



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

MISC. APPLICATION No. 1 OF 2018

JOHN MAGETO NYACHIEO.....APPLICANT

VERSUS

REGIONAL SURVEYOR – NAKURU.....1ST RESPONDENT

NAKURU COUNTY LAND REGISTRAR.....2ND RESPONDENT

NAKURU COUNTY PHYSICAL PLANNER.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JOHN KINYUA.....5TH RESPONDENT

RULING

1. The applicant commenced these proceedings by Notice of Motion dated 17th May 2018 which was later replaced by Amended Notice of Motion dated 28th September 2018. He seeks an order that the 1st to 4th respondents be ordered to cause rectification of the 21st edition of Registry Index Map with regard to the position of land parcels Nakuru/Molo (Kapsita) 97 and Nakuru/Molo (Kapsita) 122 to reflect the true position on the ground. The application is supported by an affidavit sworn by himself.
2. The applicant and the 5th respondent were involved in litigation in **ELC 236 of 2016 (Nakuru)** where the applicant claimed that he was the registered proprietor of land known as Nakuru/Molo (Kapsita) 97 and accused the 5th respondent of invading the land and dispossessing him. Judgment was delivered on 27th July 2017 in favour of the applicant. The court declared the applicant the legal owner of the parcel of land, ordered the 5th respondent together with his agents or servants to vacate and granted a permanent injunction restraining the 5th respondent together with his agents or servants from invading the parcel or interfering with the applicant's quiet enjoyment of it. It should be noted that the subject matter of the litigation in **ELC 236 of 2016 (Nakuru)** was only land parcel number Nakuru/Molo (Kapsita) 97. Land parcel number Nakuru/Molo (Kapsita) 122 did not feature anywhere in that litigation. Further, the 1st to 4th respondents herein were not parties to **ELC 236 of 2016 (Nakuru)**.
3. In the affidavit in support of the present application, the applicant has deposed that the position of land parcel number Nakuru/Molo (Kapsita) 97 is no longer the same one that it had in the 16th edition of the Registry Index Map. That in the 21st edition of Registry Index Map the position of land parcel number Nakuru/Molo (Kapsita) 97 has been interchanged with that of land parcel number Nakuru/Molo (Kapsita) 122 and that arising from that change, the 5th respondent is now claiming that the land which stands on what was previously captured as land parcel number Nakuru/Molo (Kapsita) 97 in the registry index map.
4. Although served, none of the respondents responded to the application. Nevertheless, the applicant must satisfy the court that he is entitled to the orders sought. Although the applicant seeks orders which will affect the rights of the registered proprietor of land parcel number Nakuru/Molo (Kapsita) 122, the applicant has not annexed a copy of the title document of the said parcel or a certificate of search. While the suggestion made by the applicant is that the registered owner of the said parcel is the 5th respondent, the court cannot take the applicant's word in the absence of a certificate of search. There is real risk of the court making orders in respect of land whose registered owner has not been given a chance to be heard.
5. I have also agonised over whether the relief sought can be granted on the basis of a miscellaneous application. The issues raised would require a hearing in which parties have an opportunity to tender oral evidence. A miscellaneous application does not offer such a facility. In sum, I am not persuaded that the applicant has made a case for the orders sought.

6. Amended Notice of Motion dated 28th September 2018 is dismissed. Since the respondents did not oppose the application, I make no order on costs.

Dated, signed and delivered in open court at Nakuru this 17th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the applicant

No appearance for the 1st respondent

No appearance for the 2nd respondent

No appearance for the 3rd respondent

No appearance for the 4th respondent

No appearance for the 5th respondent

Court Assistants: Beatrice & Lotkomoi