



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 252 OF 2010**

**NUMERICAL MACHINING COMPLEX LTD.....PLAINTIFF**

**VERSUS**

**ATHI MLOLONGO DEVELOPMENT CO. LTD.....1<sup>ST</sup> DEFENDANT**

**JET MEMBERS ASSOCIATION.....2<sup>ND</sup> DEFENDANT**

**TUPENDANE VISION S.H. GROUP.....3<sup>RD</sup> DEFENDANT**

**MAVEMBA MEMBERS ASSOCIATION.....4<sup>TH</sup> DEFENDANT**

**NARETOI AGENCIES.....5<sup>TH</sup> DEFENDANT**

**ATHI RIVER MLOLONGO S.H. GR...UP.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 24<sup>th</sup> June, 2014, the Plaintiff is seeking for the following orders:

*a. That pending the hearing and determination of the suit herein, the Plaintiff/Applicant be at liberty to commission a geo-spatial survey to be carried out by the Government Surveyor and a Private Surveyor on Land Registration Number 26699/30 (originally Land Registration Number 11895/20).*

*b. That pending the hearing and determination of the suit herein, the Plaintiff/Applicant be at liberty to commission a geo-spatial survey to be carried out by the Government Surveyor and a Private Surveyor on Land Registration Number 26700/2 (originally Land Registration Number 11895/20) and the Surveyor's reports to be deposited in this Honourable Court within seven days of conclusion of the survey.*

*c. That pending the hearing and determination of the suit herein, the Plaintiff/Applicant be at liberty to fence Land Registration Number 26699/30 (originally Land Registration Number 11895/20) and Land Registration Number 26700/2 (originally Land Registration Number 11895/20) once surveyed in terms of prayers (c) and (d) herein.*

*d. That the County Commander Machakos County do provide security to the Government Surveyor, a Private Surveyor and Contractors that the Plaintiff/Applicant commissions to undertake the survey exercise and fencing exercise in terms of prayers (c), (d) and (e) herein.*

*e. That this suit and Machakos HCCC No. 124 of 2010 be consolidated.*

*f. That the hearing of the main suit herein and Machakos HCCC No. 124 of 2010 be fast tracked.*

2. The Application is supported by the Affidavit of the Plaintiff's Managing Director who has deponed that the Plaintiff is the registered proprietor of Land Registration Number 11895/20 (*the suit land*); that the suit land was sub-divided into L.R Nos. 26699/30 and 26700/2 and that after the said sub-division, the Plaintiff surrendered the original mother title to the Registrar of Titles to facilitate issuance of Title over L.R. No. 26699/30 and 26700/2.

3. The Plaintiff's Managing Director deponed that the National Land Commission, the Commissioner of Lands and the Chief Land Registrar have all confirmed that L.R. No. 11895/23 in the name of the 3<sup>rd</sup> Defendant, Grant No. 88041 for L.R. No. 26700/3 in the name of the 5<sup>th</sup>

Defendant, Grant No. 100053 for L.R. No. 11895/20 in the name of the 4<sup>th</sup> Defendant, Grant No. 100058 for L.R. No. 11895/21 and Grant No. 90944 in the name of the 1<sup>st</sup> Defendant are all forgeries and that the National Land Commission has confirmed in writing that L.R. No. 26699/30 and 26700 are vested in the Plaintiff.

4. It is the Plaintiff's case that a survey should be carried out over L.R. No. 26699/30 and 26700/2 in order for the court to get sufficient information to ascertain the authenticity of the rival proprietary claims by the parties herein; that upon survey, the suit property to be fenced to avert encroachment and that as a result of the encroachment on the suit land by the Respondents and their agents, the operations of the Applicant have stalled since the year 2010.

5. The 1<sup>st</sup> and 4<sup>th</sup> Defendants filed their Grounds of Opposition and a Replying Affidavit.

6. In the Grounds of Opposition, the 1<sup>st</sup> and 4<sup>th</sup> Defendants averred that the Plaintiff's Application is not interlocutory in nature; that the same goes beyond the pleadings in the suit and that the matters raised in the Application should have been pleaded in the body of the main suit.

7. In his Replying Affidavit, the 1<sup>st</sup> Defendant's Chairman deponed that the 1<sup>st</sup> Defendant is the registered proprietor of L.R. No. 11895/21; that after being allocated the suit land by the President, the 1<sup>st</sup> Defendant paid a stand premium of Kshs. 4,216,500 and that the 1<sup>st</sup> Defendant was issued with a letter of allotment.

8. It is the deposition of the 1<sup>st</sup> Defendant's Chairman that the 1<sup>st</sup> Defendant was subsequently issued with Grant I.R. No. 100058 and that the County Government of Machakos approved the sub-division of the suit land; that the Plaintiff does not have a title for L.R. No. 26700/2 and that the Registrar of Titles certified the 1<sup>st</sup> Defendant's title as a true copy of the original.

9. The deposition of the Chairman of the 4<sup>th</sup> Defendant is that the 4<sup>th</sup> Defendant is the registered proprietor of L.R. No. 11895/20; that the 4<sup>th</sup> Defendant paid the stand premium of Kshs. 4,272,975 for the suit land and that the 4<sup>th</sup> Defendant was issued with a letter of allotment. According to the 4<sup>th</sup> Defendant's Chairman, the 4<sup>th</sup> Defendant has the Title document in respect of the suit land.

10. In his submissions, the Plaintiff's advocate submitted that it is prudent that a survey be carried out over L.R. No. 26699/30 and L.R. No. 26700/2 to ascertain the authenticity of the proprietorship of the suit land by the Defendants; that the Defendants will not suffer any prejudice with the carrying out of the survey of the disputed land and that under Section 18 of the repealed Registered Land Act, the Director of Surveys was required to prepare and maintain a series of maps for every registration district.

