



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 627 OF 2017

REUBEN NJARO BALOSI.....PLAINTIFF

VERSUS

SERA MWERU KANGARI.....1ST DEFENDANT

LAND REGISTRAR, KAJIADO COUNTY.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 28th January, 2020 brought pursuant to section 1, 1A, 3 and 3A of the Civil Procedure Act including Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff seeks the following orders:

1. Spent
2. That this Honourable Court be pleased to issue an order that the 2nd Defendant / Respondent to surrender the original transfer form dated 27th October, 1972 pertaining to all that parcel of land known as LTK/ KIMANA – TIKONDO/ 181 to the document examiner within a time frame to be fixed by the court.
3. That the Plaintiff/ Applicant herein to supply his specimen signatures to the document examiner within a period to be specified by the court.
4. That the costs of this application be in the cause.

The application is premised on the grounds on the face of it and the supporting affidavit of REUBEN NJARO BALOSI where he deposes that he is the registered proprietor of all that parcel of land known as KIMANA/ TIKONDO/ 181 hereinafter referred to as the 'suit land'. He explains that way back in 1972, Land Adjudication was conducted in Kimana Tikondo Group Ranch in Loitoktok Area and his late father Samuel Balosi Kulale gave out his name to the Land Adjudication for allocation of a parcel of land. Further, that he was allocated the suit land. He denies selling, transferring, charging, alienating and or disposing of the suit land. He claims as this matter progressed to full hearing, he testified and called witnesses who corroborated his testimony that he has always been the proprietor of the suit land and they denied knowledge of the Defendant. He contends that the 1st Defendant did not call any witnesses nor did she testify or explain to the court how she acquired the suit land. He states that it was not until the 3rd October, 2019 upon the Court orders that the 2nd Defendant tabled a report on the status of the suit land and through his lawyers, he came to learn about the alleged transfer and subsequent transactions that took place as per the 2nd Defendant's report. Further, that the said report indicated that the suit land was transferred from himself to one MUMIRA KAMAU vide a transfer dated the 27th October, 1972 but he denies knowing the said MUMIRA KAMAU. He denies executing any instrument or document transferring suit land to any third parties and is willing at the earliest opportune moment to present himself to the document examiner and provide samples of his signature to verify whether he indeed executed the transfer forms. He claims to have severally attempted to make a report to the DCIO Loitoktok and was advised to seek orders from Court to that effect. Further, the report was finally made vide OB Number 20/16/ 01/2020. He reiterates that the time frames within which the alleged transactions as per the 2nd Defendant/ Respondent's report, concerning the suit land are in no way, shape or form practical, as the intricacies behind these transactions are delicate in nature. Further, that the application has been brought without undue delay and no party will be prejudiced in any manner whatsoever if the orders sought are granted.

The 1st Defendant opposed the application by filing Grounds of Opposition and Replying Affidavit sworn by SERAH MWERU KANGARI where she deposes that together with her late husband, they are bona fide registered proprietors of the suit land having been duly issued with a Title dated 30th January, 1981. She confirms that they acquired the suit land from one MUMIRA KAMAU and have been in quiet

