OF 2019 (O.S)**

**IN THE MATTER OF SECTION 33[5] OF THE LAND**

**REGISTRATION ACT NO.3 OF 2012, LAWS OF KENYA**

**AND**

**IN THE MATTER OF LAND PARCEL LAND REFERENCE**

**L.R NO. 23100/9, KIPKABUS AREA, UASIN GISHU COUNTY**

SILAS SAMOEI.....1<sup>ST</sup> APPLICANT  
EDWARD NYABURI OGETO.....2<sup>ND</sup> APPLICANT  
JAMES KIMUTAI TOO.....3<sup>RD</sup> APPLICANT  
KIPKURGAT SAWE.....4<sup>TH</sup> APPLICANT  
PHILEMON SAWE.....5<sup>TH</sup> APPLICANT  
ANDREW CHESAINA.....6<sup>TH</sup> APPLICANT  
DANIEL KETER.....7<sup>TH</sup> APPLICANT  
SAMUEL KIPKEMBOI.....8<sup>TH</sup> APPLICANT  
PHILIP CHELIMO.....9<sup>TH</sup> APPLICANT

**VERSUS**

**PERMANENT SECRETARY, MINISTRY OF**

**LANDS AND PHYSICAL PLANNING.....1<sup>ST</sup> RESPONDENT**

**CHIEF LANDS REGISTRAR, MINISTRY**

**OF LANDS AND PHYSICAL PLANNING.....2<sup>ND</sup> RESPONDENT**

**MINISTRY OF LANDS AND PHYSICAL PLANNING.....3<sup>RD</sup> RESPONDENT**

**LANDS REGISTRAR, ELDORET.....4<sup>TH</sup> RESPONDENT**

**RULING**

This ruling is in respect of an application dated 3<sup>rd</sup> February 2020 by the applicant seeking for the followings orders.

- a) Spent.
- b) Pending the hearing and determination of this Application suit, an order of inhibition be and is hereby issued by this court inhibiting dealing with parcel of land no. Parcel L.R NO. 23100/9, KIPKABUS AREA, UASIN GISHU COUNTY.
- c) Pending the hearing and determination of this suit, an order of inhibition be and is hereby issued by this court inhibiting dealing with parcel of land no. Parcel L.R NO. 23100/9, KIPKABUS AREA, UASIN GISHU COUNTY.
- d) The Registrar of lands-Eldoret be and is hereby directed to reconstruct the entire land register in respect of land known as L.R NO. 23100/9, KIPKABUS AREA, UASIN GISHU COUNTY after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.
- e) Costs be in the cause

When this matter came up for hearing on 13<sup>th</sup> February 2020, counsel agreed by consent that an temporary order of inhibition be issued on the suit land pending the hearing and determination of the application. Counsel further agreed to canvass the application by way of written submissions which were duly filed.

### **APPLICANT'S SUBMISSIONS**

Counsel relied on the grounds in support of the application together with the supporting affidavit by the applicant. Counsel stated that the Applicants are the beneficial owners of parcel of land known as parcel **L.R NO. 23100/9, KIPKABUS AREA, UASIN GISHU COUNTY** whose land register is either lost or destroyed. Further that the Applicants executed various sale agreements with the proprietor of the said land with legitimate expectation that they will conclude the said land transactions; however, the land register cannot be traced.

It was counsel's submission that the applicants require a reconstruction of the register is in order to pave way for subdivision plan and deed plans to be done against the names of the applicants according to their respective acreage of land bought by the Applicants.

Counsel also submitted that the Applicants have made several inquiries and written to the Respondents for the reconstruction of the register but their efforts have been fruitless. Counsel relied on the case of **Samuel Kamau Macharia...Vs...Ali Khan Ali Muses & 2 Others (2014 eKLR)**, where the Court held that;

*“The green card could not have been plucked out for any other reason but to facilitate fraud. This was to conceal the chronological order of the entries on the same and to avoid detection of previous entries. The Kwale Land Registrar shall reinstate the plaintiff as the registered owner of Galu/ Kinondo/50, and delete the names of the 1<sup>st</sup> defendant from the same.”*

Counsel further relied on the case of **Kenya National Examinations Council Vs...Republic Ex parte Geoffrey Gathenji Njoroge (1997) eKLR**, where the Court held that:

*“An order of mandamus will compel the performance of a public duty which is imposed on a person or body of person by a statute and where that person or body of person has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”*

Counsel therefore urged the court to allow the reconstruction of the register as prayed.

### **RESPONDENT'S SUBMISSIONS**

Counsel for the respondent opposed the application by filing grounds of opposition. Counsel listed two issues for determination of the court as follows:

- a) Whether the applicants have locus to institute these pleadings,
- b) Whether the orders sought can be granted by this court.

