



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

PETITION NO. 18 OF 2017

IN THE MATTER OF ARTICLES 22, 23, 27(1), 40, 47, 50 (1) OF THE CONSTITUTION

BETWEEN

WYCLIFFE ONYANGO OCHIENG.....PETITIONER

VERSUS

OFFICER COMMANDING POLICE STATION, NGONG POLICE

STATION.....1ST RESPONDENT

DEPUTY DIVISIONAL CRIMINAL INVESTIGATION OFFICER,

NGONG POLICE STATION –MR. MALOBA...2NDRESPONDENT

RULING

The application before Court is the Petitioner's Notice of Motion dated 20th June, 2017 brought pursuant to Articles 22, 23 and 159 of the Constitution and all the other enabling provisions of the law.

The application is premised on the grounds that the Petitioner is the registered owner of the suit land and on 19th June, 2017, the 2nd Respondent stopped his agents from undertaking developments thereon citing the reason that the said suit land was under investigation. The Petitioner has never been given any written communication and/or reasons pertaining to the alleged investigations and or dealings on the said land. The Petitioner is apprehensive that the Court should intervene since his fundamental rights and freedoms shall continue to be infringed upon. The actions of the Respondents are unlawful and greatly prejudicial to the Petitioner.

The application is supported by the affidavit of WYCLIFFE ONYANGO OCHIENG who is the Petitioner herein where he deposes that he is the registered owner of land parcel number NGONG/NGONG/ 17410 (suit land) which he purchased from AKHTARI BEGUM AKLAM and SAMIRA AKMAL who were its original owners. Further that the said land was transferred and registered in his name, after they obtained consent of the OLOOLAISER Land Control Board on 20th December, 2016. He claims he has been enjoying quiet and peaceful possession of the suit land until 19th June, 2017 when the 2nd Respondent ordered his agents to stop undertaking any developments thereon as there were investigations pertaining to the same. He insists he has never been informed of any proceedings and/or investigations pertaining to the suit land and has written to the Respondents intimating his apprehension and asking them to abide by the law, as well as provide him with written reasons for the illegal actions but they have not done so. He is apprehensive of the adverse action they are likely to take against him and their interference is an infringement of his right to property. Further that the Respondents action are an infringement of his right to fair administrative action as guaranteed under Article 47 of the Constitution as read together with the Fair Administrative Act.

The 2nd Respondent opposed the application and filed Grounds of Opposition and Replying affidavit. In his Grounds of Opposition he insists the entire application and Petition is incompetent and lacks merit because the burden of proving any alleged contravention of Rights and Freedoms lies wholly on the Petitioner at all times. He states that presumption of the unconstitutionality can only be rebutted upon full hearing of the Petition consequently, the prayers of conservatory orders and/or interim orders sought by the Petitioner are premature and ought not to be granted. He insists the 2nd Respondent is an Independent Constitutional body established under the Constitution to investigate criminal conduct and the Petitioner herein intends to obstruct as well as interfere with its Statutory and Constitutional Mandate. 2nd Respondents states that they have not acted ultra vires or infringed on the rights of the Petitioner and there is no Constitutional issue raised in the Petition.

The 2nd Respondent's replying affidavit is sworn by PATRICK M. KHAEMBA who is the lead investigating officer attached to the Directorate of Criminal Investigations, Kajiado County. He deposes that they received a complaint from one ELIUD NDUNGU MUGAMBI that in June 2015 he subdivided land parcel number NGONG/NGONG/14013 into five portions registered as NGONG/NGONG/71234 –

71238. He contends that on the 22nd May, 2017 two persons VIJAY MORJARIA and HITESH MORJARIA made a report and produced documents at the Ngong Police Station claiming their parcel of land NGONG/NGONG/88307 and NGONG/NGONG/ 88308 measuring 0.40 hectares had been unlawfully invaded by one ELIUD NDUNGU MUGAMBI. He claims that consequently they commenced investigations into these two allegations where all parties were summoned to record statements and produce documents. He avers that on 18th June, 2017 as investigations were ongoing, they learnt the Petitioner was also laying claim on land parcel number NGONG/NGONG/71238 which had been claimed by ELIUD NDUNGU MUGAMBI and he was summoned on 19th June, 2017 to present himself at the Directorate of Criminal Investigations to enable them investigate the allegations so as to arrive at a decision. The 2nd Respondent contends that on 19th June, 2017 the Petitioner availed to them a letter dated the 19th June, 2017 from messrs Otieno Ogola & Company Advocates claiming he was the legitimate and rightful owner of NGONG/NGONG/71238. He reiterates that the Petitioner was informed that ELIUD NDUNGU MUGAMBI, VIJAY MORJARIA and HITESH MORJARIA were also staking claim over land parcel NGONG/NGONG/71238. He insists the Petitioner has moved court in bad faith as they have a lawful, Constitutional and statutory mandate to receive formal complaints, investigate the said complaints and the same cannot be curtailed by the Court. Further that there is currently an existing conflict over ownership of land parcel number NGONG/NGONG/71238 which raises possibilities of fraudulent transactions that ought to be unearthed to ensure the rightful owner of the said land enjoys quiet possession as guaranteed by the Constitution. He contends that he does not have a legal claim over the suit land hence the orders sought cannot be enforced. He explains that from their investigations, the title NGONG/NGONG/17410 was hived off from title NGONG/NGONG/13502 originally owned by PAUL GIHIOMI MWANGI as part of twelve plots. Further that the said NGONG/NGONG/17140 was not hived off from NGONG/NGONG/13501 but NGONG/NGONG/13502, and forensic examination over the said parcels are ongoing, hence the real owner of the said title cannot be currently ascertained.

