



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE 93 OF 2012

MOKOI OLE NKARE SONYOI.....PLAINTIFF

VERSUS

COMMISSIONER OF LANDS

DISTRICT LAND REGISTRAR, KAJIADO

DISTRICT LAND SURVEYOR, KAJIADO

LEPEN LOONKULAK OLE NAGELI.....DEFENDANTS

RULING

In this suit commenced by the plaintiff against the defendants jointly and severally on 26th March, 2012, the plaintiff prays for a permanent injunction against the 4th defendant to restrain him from trespassing, ingress, cultivation, disposing off or in any other manner interfering with the plaintiff's quiet possession and ownership of Land reference number Kajiado/Kaputiei/Central/2128 hereinafter "*the suit premises*". The Plaintiff also wants all the defendants, restrained from doing or suffering to be done any act or omission that will in anyway interfere with the extent, boundaries and or acreage of the plaintiffs' aforesaid suit premises, an order under section 143 of the Registered Land Act for the cancellation of title deed to land reference No. Kajiado/Kaputiei/Central/2344, General damages, costs and interest.

The Plaintiff's claim is anchored on the fact that he was at all material times the registered owner of the suit premises which was a subdivision of **Kajiado/Kaputiei-Central-Central/442**. The subdivision was effected on or about 12th –July 2011 when the 3rd defendant approved the mutation authorizing the said subdivision which enabled the 2nd defendant to issue the plaintiffs with a title deed. However on 10th September, 2011, the 4th defendant purported to survey and subdivide his land Kajiado/Kaputiei-Central/447 which is adjacent to the Plaintiff's premises but refused, neglected and or failed to inform and notify the plaintiff or any other neighbour as by law required when a survey is conducted. The result of the illegal and un-procedural survey aforesaid is that the sketch map and mutation blatantly encroached upon and entirely swallowed up the plaintiff's suit premises which has now been renamed Kajiado/Kaputiei-Central/ 2344 notwithstanding the fact that the plaintiff has a title deed. On or about the October, 2011 the 3rd defendant illegally and or corruptly approved the 2nd mutation and the 2nd defendant proceeded to issue a title deed to the 4th defendant. The net effect of the foregoing is that, there exists 2 title deeds to the same parcel of land. However, the plaintiff is of the opinion that his title is indefeasible under the provisions of section 28 of the Registered Land Act and more particularly since it was a first registration. On 17th February, 2012 the 4th defendant lodged a complaint with the 2nd defendant purporting that there was a boundary dispute and the 2nd defendant issued summons to the

plaintiff and his sons requiring them to attend a boundary resolution meeting on 6th March, 2012. On the said date the 2nd defendant failed and or refused to turn up and has since refused and or failed to adjudicate over the dispute thus forcing the plaintiff to seek legal redress. In the premises, the plaintiff had reasonable apprehension that unless the court comes to his rescue by issuing injunctive orders, the 4th defendant may at any time proceed to dispose off the suit premises to the Plaintiff's irreparable detriment.

Contemporaneously with the filing of the suit, the plaintiff took out under certificate of urgency, a notice of motion seeking to injunct the 4th defendant from subdividing, transferring, selling, disposing, alienating, charging, wasting or in any manner dealing with land reference Kajiado/Kaputiei-Central/2344 pending the hearing and determination of the suit. The application was brought under Order 40 rules, 1, 2 & 4 of the Civil Procedure Act, section 28, 32, 128, 143 and 159 of the Registered Land Act and all other enabling provisions of the law. The grounds and affidavit in support of the application are replicas of what I have already stated hereinabove.

Served with the pleadings, the 4th defendant was first to react. He filed on 24th April, 2012 a replying affidavit as well as well as a defence. He deponed where pertinent that he was the registered proprietor of Kajiado/Kaputiei/Central/477 measuring 99.5 hectares. On 10th September, 2011, he commissioned a survey of the said property in order to subdivide it into various parcels. In the process it was discovered that 18.9 hectares out of his parcel of land aforesaid could not be accounted for. Earlier on the plaintiff had also commissioned a survey of his parcel of land which bordered his which showed that his parcel of land measured 131.6 Ha as opposed to 99.5 Ha as indicated in his title deed. That the 4th defendant's missing acreage had been consumed by the plaintiff's suit premises. The District surveyor was compelled to correct the anomaly. Prior to this, there existed a boundary dispute between the plaintiff and 4th Defendant. Infact the 4th defendant had referred the said dispute to the elders which arbitrated on the dispute on 29th May, 2011 and resolved that indeed the plaintiff's boundary had encroached into the 4th defendant's land. The elders then referred the matter to the District Surveyor (3rd respondent) for resolution. The Land Registrar having received the complaint summoned all the parties to appear before him first on 17th February, 2012 but the plaintiff did not show up and on 19th March, 2012, when the District Land Registrar (2nd respondent) could not make it. The 2nd and 3rd respondents having realized that the boundaries had been extended unfavourably by the plaintiff, they went ahead to rectify the anomaly and upon subdivision issued him with a new title being Kajiado/Kaputiei-Central/2344, which was rightfully his property and not the plaintiff's. The plaintiff, it would appear intends to unfairly benefit over property that did not in the first place belong to him and thus the title to his suit premises ought to be cancelled. Otherwise the plaintiff's contention that his title is indefeasible is not true since it was a subdivision from another title and not necessarily a first registration as the plaintiff has claimed.