11. The Plaintiff's advocate finally submitted that L.R. No. 26690/30 and L.R. No. 26700/2 have been subjected to encroachment by third parties over the years and that fencing the property will not prejudice any of the Respondents.

12. The 1<sup>st</sup> and 4<sup>th</sup> Defendant's advocate submitted that the Application is bad in law and incapable of being granted at an interlocutory stage; that the 1<sup>st</sup> and 4<sup>th</sup> Defendants are the registered proprietors of L.R. No. 11895/21 and L.R. No. 11895/20 respectively and that the 1<sup>st</sup> and 4<sup>th</sup> Defendants' members have been in actual and physical possession of the suit properties.

13. The counsel for 1<sup>st</sup> and 4<sup>th</sup> Defendants finally submitted that allowing the prayers in the Application will determine the suit conclusively; that the Plaintiff has not demonstrated how Machakos HCCC No. 124 of 2010 is related to this suit for consolidation purposes and that the fencing of the suit land shall amount to alienating the suit land without hearing the Defendants.

14. The 3<sup>rd</sup> Defendant's advocate submitted that the intention of the Application is for the Plaintiff to gain possession of L.R. No. 11895/23 and therefore alienate it and evict the 3<sup>rd</sup> Defendant and that if the Application is allowed, it would have conclusively determined the matter.

15. In the Amended Plaintiff dated 23<sup>rd</sup> October, 2014, the Plaintiff averred that the Plaintiff is the registered owner of land known as L.R. No. 11895/20 which was sub-divided to create L.R. No. 26690/30 and L.R. No. 26700/2.

16. According to the Plaintiff despite being the owners of L.R. No. 11895/20, whose mother title was surrendered to the Government for the sub-division and creation of L.R. No. 26690/30 and 26700/2, it has discovered that the 1<sup>st</sup> to 5<sup>th</sup> Defendants purport to hold title documents over the suit land purportedly issued by the 6<sup>th</sup> Defendant. The five title documents that are held by the 1<sup>st</sup> to the 5<sup>th</sup> Defendants are for L.R. No. 11895/21, 27711, 1895/23, 11895/20 and 26700/3 respectively.

17. It is the Plaintiff's case that the titles that the 1<sup>st</sup> -5<sup>th</sup> Defendants are purporting to hold are forgeries. The Plaintiff is seeking for an order of the court to have the title which are in the names of the 1<sup>st</sup> -5<sup>th</sup> Defendants to be declared null and void for being forgeries.

18. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants on the other hand have produced the letters of allotment, the receipts evidencing payment of the stand premium and the copies of Grants for L.R. Nos. 11895/21, 11895/23 and 11895/25 respectively.

19. Indeed, the Plaintiff has acknowledged that the 1<sup>st</sup>-5<sup>th</sup> Defendants are in possession of title documents in respect of some portions of the suit. It is the Plaintiff's contention that the Grants which are being held by the 1<sup>st</sup>-5<sup>th</sup> Defendants were obtained fraudulently. That being the case, the issue of whether indeed the title documents for L.R. No. 11895/21, 27711, 11895/23, 11895/20 and 26700/3 were obtained fraudulently can only be determined after hearing the suit and not at an interlocutory stage.

20. However, considering that both the Plaintiff and the 1<sup>st</sup> -5<sup>th</sup> Defendants are claiming that the suit land belongs to them, and that they all have title documents, albeit with different I.R. and L.R. numbers, it will not be prejudicial to the Respondents if the Plaintiff is allowed to engage Surveyors to conduct a geo-spatial survey in respect to L.R No. 26699/30.

21. The Survey or re-survey for L.R No. 26699/30 (*originally L.R. No. 11895/20*) will assist, not only the court and the Plaintiff, but also the Defendants, in ascertaining if indeed the dispute is in respect of the same property and the extent of the boundaries of the land in dispute. Once that is done, the court will, after hearing the parties, determine the issue of ownership of the contested land.

22. However, other than allowing the Plaintiff to re-survey the suit land and prepare a Report, which Report will form part of the Plaintiff's evidence, the court cannot allow the Plaintiff to fence the disputed parcel of land. Indeed, until the issue of ownership of the suit land is determined, neither the Plaintiff nor the Defendants should change the nature of the suit by developing it, including fencing the land, as claimed by the Plaintiff.

23. Although the Plaintiff has prayed for an order consolidating Machakos HCCC No. 124 of 2010 with this suit, no evidence was placed before the court to show the nexus between this suit and Machakos HCCC No. 124 of 2010. Indeed, it is not clear to this court if the suit property herein is the same as the suit property in ELC. No. 124 of 2010. That being the case, the prayer for consolidation of the two suits is declined.

24. For the reasons I have given above, I allow the Plaintiff's Application in the following terms:

*a. That pending the hearing and determination of the suit herein, the Plaintiff/Applicant be at liberty to commission a geo-spatial survey to be carried out by the Government Surveyor and a Private Surveyor on Land Registration Number 26699/30 (originally Land Registration Number 11895/20), and the report to be filed in this court.*

*b. That pending the hearing and determination of the suit herein, the Plaintiff/Applicant be at liberty to commission a geo-spatial survey to be carried out by the Government Surveyor and a Private Surveyor on Land Registration Number 26700/2 (originally Land Registration Number 11895/20) and the Surveyor's reports to be deposited in this Honourable Court.*

*c. That the County Commander Machakos County do provide security to the Government Surveyor and a Private Surveyor that the Plaintiff/Applicant commissions to undertake the survey exercise in terms of prayers (a) and (b) herein.*

*d. Each party to bear his/its own costs.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29<sup>TH</sup> DAY OF MARCH, 2019.**

**O.A. ANGOTE**

**JUDGE**