



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 201 OF 2018**

**LELOPA OLE PARSAUREI**

**(Suing as the widow and personal representative of**

**Masare Ole Alaseso Mapi alias Masarei Ole Alasejo Mapi – deceased)....PLAINTIFF**

**VERSUS**

**COUNTY LAND REGISTRAR.....1<sup>ST</sup> DEFENDANT**

**GEORGE NGACHA NJIRIRI.....2<sup>ND</sup> DEFENDANT**

**SAMUEL NGACHA NJIRIRI.....3<sup>RD</sup> DEFENDANT**

**GEORGE NGANGA NJIRIRI.....4<sup>TH</sup> DEFENDANT**

**ATHI RIVER MINING COMPANY LIMITED.....5<sup>TH</sup> DEFENDANT**

**KELLIAN WANJIKU NJIRIRI.....6<sup>TH</sup> DEFENDANT**

**SUSAN NJOKI NJIRIRI.....7<sup>TH</sup> DEFENDANT**

**KARAGITA EAST AFRICA LIMITED.....8<sup>TH</sup> DEFENDANT**

**MAGANA HOLDINGS LIMITED.....9<sup>TH</sup> DEFENDANT**

**TWO TWENTY INVESTMENTS LIMITED.....10<sup>TH</sup> DEFENDANT**

**INNER CONNECTIONS LIMITED.....11<sup>TH</sup> DEFENDANT**

**ROMA MANAGEMENT COMPANY LIMITED.....12<sup>TH</sup> DEFENDANT**

**LOCAL AUTHORITIES PENSION TRUST**

**REGISTERED TRUSTEE.....13<sup>TH</sup> DEFENDANT**

**ROTINO FARMERS LIMITED.....14<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion Application dated 20<sup>th</sup> December, 2018, the 5<sup>th</sup> Defendant's Notices of Preliminary Objection dated 18<sup>th</sup> February, 2019 and 11<sup>th</sup> March, 2019 respectively.

The Notice of Motion Application is brought pursuant to Order 51 Rule 1; Order 40 Rules 1, 2 & 4 of the Civil Procedure Rules, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act. It is premised on the summarized grounds that the deceased was proprietor of Land Reference

Number Kajiado/ Oloolotikoshi/ Kitengela/ 3 hereinafter referred to as the ‘ suit land’ and on 17<sup>th</sup> March, 1982, a mutation form was illegally and fraudulently drawn with the deceased thumbprint being forged culminating in the parcel being subdivided into three portions. Upon the deceased demise in April, 2017, strangers have invaded his land. The 2<sup>nd</sup> to 14<sup>th</sup> Defendants have fraudulently and illegally subdivided suit land to the detriment of the bonafide beneficiaries who hold a Certificate of Confirmed Grant from the Kajiado Chief Magistrate’s Court dated 6<sup>th</sup> November, 2018. The 2 – 14<sup>th</sup> Defendants are now erecting illegal structures and walls on the suit land which acts are wasting away the land and antagonizing them against family members including community at large. The 13<sup>th</sup> Defendant has deployed the Kenya Police Service to illegally protect and oversee her erect an illegal wall. The Respondents are in actual possession of the Original Title Deeds to the resultant subdivisions and the Plaintiff is apprehensive that the Respondents shall treacherously, fraudulently, illegally and/ or cunningly deal with the said Title deeds to the detriment of the bona fide beneficiaries and the deceased estate. The deceased’s estate beneficiaries stands to suffer irreparable loss and damage unless the orders sought herein are granted and the said loss cannot be adequately compensated by damages as the subject is ancestral land.