On the first issue as to whether the applicants have locus to institute these proceedings, counsel submitted that the applicants stated that they bought the parcels of land from one

Patrick Ngumbao Mweni the registered owner of the land parcel known as L.R No. 23100/9, KIPKABUS AREA UASIN GISHU COUNTY and in their attempts to finalize the said transactions they found that the register was lost or destroyed.

Mr. Kuria counsel for the respondents submitted that applicants are seeking that the court do direct the respondents to meddle with documents which do not have their entries to demonstrate their alleged rights over the suit land. That it is trite law that the parties instituting a suit must in some way demonstrate their overriding interest which has either been breached or is about to be breached.

Counsel for the respondents submitted that in this case the applicants have merely availed a copy of the certificate of title over the suit land which indicates that the registered owner is Patrick Ngumbao Mweni. Further that it is undisputed that the suit parcel of land was registered under the Registration of Titles Act Cap 281 (repealed) and a certificate of title was issued and as such the only party that could seek such orders from this court or move the respondents into action would be the registered owner of the parcel of land.

It was Mr. Kuria's submission that even though there is evidence of sale of land, the process of sub-divisions and transfer can only be initiated by the registered owner. As this land is registered under the Registration of Titles Act (repealed) the process would involve an application for conversion of registration of the suit land from RTA to RLA. The applicants' have failed to demonstrate that the registered owner ever took steps to reconstruct the register as provided for under section 33 of the Land Registration Act No. 3 of 2012.

Counsel therefore stated that the applicants are not in a position to have the respondents invoke section 33 of the Land Registration Act as they are not the registered proprietor and therefore cannot demand that the respondents invoke its powers as set out in section 33 (5) of the Land Registration Act.

On the issue as to whether the orders sought can be granted, counsel submitted that the suit land is under the RTA (repealed) in which there are only two registries, namely Nairobi and Mombasa and in the custody of the Registrar of titles. Further that the applicants have not demonstrated that the suit parcel of land known as L.R No. 23100/9, KIPKABUS AREA UASIN GISHU COUNTY title was ever converted to RLA and thereafter a register opened in Eldoret offices and therefore under the scope and mandate of the 4<sup>th</sup> respondent.

Mr. Kuria also submitted that the applicants' have demonstrated that they sought redress from a party who is not in a position effect the necessary actions in regard to the suit parcel of land. Further that at no point have the applicants shown by either fact or evidence that the register of land known as L.R No. 23100/9, KIPKABUS AREA UASIN GISHU COUNTY is indeed lost or that the registered proprietor has taken any steps to have it reconstructed.

Secondly, that the orders sought cannot be granted as what the applicants are seeking is outside the scope and mandate of the 4<sup>th</sup> respondent as the suit land is registered under RTA hence any orders seeking for reconstruction of the register must be directed to the 2<sup>nd</sup> respondent who is in charge of the registry of such titles. Counsel therefore urged the court to dismiss the originating summons as it is without merit as the registered owner of the suit land is not the initiator of this proceedings.

#### **ANALYSIS AND DETERMINATION**

The issues for determination in this application is as to whether the applicants have locus to institute this suit and whether the orders sought can be granted to the applicants. The applicants have annexed sale agreements to show their stake in the suit parcel of land having bought various portions. It is trite that the Land Registrar has powers to reconstruct a register under section 33 of the Land Registration Act which provides as follows:

***(1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a duplicate certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.***

***(2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed.***

***(3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.***

***(4) If a lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.***

***(5) 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.***

From the provisions above, it is clear that the Registrar only deals with the registered proprietor in case of loss of a certificate on in the reconstruction of a register. It does not provide that any person who has an interest in a property can request the Registrar to re issue a lost certificate of lease or reconstruct a register.

There are also laid down procedures to be followed before such reissuance and reconstruction of a register is done. The Registrar must make such inquiries as may be necessary and give due notice of sixty days in the Kenya gazette with wide circulation in the country.

The applicants are purchasers who want to proceed with the process of subdivision and transfer of the various portions purchased. All these processed will involve the registered owner who should lead the process. The court has not been told where this registered owner one Patrick Ngumbao Mweni is and why he is not leading the process. The court has further not been told whether the said registered owner has started any process for the reconstruction of the register as stipulated in the Act to enable him subdivide and transfer to the applicants their portions as per the agreements.

I find that the mere fact that the applicants have annexed land sale agreements is not enough to give them locus to seek for a reconstruction of the register. What about if the registered owner disputes the completion of the terms of the agreements and states that the register has been

reconstructed without his knowledge. The best that the applicants should have done was to involve the registered owner to seek for the orders.

Having said that I find that the application lacks merit and is therefore dismissed with costs.

***DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF JULY, 2020***

***DR. M. A. ODENY***

***JUDGE***