In his statement of defence and counterclaim the 4th defendant reiterated what he had deponed to in his replying affidavit to the application. Suffice to add that the 2nd defendant could not have issued the plaintiff with the title deed to the suit premises as he was not rightfully entitled to the same. The title to his land was issued procedurally and after demarcation exercise that had established that the plaintiff's suit premises had exceeded its delineated borders and encroached into his land. As far as the 4th defendant was concerned the rightful title that should stand is his and that of the plaintiffs should be nullified. He therefore prayed for a declaration that the plaintiff's title to the suit premises was illegally and irregularly obtained by the plaintiff and should be invalidated, a declaration that his title was the rightful one over the property and costs of the counterclaim. The other respondents neither filed any papers in opposition to the application nor defences.

When the application came up for *interpartes* hearing before me on 26th June, 2012, **Mr. Wachira** for the plaintiff and **Mr. Munyi** for the 4th defendant consented to canvassing the application by way of written submissions. They also consented to the interim orders of injunction being issued. Subsequently the parties filed and exchanged the written submissions which I have carefully read and considered.

It is common ground that there exist two title deeds to the same physical parcel of land. One has been

issued to the plaintiff and the other to the 4th defendant. They all claim that the said titles were genuinely issued to them respectively. It is against the law to have two different title deeds to the same parcel of land. The plaintiff says that his came out first and should be treated as the genuine one. On the other hand, the 4th defendant takes the position that the plaintiff's title was wrongly issued to him. The plaintiff knew that his title included a parcel of land which belonged to the 4th defendant. The matter had been arbitrated upon by the elders who had confirmed that indeed the plaintiff's suit premises had encroached and encompassed a portion of the 4th defendant's parcel of land. A decision on this contrasting position cannot be reached at this interlocutory stage. That must wait a plenary hearing. Suffice to say that at this stage, both parties have demonstrated that they have a *prima facie* case with a probability of success at the trial either on the plaint or counterclaim. However, it is the plaintiff who has sought an injunction in the plaint and has indeed made an application for the same, the subject of this ruling. On the other hand, the 4th defendant, much as he has filed a counterclaim, seeking the annulment of the plaintiff's title, he has neither prayed for nor applied for a temporary injunction. I do not therefore see any hindrance in the way of the plaintiff getting his wish pending the hearing and determination of the suit.

The injunction is all the more necessary considering the allegation of the plaintiff that his parcel of land to which he has title and which title to-date has not been cancelled, has been swallowed by the 4th defendant's land parcel to which he similarly has title. As it were, the plaintiff's current title deed is a mere piece of papers, as politicians are wont to say nowadays. He needs protection pending the hearing of the suit. There is nothing to stop the 4th defendant from disposing the said parcel of land because he has title deed thereto.

The acreages involved in the parcels of land in contention are massive. For the plaintiff it is 18.95 Ha which approximately is 45 acres whereas that of the defendant is 99.5 Ha which is approximately 238.8 acres. No doubt the plaintiff would suffer prejudice and irreparable loss if the injunction for now was to be declined. He may end up losing the suit premises which in economic terms is phenomenon. That is an irreparable loss, which I do not think can be compensated by an award of damages.

Finally, on the question of balance of conveniences, it is my view that it tilts in favour of the plaintiff. His land has allegedly been swallowed up by the 4th defendant's. He is therefore at the mercy of the 4th defendant. If the injunction is not granted, the 4th defendant will be at liberty to do with the land whatever he chooses. He may even off load it in the market; with disastrous consequences to the plaintiff. The 4th defendant has no such nightmares. He can hold on the land for a little while as the suit is heard and determined, so that an order of injunction in the interim will not prejudice him at all. After all, the land is registered in his name.

Accordingly, I allow the application in terms of prayer 3 in the face of the application on condition that the plaintiff executes an undertaking as to damages in the tune of Kshs. 2,000,000/= within the next seven (7) days from the date of the ruling. Costs shall be in the cause.

RULING DATED, SIGNED and DELIVERED at MACHAKOS his 6TH day JULY, 2012.

ASIKE -MAKHANDIA

JUDGE