possession and enjoyment of the same for over 35 years. She explains that this matter came up for hearing on 6th May, 2019 and proceeded with the Plaintiff's case wherein the Plaintiff and his two witnesses testified after which he closed his case. Further, that the Court directed that Summons were to be issued to the Land Registrar to produce a detailed report on the suit land. She confirms that on 3rd October, 2019, the Land Registrar produced a report detailing the history and or acquisition of the suit land. She avers that the Plaintiff's Counsel made an oral application to recall the Plaintiff in line with the contents of the 2nd Defendant's report and the Court directed them to make a formal application within twenty-one (21) days from the said date after which the Defendants were to respond within twenty-one (21) days after service. Further, that failure of which, the parties were to file and exchange written submissions within 42 days. She insists the 2nd Defendant's report including annexures confirm that they are the registered proprietors of the suit land. She contends that this application is another belated attempt by the Plaintiff to cause unreasonable delay to the determination and conclusion of this matter as it has been brought four months after parties closed their case in flagrant disregard to the orders of the Court made on 3rd October, 2019. She states that the Plaintiff has not furnished court with any reason for the delay. Further, that the Court and the Defendants herein have no duty and or obligation to assist the Plaintiff gather evidence in support of his case and the cited provisions of the law offers no assistance to him. She reaffirms that the motion is a disingenuous attempt to reopen a closed matter and fill in glaring gaps in an otherwise hopeless case by the Plaintiff which is not plausible in an adversarial system of Law. Further, the entire suit is statute barred and the present application will serve no useful purpose other than to waste the court's judicial time.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 28th January, 2020 including the rivalling affidavits, Grounds of Opposition and respective submissions, the only issue for determination is whether the Plaintiff is entitled to the orders sought in the said application.

The Plaintiff in his submissions reiterated his claim and insisted that the application is not meant to prejudice the 1st Defendant but simply to get to the bottom of the underlying issue which is fraud. He further submitted that the issue before court is whether the Plaintiff executed the Transfer Forms. He seeks the Court to exercise its discretion to allow the application to subject the transfer documents for examination by a document examiner in a bid to establish his claim that he never executed the said Transfer Documents. To buttress his averments, he relied on the decision of **Rose Kaiza V Angelo Mpanju Kaiza (2009) eKLR**.

The 1st Defendant in his submissions stated that the application is misconceived and an abuse of the court process as it is belated as well as disguised attempt by the Plaintiff to reopen his case. Further, there is no application to recall Plaintiff and the Civil Procedure Rules provides circumstances under which a matter may be heard de novo which threshold the Plaintiff has not met. She further submits that the Plaintiff having produced the Green Card to support his case, cannot turn around to challenge it. She relied on the decisions of **Benjoh Amalgamated Limited & Another V Kenya Commercial Bank Limited (2014) eKLR** to support her arguments. She further submitted that the application seeks to delay the hearing and determination of the suit and relied on the decision of **Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 6 others (2013) eKLR**. Further that the application seeks to invite the Court to compromise its independence and impartiality contrary to article 50 (1) of the Constitution which makes it a nullity ab initio and relied on the decisions of **KN Vs JMT (2018) eKLR and Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others (2014) eKLR**.

From the Court record, I note the Plaintiff testified and produced a copy of the Green Card. The Plaintiff even called witnesses to support his averments that he is the owner of the suit land, after which he closed his case on 6th May, 2019. The 2nd Defendant testified and closed their case on 3rd October, 2019 and the Court directed the parties to file their respective written submissions. I note on 18th June, 2018, the Plaintiff's Counsel confirmed that he had complied with Order 11 of the Civil Procedure Rules and was calling four witnesses. From the Court record there was no indication by the Plaintiff that he intended to subject the documents to an examiner and this issue has arisen only after the evidence tendered by the District Land Registrar, Kajiado. Further, the Plaintiff has not demonstrated why from the year 1973 he had not sought the services of a document examiner to verify if he indeed signed the documents. Insofar as the authority cited by the Plaintiff is relevant, however to my mind, I opine that it was the Plaintiff's responsibility to prepare for his case and not let the Defendants including the Court to aid him in doing so. I find that the application as filed is actually a fishing expedition as the Plaintiff has not indicated on how he intends to use the materials from the document examiner since both parties already closed their cases. Further, there is no application to reopen the Plaintiff's case. In the circumstance, I find the instant application misconceived and an abuse of the court process and is a belated as well as disguised attempt by the Plaintiff to reopen his case.

It is against the foregoing that I find the application dated 28th January, 2020 unmerited and will proceed to dismiss it with costs to the Defendants.

Dated Signed and Delivered at Kajiado this 26th Day of November 2020.

CHRISTINE OCHIENG

JUDGE