



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 282 OF 2017**

**AMBROSE NGENNE MUSYOKA.....PLAINTIFF**

**VERSUS**

**FELIX MUSILA MUTUKU.....1<sup>ST</sup> DEFENDANT**

**PETER MUTISYA MUTUKU.....2<sup>ND</sup> DEFENDANT**

**PATRICK MWANZIA KIUNGU.....3<sup>RD</sup> DEFENDANT**

**GRACE NYAMBURA GITHINJI.....4<sup>TH</sup> DEFENDANT**

**JAMES NDUNG'U MUTHEE.....5<sup>TH</sup> DEFENDANT**

**JOHN KIZIBI MAGERE.....6<sup>TH</sup> DEFENDANT**

**WILLIAM MAKHALANYA LIBOMBOLO**

**AS TRUSTEES OF NAIROBI CITY SECURITY STAFF**

**DEVELOPMENT ASSOCIATION.....7<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 12<sup>th</sup> November, 2018, the Plaintiff is seeking for the following reliefs:

***a. That a temporary injunction do issue restraining the Defendants whether by themselves or their agents, employees or servants from entering, dividing, constructing, trespassing, cultivating, interfering, residing, selling, sub-letting, transferring, charging, alienating or in any way dealing with the Plaintiff's property known as Donyo Sabuk/Komarock 1/58676 and Donyo Sabuk/Komarock 58677 pending the hearing and determination of this suit.***

***b. That cost of this Application be borne by the Defendants.***

2. In his Affidavit sworn on 12<sup>th</sup> November, 2018, the Plaintiff stated that in the year 2005, he purchased a total of 22½ (22.5) acres of land which was to be excised from land known as Donyo Sabuk/Komarock Block 1/64; that after paying for the suit land, he took possession of the land, fenced it, developed it by constructing semi-permanent houses and sunk a borehole.

3. According to the Plaintiff, on 8<sup>th</sup> September, 2011, he was instructed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to pay the survey fees for the sub-division of Donyo Sabuk/Komarock Block 1/64 which he did; that on 10<sup>th</sup> February, 2015, the 1<sup>st</sup> Defendant attempted to change the boundary of his land and that on 19<sup>th</sup> March, 2016, the clan confirmed that he was entitled to land measuring 22.5 acres.

4. The Plaintiff's complaint is that in December, 2016 and early January, 2017, the 4<sup>th</sup> and the 5<sup>th</sup> Defendants, together with their agents started trespassing on the suit land; that he subsequently discovered that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had illegally sub-divided the suit land and transferred it and that the Defendants are now in the process of constructing permanent structures on the land.

5. In response, the 1<sup>st</sup> Defendant deponed that the 2<sup>nd</sup> Defendant is his younger brother; that the two of them are the registered proprietors of the suit land having inherited it from their deceased father's Estate and that they have since transferred the suit land to the other Defendants.

6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied ever selling the suit land to the Plaintiff; that the Plaintiff has not produced documents to support his case and that the Application should be dismissed.

7. One of the Trustees of the 5<sup>th</sup> Defendant deponed that the 5<sup>th</sup> Defendant's membership comprises of 107 employees of the Security Department of Nairobi County; that their members invested their savings in the suit land and that in the year 2016, they identified and purchased land known as Donyo Sabuk/Komarock Block 1/5876.

8. According to the 5<sup>th</sup> Defendant, the suit land was registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants before they purchased it; that they took possession of the land and sub-divided it amongst its 107 members and that the Plaintiff has never been in possession of the suit land.

9. The 5<sup>th</sup> Defendant's counsel submitted that although the Plaintiff claims that he purchased the suit land in the year 2005, he never obtained the requisite consent of the Land Control Board within six (6) months and that the Plaintiff served the 5<sup>th</sup> Defendant with the Application without annexing documents.

10. Both the Plaintiff's and the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants' advocates filed brief written submissions which I have considered.

11. The principles for the grant of an order of injunction are now settled. The Applicant must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable injury that cannot be compensated by an award of damages. Where the court is in doubt, it must decide the Application on a balance of convenience (*See Giella vs. Cassman Brown (1973) EA 358*).

12. The Plaintiff's case is that vide three Agreements, he purchased a parcel of land measuring 22.5 acres which was to be excised from land known as Donyo Sabuk/Komarock Block 1/64. According to the Plaintiff, he thereafter took possession of the said land and constructed semi-permanent structures.

13. The alleged Sale Agreements were not annexed on the Plaintiff's Supporting Affidavit. Indeed, the only documents that were annexed on the Supporting Affidavit are photographs that were taken on 20<sup>th</sup> October, 2018 by an unknown person. Those photographs show one small mabati structure and a foundation being done in the neighbourhood. Other than the photographs which do not indicate the parcel of land in question, the Plaintiff did not annex any other document in support of his case. Indeed, in the entire Supporting Affidavit, the only document that was referred to is the photographs, which, according to paragraph 11, shows the construction being undertaken by the Defendants.

14. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have deponed that they were the registered proprietors of the suit land which they have since sold to the other Defendants. The 5<sup>th</sup> Defendant confirmed that it purchased a portion of the suit land being Donyo Sabuk/Komarock Block 1/58676 measuring 5.28 Ha (*approximately 13.2 acres*). The 5<sup>th</sup> Defendant annexed on its Trustee's Affidavit the copy of the official search for the said land.

15. The search annexed on the 5<sup>th</sup> Defendant's Affidavit shows that parcel number 58676 was registered in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 7<sup>th</sup> August, 2015. The said land was then transferred to the 5<sup>th</sup> Defendant on 20<sup>th</sup> January, 2017. The Mutation form produced by the 5<sup>th</sup> Defendant shows that the land was further sub-divided into further portions measuring between 0.0288 Ha and 0.1800 Ha. Those are the portions of land that the 5<sup>th</sup> Defendant's members have taken possession. Indeed, the photographs annexed on the 5<sup>th</sup> Defendant's Affidavit shows the advanced stage that the houses being put up by the 5<sup>th</sup> Defendant have reached.

16. Although the Plaintiff states that he bought the suit land in the year 2005, there is no evidence to show that he procured the consent of the Land Control Board for the sub-division and transfer of the land. In the absence of copies of Sale Agreements showing that he purchased the suit land from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or their late father; and in the absence of the consent of the Land Control Board which should have been procured within six (6) months of purchase, I find and hold that the Plaintiff has not established a prima facie case with chances of success.

17. Indeed, it is the 5<sup>th</sup> Defendant's members who are in possession of a bigger portion of the land that the Plaintiff purports to have purchased. The said members have since put up houses which are almost being completed. Having not put up any structures on the land, the Plaintiff will not suffer any irreparable injury that cannot be compensated in damages if the injunction is not granted.

18. For the reasons I have given above, I dismiss the Plaintiff's Application dated 12<sup>th</sup> November, 2018 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF MAY, 2019.**

**O.A. ANGOTE**

**JUDGE**