



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 198 OF 2018

SHADRACK MWAMUU NZIOKA....1ST PLAINTIFF/RESPONDENT

S. MBASA MAITHYA.....2ND PLAINTIFF/RESPONDENT

MOHAMED SORA (Suing on their behalf and as the officials of Crescent

Self-Help Group).....3RD PLAINTIFF/RESPONDENT

VERSUS

EPHRAIM MAINA.....DEFENDANT/APPLICANT

RULING

1. In the Notice of Motion dated 6th November, 2018, the Defendant is seeking for the following orders:

- a. That this Honourable Court be pleased to set aside the ex parte proceedings and orders made on 25th October 2018.**
- b. That this Honourable Court be pleased to order that the Plaintiffs' Application dated 18th September, 2018 be heard on merit.**
- c. That the costs of the Application be awarded to the Defendant/Applicant.**

2. According to the Defendant's Affidavit, he has never been served with the Application dated 18th September, 2018 which came up for *inter- partes* hearing on 25th October, 2018; that the orders which were issued on 25th October, 2018 were procured fraudulently and that he does not own the suit properties.

3. The Defendant deponed that he is the registered proprietor of land reference number 12610/62; that he is in quiet possession and occupation of the said land which has chicken hatcheries and secured by a perimeter fence and that he does not know the Plaintiffs or Crescent Self Help Group. The Defendant finally deponed that the suit is a crafty attempt by the Plaintiffs to use the court to access and gain possession of his land.

4. In response, the 1st Plaintiff deponed that the Defendant is not in occupation of the suit land; that the Plaintiffs have been in active, continuous and uninterrupted occupation of the suit land and that the Defendant has been an absentee landlord who does not seem to be aware of the actual ground location of the suit land.

5. According to the 1st Plaintiff, they moved and occupied the suit land in the year 2003; that they registered a Self Help Group in the year 2017 to assist each other as neighbours in social, political and economic fronts and that the said Self Help Group was registered on 15th January, 2018.

6. The 1st Plaintiff finally deponed that on 6th March, 2018, the National Land Commission placed an advert under Section 14(1) (2) of the Land Act for anyone claiming ownership of the suit land to come forward and prove ownership of the land and that the Plaintiffs submitted their report to the National Land Commission.

7. The Defendant's/Applicant's advocate submitted that there is no Affidavit of Service on record to prove that the Defendant was served with the Application that gave rise to the orders of injunction; that the Defendant is the registered proprietor of land parcel number 12610/62

and that the Application should be allowed.

8. The Plaintiffs'/Respondents' advocate submitted that after occupying the suit land for a considerable period of time, they filed the current suit to have their rights authenticated and crystallized; that the Defendant was served with the court processes and that the Plaintiffs have annexed an Affidavit of Service.

9. The Plaintiffs' counsel submitted that the Defendant did not recall the process-server for cross-examination on his Affidavit of Service. Counsel submitted that there is inconsistency between the Defendant's assertion that he owns L.R. No. 12610/62 and the Valuation Report which shows that he owns L.R. No. 12610/2; that the Defendant is deliberately misleading the court and that the Application should be dismissed.

10. The record shows that this suit was commenced by way of an Originating Summons dated 18th September, 2018. Together with the said Originating Summons, the Applicants filed a Notice of Motion in which they sought for a temporary injunction restraining the Respondent or his servants from entering, evicting, sub-dividing, obtaining consent for transfer, selling, transferring or dealing in any way with Land Titles Nos. 12610/1, 12610/2, 12610/3, 12610/4 and 12610/5 within Ngelani of Athi River pending the hearing of the suit.

11. In the Affidavit in support of the Application dated 18th September, 2018, the 1st Plaintiff deponed that the Defendant is the owner of the suit properties and that the Plaintiffs are in occupation of the said land. However, the Affidavit in support of the Notice of Motion of 18th September, 2018 and the Originating Summons did not have a copy of the titles of the suit properties as annexures.

12. In his Affidavit of Service, the process-server deponed that on 4th October, 2018, he served the Defendant with the Application dated 18th September, 2018 "*near Parliament gate*"; that he served the Defendant with the court process while he was in the car and that although the Defendant received the Application, he declined to sign his copy.

13. Although the Defendant has denied having been served with the Application dated 18th September, 2018 which was allowed by the court on 25th October, 2018, he has not denied that he is a Senator and that he was near the Parliament Gate on 4th October, 2018. Indeed, the Defendant/Respondent did not request the court to summon the process-server for cross-examination on the deposition of his Affidavit of Service.

14. The failure by the Defendant to deny that he was in Parliament on 4th October, 2018 at 2.30p.m., and having failed to have the process-server summoned for cross-examination shows that the Defendant was indeed served with the Notice of Motion dated 18th September, 2018.

15. However, the Defendant's deposition that he is not the registered proprietor of the suit land points to the fact that the Plaintiffs/Respondents might have sued the wrong party.

16. According to the Defendant's Affidavit, he is not the registered proprietor of L.R. No. 12610/1, 12610/2, 12610/3, 12610/4 and 12610/5 (*the suit properties*). Instead, it was his deposition that he owns land whose reference number is L.R. No. 12610/62 measuring 45.35 Ha.

17. The Defendant has exhibited on his Affidavit the Certificate of Title for L.R. No. 12610/62. The said title shows that the land was registered in favour of the Defendant on 16th December, 1992. The Defendant then charged the land to Credit Bank Limited on 18th April, 2017 for USD\$ 2,000,000.

18. Considering that the Plaintiffs have not exhibited evidence showing that the suit properties are registered in the name of the Defendant, and in view of the Certificate of Title showing that the Defendant is the registered proprietor of a different piece of land known as L.R. No. 12610/62, I find that the injunctive order should not have been issued as against the Defendant.

19. For that reason, I allow the Defendant's Application dated 6th November, 2018 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE