



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 528 OF 2017**

**(Formerly Nairobi Milimani ELC Case No. 773 of 2016)**

**PARIKIEN OLE NAIKUNI OSEUR.....PLAINTIFF**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION.....1<sup>ST</sup> DEFENDANT**

**NKOSERA KILELU SIRERE.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 31<sup>st</sup> August, 2018 brought pursuant to sections 48, 70, 76, 144 of the Evidence Act; Section 19 of the Stamp Duty Act; Sections 1A, 1B and 3A of the Civil Procedure Act and all the other enabling provisions of the law. The Plaintiff seeks the following orders:

1. That this Honourable Court be pleased to find that the following documents as inadmissible and proceed to expunge them from the Court record, namely;
  - a. The report by Land Registrar Kajiado on Kajiado/ Purko/ 590;
  - b. The photocopy of transfer deed for Kajiado/ Purko/ 799;
  - c. The photocopy of mutation form SNO. 111488 registered on 29<sup>th</sup> January, 2001;
  - d. The photocopy of application for consent to subside.
  - e. The copy of agreement for sale of land dated 5<sup>th</sup> October, 2000
2. That the costs of this application be in the cause.

The application is premised on the summarized ground that the Land Registrar presented his report on land parcel number Kajiado/ Purko/ 590, after the Plaintiff had closed his case on 25<sup>th</sup> July, 2017. The said report contained the following documents: photocopy of transfer deed for Kajiado/ Purko/ 799; Photocopy of Mutation Form SNO. 111488 and photocopy of application for consent to subdivide. He avers that the production of the documents were objected to by the Plaintiff's Counsel as he did not have prior notice of the same. He contends that the Land Registrar failed to furnish the Director of Criminal Investigation with the said original documents to be examined by an expert as directed by the Court. He is apprehensive that the 2<sup>nd</sup> Defendant might rely on the said documents and it will prejudice his case.

The application is supported by the affidavit of PARIKIEN OLE NAIKUNI OSEUR the Plaintiff where he reiterates the contents of his claim.

The application is opposed by the 2<sup>nd</sup> Defendant NKOSERA KILELU SIRERE who filed a replying affidavit where he avers that the Plaintiff sold him the suit land. He contends that the Principal Land Registrar is a public servant and the custodian of all land documents within Kajiado County. He explains that the Land Registrar attended Court in his capacity as a public servant to produce entries in a public record and it was therefore within his powers to do so as provided under section 38 of the Evidence Act. He insists the documents produced by the Land Registrar are admissible as they are a mere reflection of the public record and should not be expunged from the record. He reiterates that Part IV of the Evidence Act classifies entries to public records as statements under special circumstances and therefore making entries admissible once produced. He reaffirms that the Land Registrar is not an interested party to the outcome of this suit so as to favour either side but only came to court to produce a report. Further, that the Plaintiff had notice of three months that the report would be produced.

He deposes that pursuant to section 22 of the Civil Procedure Act, the Court had power to summon the Land Registrar notwithstanding that neither party had listed him as a witness. He states that the Plaintiff has not furnished any evidence in Court why the DCI Kajiado proceeded to take his fingerprints while knowing he only had photocopies and later turn around to decline carry out the examination. Further, that Stamp Duty on any Sale of Land is paid on the instrument of transfer which is chargeable with stamp duty and not the Sale Agreement which is a document witnessing the Sale. He insists that in the instrument of transfer and receipt that were produced by the Land Registrar, it is clear he paid Kshs. 3, 000/= in respect of stamp duty and other charges. Further, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had already filed most of the documents contained in the Land Registrar's report. He further reiterates that the Plaintiff has admitted in his documents that he received monies from him 18 years ago but this was a friendly loan. Further, that the Plaintiff through his lawyer in a demand letter written to him on 27<sup>th</sup> May, 2003 admitted that he entered into a Sale Agreement with him to sell 60 acres of land and the 2<sup>nd</sup> Defendant paid him Kshs. 462, 000/= as purchase price.

Both the Plaintiff and 2<sup>nd</sup> Defendant filed their submissions that I have considered.

### **Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 31<sup>st</sup> August, 2018 including the supporting and replying affidavits as well as the submissions filed herein, the only issue for determination is whether the Land Registrar's Report including the documents annexed therein should be expunged from record.

I note the claim herein revolves around ownership of land parcel number Kajiado/ Purko/ 590 and its resultant subdivision Kajiado/ Purko/ 800 and Kajiado/ Purko/ 799 respectively. The Plaintiff disputes undertaking the subdivision and seeks for rectification of title. The Plaintiff seeks the Land Registrar's Report on Kajiado/ Purko/ 590 as well as the documents therein to be expunged from record as they were photocopies. Further, that the Land Registrar who was not a party to this suit was summoned after he had closed his case and this is prejudicial.

I note the Civil Procedure Act and the Evidence Act gives the Court the mandate to seek extra evidence for purposes of determining the real questions in issue in a suit. In the current scenario, the Court summoned the Land Registrar who is a public servant to produce documents in respect of land parcel number Kajiado/ Purko / 590 to enable the Court make a proper determination of the real issues in dispute. The custodian of all the land documents in respect of any transaction in a given locality is the Land Registrar. The Plaintiff claims it will suffer prejudice if the documents are produced. However, upon perusal of the Court file, I note the Defendants had already produced some of the documents, which the Land Registrar relied upon. I note the Plaintiff was given ample time and based on the proceedings herein; his counsel even cross-examined the said Land Registrar.

Section 22 (b) of the Civil Procedure Act provides that '**Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party— (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;**'

Further, Section 38 of the Evidence Act provides that: '**An entry in any public or other official book, register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible.**'

A cursory look at the documents produced by the Land Registrar reveals they were certified true copies of the original. I note the Land Registrar was producing the documents in respect of land parcel number Kajiado/ Purko/ 590, which were records in his custody to confirm the various transactions relating to the dispute herein. Further, that stamp duty was indeed paid as indicated in the Transfer of Land Form dated the 19<sup>th</sup> January, 2001. Since the report produced by the Land Registrar who is a public servant related to the dispute herein, and it is the court that issued summons to him. I opine that the Plaintiff is simply seeking to rely on technicalities in an attempt to block the said report. I further opine that the Plaintiff had capacity to hire a private document examiner if the DCI failed to issue a report, which he has not done. In the interests of justice, I find that the report by the Land Registrar is a mere reflection of the public record and is pertinent in the case at hand. In relying on section 22(b) of the Civil Procedure Act as well as Section 38 of the Evidence Act, I hold that his report is admissible and will decline to expunge it from the record.

In the circumstances, I find the application dated the 31<sup>st</sup> August, 2018 unmerited and will dismiss it with costs.

**Dated signed and delivered in open court at Kajiado this 18<sup>th</sup> day of February, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**