The application is supported by the affidavit of the Plaintiff LELOPA OLE PASAUREI who reiterates his claim above and avers that he has instituted this suit on behalf of the estate of Masare Ole Alaseso Mapi alias Masarei Ole Alasejo Mapi (deceased) pursuant to Letters of Administration issued by the Honourable Court at Kajiado on 6<sup>th</sup> November, 2018 in Succession Cause No. 6 of 2018. He avers that the deceased who was the owner of the suit land passed away on 12<sup>th</sup> April, 2017. He contends that upon enquiring on the status of the suit land, he was shocked to learn that the same had been suspiciously and fraudulently subdivided on 17<sup>th</sup> March, 1982 into land parcel numbers Kajiado/ Oloolotikoshi/ Kitengela/ 162; 163; 164 and further subdivided into Kajiado/ Kitengela/ 5663; 5664; 11344; 11345; 11346; and 11347 respectively. He claims the suit land was subdivided without the deceased consent and approval to the detriment of his rightful beneficiaries. He claims the 1<sup>st</sup> Defendant was careless, grossly negligent and/or compromised in that they facilitated and/or condoned the registration of improper, incomplete and fraudulent documents. Further, the 2<sup>nd</sup> to 14<sup>th</sup> Defendants and other parties claiming under them have started other destructive activities upon the deceased’s property. He insists the Court should proceed and order that all fraudulent subdivisions emanating from Kajiado/ Oloolotikoshi/ Kitengela/ 3 be cancelled and same revert to the deceased name/estate. Further, that original title deeds ought to be delivered to the court pending the hearing and determination of the suit.

The 8<sup>th</sup> Defendant opposed the application and filed Grounds of Opposition and Replying affidavit sworn by JAMES KAMAU KANIU who is its Managing Director. In the Grounds of Opposition, it contends that the application is misconceived and bad in law; it is frivolous, vexatious and an abuse of court process; statute barred; 8<sup>th</sup> Defendant is a bona fide purchaser for value; and there has been inordinate delay in filing the application. In the replying affidavit, he avers that the 8<sup>th</sup> Defendant purchased a subdivision of the suit land measuring 8 acres from one Masarie Ole Alasejo Mapi sometimes in the year 1982. He claims prior to the purchase, the 8<sup>th</sup> Defendant undertook due diligence which confirmed the vendor was proprietor of the land. He insists the 8<sup>th</sup> Defendant is a bona fide purchaser for value that has taken possession of the land and commenced developing it. He reiterates that the Plaintiff has not exhibited any documents to prove fraud and failed to establish a prima facie case.

The 11<sup>th</sup> Defendant opposed the application by filing a replying affidavit sworn by OSCAR MANN who is its Director where he denies the allegations of fraud or illegal invasion of the suit land. He avers that the application lacks merit, is incompetent, vexatious, fatally defective and an abuse of the court process. He reiterates the 11<sup>th</sup> Defendant’s Preliminary Objection date the 14<sup>th</sup> February 2019. He claims neither the Plaintiffs’ nor the estate have given any explanation for the inexcusable or inordinate delay in coming to court since the occurrence of the alleged cause of action. Further, the suit and application is barred by laches. He states that the 11<sup>th</sup> Defendant lawfully acquired land parcel number Kajiado/ Kitengela/ 5663 measuring 28 hectares for value without notice of any defects in the title from the 10<sup>th</sup> Defendant and have been in open, peaceful including uninterrupted occupation of the same from 2<sup>nd</sup> June, 1999 in the full glare of the Applicants. He explains that Kajiado/ Kitengela/ 5663 was a resultant subdivision of Kajiado/ Kitengela/ 162 which was a portion subdivided from Kajiado/ Oloolotikoshi/ Kitengela/ 3. Further, that the 11<sup>th</sup> Defendant took vacant possession with the deponent residing on the land to date. He contends that in 2000 the 11<sup>th</sup> Defendant leased about 20 – 25 acres of the property to the Centre for Wildlife Management Studies (CWMS) of the School of Field Studies (SFS) for a period of 10 years and the said leasehold was registered on the title to the property. Further, during the lease, the Lessee built permanent structures whereof it operated a school and employed a large workforce including the Applicants’, with the operations including activities being in full glare of the Applicant as well as the entire estate without any objections. He further explains that the title documents in respect of the 11<sup>th</sup> Defendant’s land as well as the transaction documents which were in the custody of their lawyers were destroyed. He further states that in 2004, Kajiado/ Kitengela/ 5663 was subsequently subdivided into 3 portions namely Kajiado/ Kitengela/ 99006; 99005 and 99007 whereof KAJIADO/KITENGELA 99006 as well as KAJIADO/KITENGELA 99005 were sold to 3<sup>rd</sup> parties while the 11<sup>th</sup> Defendant is in occupation of the remaining KAJIADO/KITENGELA 99007. Further, the said title was surrendered to allow issuance of new titles. He is opposed to the interim orders sought as the same will grossly prejudice the 11<sup>th</sup> Defendant, insists documents relating to subdivisions are public ones hence accessible at the lands registry and the balance of convenience favours dismissal of the instant application.

The 13<sup>th</sup> Defendant opposed the application and filed a replying affidavit sworn by its Property Manager CATHERINE MASYUKI where she avers that the 13<sup>th</sup> Defendant purchased Kajiado/ Kitengela/ 5664 from Roma Management Company Limited who is sued as the 12<sup>th</sup> Respondent/Defendant, on 18<sup>th</sup> May, 2012 for valuable consideration and has been in possession from then on to date. She claims the transfer was in accordance with the law after due diligence had been undertaken and there is nowhere in the Green Card which indicates the Plaintiff or his father were proprietors of the said land. She denies the allegations of fraud and insists the Plaintiff has not established a prima facie case against the 13<sup>th</sup> Defendant. She insists the structures they are putting up on their land are not illegal and neither are they frustrating the bona fide beneficiaries. Further, that they have engaged 3<sup>rd</sup> Parties in the construction work on their land and have contractual obligations towards them hence if the injunctive orders are granted, they will be in breach of the said obligations leading to huge losses. She reiterates that the orders sought for surrendering of titles and registration of restriction have no basis since the Court has not declared itself on the issue of ownership in respect of the parcels of land.

The Plaintiff filed a further affidavit sworn by LELOPA OLE PASAUREI where he reiterates his claim above and contends that the 8<sup>th</sup> Defendant never obtained consent of the Land Control Board hence the transaction is null and void. He challenges the 11<sup>th</sup> Defendant’s loss

of documents and insists the transactions done by it were illegal. He claims the 11<sup>th</sup> Defendant undertook subdivision in 2018 and not 2004 and that it has never been the bonafide purchaser of its land Kajiado/ Kitengela/ 5663. He contends that the 10<sup>th</sup> Defendant did not have a proper title to pass to the 11<sup>th</sup> Defendant and that the 11<sup>th</sup> Defendant cannot be an adverse possessor. He denies that the estate voluntarily sold suit land and challenges the fact that the 11<sup>th</sup> Defendant never annexed the Lease documents to prove their claim. He explains that the 11<sup>th</sup> Defendant had bought land adjacent to the suit land but slowly encroached on the deceased land after which it processed title to Kajiado/ Kitengela/ 5663. He disputes that the 11<sup>th</sup> Defendant nor the Deponent has been residing on the suit land since 1999 and that there are third parties or strangers therein. As for 13<sup>th</sup> Defendant's assertion that it is the bona fide owner of Kajiado/ Kitengela/ 5664, it insists, there was no valid title passed to it by the 12<sup>th</sup> Defendant. He avers that the 13<sup>th</sup> Defendant has been putting up illegal structures on the suit land and they had even complained of their acts of trespass.

The 5<sup>th</sup> Defendant filed another Notice of Preliminary Objection dated 18<sup>th</sup> February, 2019 contending that the Plaintiff's suit and application against it, are in violation of section 560 of the Insolvency Act as it was placed under Administration with effect from 17<sup>th</sup> August, 2018 which Administration prevails to date.

The 5<sup>th</sup> Defendant further filed a Notice Preliminary Objection dated the 11<sup>th</sup> March, 2019 in respect to the Plaintiff's Notice of Motion dated the 7<sup>th</sup> March, 2019 where it states that the Court lacks jurisdiction to entertain the said application.

The Plaintiff opposed the two Notices of Preliminary Objection and filed his Grounds of Opposition where he averred that the Court had jurisdiction to entertain this matter; he has a right to enjoin the 5<sup>th</sup> Defendant in this suit to realize proprietary rights; the contention is a mere technicality; the objections are frivolous and vexatious and should be struck out.

The Plaintiff, the 5<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup> Defendants filed their respective submissions to the Notice of Motion Application dated 20<sup>th</sup> December, 2018, the 5<sup>th</sup> Defendant's Notice of Preliminary Objection dated 18<sup>th</sup> February, 2019 and 11<sup>th</sup> March, 2019 respectively which I have considered

### **Analysis and Determination**

Upon consideration of the Notice of Motion dated 20<sup>th</sup> December 2018, the 5<sup>th</sup> Defendant's Notice of Preliminary Objection dated 18<sup>th</sup> February, 2019 and 11<sup>th</sup> March, 2019 respectively, Grounds of Opposition as well as the parties' affidavits including submissions, the following are the issues for consideration:

- Whether the Plaintiff is entitled to orders of interlocutory injunction.
- Whether the Plaintiff's claim is statute barred.
- Whether the Court has jurisdiction to entertain the suit as against the 5<sup>th</sup> Defendant.

As to whether the Plaintiff is entitled to orders of interlocutory injunction. The Plaintiff claims that his deceased father was the proprietor of Land Reference Number Kajiado/ Olooloitikoshi/ Kitengela/ 3 and on 17<sup>th</sup> March, 1982, a mutation form was illegally and fraudulently drawn with the deceased thumbprint being forged culminating in the parcel being subdivided into three portions. Further, that upon the deceased demise in April, 2017, strangers have invaded his land. He insists the 2<sup>nd</sup> to 14<sup>th</sup> Defendants have fraudulently and illegally subdivided the suit land to the detriment of the bonafide beneficiaries and hold titles to the same. He seeks for an injunction; for the Defendants to surrender their title deeds and for a restriction to be entered thereon. He submits that he has established a prima facie case and relied on the cases of: *Mrao vs First American Bank of Kenya Ltd & two others C.A Civil Appeal No. 39 of 2002 (2003) KLR 125*; *Paul Gitonga Wanjau V Gathuthi Tea Factory Company Ltd & 2 others (2016) eKLR*; and *Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358 to buttress his arguments. The 5<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup> Defendants opposed the application and insisted they were all registered proprietors of their respective parcels of land which were resultant subdivisions of the suit land. They all claimed they had taken possession and developed the same in the full glare of the Applicant. Further, that no one had raised any claim against them and the Plaintiff's claim was statute barred. They relied on the following cases including: *Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358*; *John Mwamuye Makupe (Suing as the Legal Representative of the Estate of Makupe Yawa Mwalungo V Omar Tsuma Baya & Anor (2019) eKLR*; *Dennis Moya Vs Virginia Wanjiku Ngunjiri & Others (2019) eKLR*; *Paul Kiroket Ole Matuku Vs Magana Holdings Ltd (2018) eKLR*; *Mrao vs First American Bank of Kenya Ltd & two others C.A Civil Appeal No. 39 of 2002 (2003) KLR 125*; *Paul Gitonga Wanjau Vs Githuthi Tea Factory Company Ltd (2016) eKLR*; *Abigel Barmao V Mwangi Theuri (2013) eKLR*; and *Beatrice Chelagat Rop & Anor Vs HFCK (2006) eKLR to oppose the application.**

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358.**

In line with this principle, the Court will proceed to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, I note the Plaintiff's claim revolves around his father's estate. Further, the suit land was subdivided and sold during the lifetime of the Plaintiff's father. The Defendants have their respective titles in respect of the portions of land they had all acquired prior to the demise of the Plaintiff's father. The 8<sup>th</sup>, 11<sup>th</sup> and 13<sup>th</sup> Defendants all claim to have taken possession and developed their respective parcels of land in the full glare of the Plaintiff. They contend that there is no proof of the alleged fraud and the Plaintiff is guilty of laches.

In the current scenario, I note there are Green Cards annexed to the respective affidavits. From a cursory look at the various Green Cards, I note the suit land had been severally subdivided prior to the deceased demise. The Plaintiff has however not indicated what steps the deceased took when his land was subdivided nor when he saw persons trespassing thereon. The Plaintiff however has alleged fraud and insists the resultant title deeds were acquired unlawfully since the consent of the Land Control Board was not obtained. Looking at the documents of title presented by the respective Defendants who opposed this application, it is evident that their claims are not baseless. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, the Court of Appeal held that in an application seeking injunctive relief, speculative injury cannot suffice and there must be more than unfounded fear and the injury should be actual as well demonstrable that cannot be compensated by damages. I note the Defendants have held their respective titles for a long time and the deceased never sought for their cancellation before his demise. Further, the Plaintiff has not indicated what harm they suffered when the Defendants held the said titles to the suit land and took possession as well as what harm they stand to suffer. In the circumstances and in relying on the facts as presented including the legal provisions cited above as well as being persuaded by the aforementioned judicial authority, I find that the Plaintiff has not established a prima facie case to warrant the orders of temporary injunction sought against the Defendants' parcels of land.

As to whether the Plaintiff's claim is statute barred.

The 5<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup> and 13<sup>th</sup> Defendants have all insisted the Plaintiff's claim is statute barred. The Plaintiff insists the claim is not statute barred. Section 7 of the Limitation of Actions Act provides that: **'An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'**

Further, Section 26 gives an extension of time and states as follows: **'Where, in the case of an action for which a period of limitation is prescribed, either—**

**(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or**

**(b) the right of action is concealed by the fraud of any such person as aforesaid; or**

**(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:**

**Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property**

**which—**

**(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or'**

I note the Plaintiff has alleged fraud on the part of the Defendants in the mode they acquired their respective parcels of land. The Plaintiff claims that the subdivisions were done using forged fingerprints. In the case of ***R. G. Patel v. Lalji Makanji [1957] EA 314*** the former Court of Appeal for Eastern Africa stated thus:

***"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."***

At this juncture, I opine that where there are allegations of fraud, the Court cannot make a proper determination unless viva voce evidence is adduced. In the circumstance, I will exercise my discretion and direct that the matter be heard on its merits.

As to whether the Court has jurisdiction to entertain the suit as against the 5<sup>th</sup> Defendant.

It has emerged that the 5<sup>th</sup> Defendant is currently under receivership. The 5<sup>th</sup> Defendant contends that the Plaintiff should not have instituted a suit against it unless he obtained leave of Court. The 5<sup>th</sup> Defendant has relied on the following judicial authorities of: **Charity Wangui Ngumo V Chase Bank Limited ( In Receivership) & Antique Actions Agencies (2018) eKLR; Kenya Union Of Commercial, Food and Allied Workers Vs Peter Obondo Kahi & Nakumatt Holdings Limited (2018) eKLR; Fredrick Okoth Owino V TSS Grain Millers (2017) eKLR and Pravin Galot V Chief Magistrates' Court at Milimani Law Courts (2017) eKLR** to support its argument.

Section 560 (1) of the Insolvency Act provides that: **'(1) While a company is under administration— (a) a person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court; (b) a person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval—subject to such conditions as the Court may impose (c) a landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and (d) a person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court.'**

Further, Section 13 of the Environment and Land Court (ELC) Act provides as follows:

**(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—**

**(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**(b) relating to compulsory acquisition of land;**

**(c) relating to land administration and management;**

**(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**

**(e) any other dispute relating to environment and land.**

I note that the Plaintiff had not sought leave to commence the suit against the 5<sup>th</sup> Defendant as envisaged by the provisions of the Insolvency Act and actually filed an application after the Preliminary Objection was raised by the 5<sup>th</sup> Defendant. I further note that the Insolvency Act refers to the Court as a High Court. From a reading of section 13 of the ELC Act that confers jurisdiction to the Environment and Land Court., I find that indeed the said Court does not have jurisdiction to grant leave to a party seeking to institute proceedings against a company in receivership. In associating myself with decision of Nyarangi JA in **The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1**, where he clearly established the law on jurisdiction and held as follows:

**“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.**

**Further, in the case of Fredrick Okoth Owino V TSS Grain Millers (2017) eKLR, Onesmus Makau with approval cited the case of Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Ltd & 2 others (2012) eKLR where it was held that: ‘ A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law. ‘**

I hold that this Court is devoid of jurisdiction to grant leave to a party seeking to institute a suit against a Company under receivership. I will hence proceed to strike out the suit as against the 5<sup>th</sup> Defendant with costs to it.

In the circumstances, I find the Notice of Motion Application dated 20<sup>th</sup> December, 2018 and Notice of Preliminary Objection dated 11<sup>th</sup> March, 2019 unmerited and will disallow them. As for the 5<sup>th</sup> Defendant’s Notice of Preliminary Objection dated 18<sup>th</sup> February, 2019, I find it merited and will allow it.

I grant the 5<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup> and 13<sup>th</sup> Defendants the costs of the application.

**Dated signed and delivered in open court at Kajiado this 30<sup>th</sup> September, 2019**

**CHRISTINE OCHIENG**

**JUDGE**