The Petitioner filed a rejoinder where he reiterated his claim and controverted the averments in the replying affidavit.

Both the Petitioner and 1st Respondent filed their written submissions that I have considered.

Analysis and Determination

Upon perusal of the materials presented by the Petitioner in respect of the Notice of Motion dated the 20th June, 2017, I find that the only issue for determination is whether the Petitioner is entitled to the injunctive orders sought pending the outcome of the Petition.

The fulcrum of the Petition is that the Respondents are interfering with the Petitioner's quiet and peaceful possession of the suit land as they have ordered his agents to stop developing the same since the title is under investigation.

The Petitioner contends that he is the registered owner of the suit land, the Respondents have declined to give him a written response in respect of the investigation they are carrying out. The 2nd Respondent avers that they received a complaint from one ELIUD NDUNGU MUGAMBI that in June 2015 he subdivided land parcel number NGONG/NGONG/14013 into five portions registered as NGONG/NGONG/71234 – 71238. Further that on the 22nd May, 2017 one Vijay Morjaria and Hitesh Morjaria made a report to them and produced documents at the Ngong Police Station claiming their parcel of land NGONG/NGONG/88307 and 88308 measuring 0.40 hectares had been unlawfully invaded by one ELIUD NDUNGU MUGAMBI. He claims consequently they opened investigations into these two allegations where all parties were summoned to record statements and produce documents. He averred that on 18th June, 2017 as investigations were ongoing, they received information that the Petitioner also laid claim on land parcel number NGONG/NGONG/71238 which had been claimed by ELIUD NDUNGU MUGAMBI and he was summoned on 19th June, 2017 to present himself at the Directorate of Criminal Investigations to enable them investigate the allegations so as to arrive at a decision. The 2nd Respondent contends that on 19th June, 2017 the Petitioner availed to them a letter dated the 19th June, 2017 claiming he was the legitimate and rightful owner of NGONG/NGONG/71238 which the 2nd Respondent also informed Petitioner that ELIUD NDUNGU MUGAMBI and VIJAY MORJARIA and HITESH MORJARIA were also staking claim over it.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: '*In civil cases, a prima facie is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.*'

I find that the 2nd Respondent is not disputing the Petitioner's title but insists the same is subject to investigation to ascertain its owner. The Petitioner has relied on Section 26 (1) of the Land Registration Act which provides as follows:

'(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. '

In so far as this provision protects the bearer of a title deed as proof of ownership over the suit land, I note in the current scenario there are other parties staking claim over it, who are not part of the Petition, and this is the reason for the purported investigation which led to the filing of the instant Petition. But at this juncture, it is only the Petitioner's Certificate of title which has been presented in court, and in relying on the above legal provisions including the cited authority, I find that the Petitioner has established a prima facie case with a probability of success

I note the Respondents are police officers who have a constitutional mandate to investigate a matter once they receive a complaint. I however note that they do not have the mandate to stop any development on the suit land even if they are investigating it. I however note that the Petitioner too is under a duty to cooperate with the Police carrying out investigations so long as they provide him with all the details of the investigations in accordance with the Fair Administrative Act. In the case of **Davi Ndolo Ngiali & 2 others Vs Directorate of Criminal Investigations & 4 others (2015) eKLR** wherein the Honourable Court appreciated the decision in **Erick Kibiwott & 2 others Vs. DPP & 2 Others Judicial Review Civil Application No.89 of 2010**, the Honourable Judge observed that:

‘The Police have a duty to investigate on any complaint once a complaint is made. Indeed the Police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...as long as the prosecution and those charged with the responsibility of making decisions to charge act in a reasonable manner, the high court would be reluctant to intervene.’

In relying on the above case, I find that the 2nd Respondent herein has a right to carry out investigation on the allegations over title to the suit land. As a Court, I cannot bar them from investigating a complaint over the title to the suit land. However, in so far as the 2nd Respondent is investigating the allegations relating to the title to the suit land, it is not mandated to interfere with the Petitioner’s right to quiet possession and peaceful enjoyment of his property. But if as a result of their investigation, they find that indeed a crime has been committed and the Petitioner is a party to it, they can charge him in a court of law. In my opinion it is only the aggrieved parties’ claiming the same title to the suit land, who have the capacity to institute civil proceedings in court to stop the Petitioner from enjoying his right to quiet possession over the suit land until the issue of title is determined, which is not the case at this point.

In the circumstances, I find the Petitioner’s application dated 20th June, 2017 merited and will proceed to make the following order:

1. The prevailing status quo be maintained pending the hearing and determination of this Petition.
2. Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 15th day of March, 2018.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Renya holding brief for Otieno for Petitioner

N/A for ODPP for Respondents