



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. 16 OF 2017

NKANATA KABURIA NGARUNI.....PETITIONER

=VERSUS=

LAND REGISTRAR MERU.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

BEATRICE KALAYU JOSEPH.....INTERESTED PARTY

RULING

1. In the application filed on 5.9.2017, petitioner is seeking for orders registration of inhibition upon land parcel no.KIBIRICHIA/GAGATHUINE/89 pending hearing of the application and the Petition. Petitioner is also seeking for an injunction restraining the interested party from evicting the petitioner and his family from land parcel no's KIBIRICHIA/GATHUINE/89 and 90 (suit land) respectively until this petition is heard and determined.

2. The grounds in support of the application are that the petitioner has lived on the suit land (before subdivision into 89 and 90) for a period of over 55 years, that petitioner is in possession of the suit land and that there is no physical boundary between land parcel no. KIBIRICHIA/GATHUINE/89 AND KIBIRICHIA/GATHUINE/90.

3. Petitioner has also filed a supporting affidavit where he has deponed as follows;

(i) That at all material times Land reference No. KIBIRICHIA/GATHUINE/49 was registered in the name M'NGARUNI KIRUE the petitioners father.

(ii) That, petitioner is the eldest son of the late M'Ngaruni Kirue

(iii) That, fraudulently and secretly one JULIA KAROKI NGARUNI the petitioners mother allegedly filled succession cause no. 25/1991 to become the legal representative to the estate of M'NGARUNI KIRUE.

(iv) That, the petitioner subsequently filled SPMCC no. 765/93 against the said JULIA KAROKI NGARUNI and obtained orders restraining the sale to other party.

(v) That, despite the restraining orders, the interested party claimed to have bought KIBIRICHIA/GATHUINE/89 in a non-existence and fraudulent auction whose details are scarce.

(vi) That, the interested party herein filed a dispute under the repealed land disputes tribunal Act and the Tribunal ruled that the land belongs to the interested party.

(vii) That, the petitioner challenged the said decision vide JR 71/2009 but was overruled. Petitioner contends that the said decision was wrong and wanting.

(viii) That, after subdivision the original land parcel no. KIBIRICHIA/GATHUINE/49 was unlawfully subdivided into two parcels 89 and 90 respectively. Copies of search certificates are availed as annexure NKN.

(ix) That, despite the subdivisions as indicated on paragraph 11, there are no physical boundaries on the ground.

(x) That, the petitioner despite living on the land has never seen any surveyor on the land and that he has property spread all over.

(xi) That, the petitioner has been on the land for over 65 years to date and tills the whole land for the benefit of the family.

(xii) That, the petitioner does not have any other land elsewhere and his property is bound to be destroyed massively.

(xiii) Petitioner believes that the subdivision was done irregularly and illegally without involving him and that his right to own property was violated.

(xiv) That there is great need to preserve the subject parcels by way of inhibition of particularly land parcel no. KIBIRICHIA/GATHUINE/89 as the interested party may want to sell the same to defeat petitioner's interest.

4. The application is opposed by the interested party who vide the replying affidavit of 19.1.2018 states that;

(i) He is the registered owner of land parcel no. KIBIRICHIA/GATHUINE/89 as is evident from copy of title deed marked as annexure "BKJI".

(ii) The applicant is a vexatious litigant who has been frustrating the interested party's enjoyment of the judgment of the honourable courts and his right to own property as enshrined by the constitution.

(iii) The interested party had filed before MERU CENTRAL DISTRICT Land Disputes Tribunal case no. 11 of 2009 seeking the eviction of the applicant from the suit land and for the Land Registrar to mark boundaries on the suit land. The tribunal ruled in favour of the interested party as is seen in annexure "BKJ2".

(iv) On the 30th September 2009 the Meru Chief Magistrate's court Meru L.D.T 23 of 2009 confirmed the decision of the Meru Central District Land Tribunal Dispute as a judgment of the court as is evident from annexure "B.K.J 3".

(v) That before execution of the judgment, the applicant was dissatisfied with that decision and he filed the high court at Meru Misc Application No. 71 of 2009 seeking to quash the decision of the tribunal in L.D.T No. 23 of 2009 and orders of prohibition to stop the implementation of the decision of the land disputes tribunal but after the matter was heard in court the applicant's case was dismissed with costs. The Judgment thereof is annexure "BKJ 4".

(vi) That the applicant has not preferred any appeal against this decision.

(vii) The applicant has declined to comply with the courts judgment and has threatened to harm the interested party if the latter uses the land, and that the orders sought by the applicant are meant to defeat or prevent the interested party from using the land.

(viii) That the applicant has not exhausted all avenues like preferring an appeal against the L.D.T matter or the judicial review matter before the filing of this petition and application and further, that this petition does not have chances of success at all.

(ix) The applicant has not attached any documents to show existence of succession cause no. 25/1999 or SPMCC 765/93 and therefore this petition and application are a fishing expedition.

(x) The allegation that the applicant has lived on this land for 65 years are false. The interested party is praying for the dismissal of the application with costs.

5. On 14.11.2017, directions were given by the court for the application to be argued by way of written submissions. Both petitioner and interested party have filed their submissions. The respondents through their counsel informed the court that they will associate themselves with the submissions of the interested party.

6. I have analyzed all the issues raised herein; First and foremost, the court has considered the litigation history of this matter. In paragraph 8 and 9 of the affidavit of petitioner, he has admitted that the dispute was taken to the land dispute tribunal whose decision thereof, he (petitioner) challenged in Judicial Review case No. 71/09. The judgment thereof delivered by myself is annexure BKJ 4. In paragraph 10 of petitioner's affidavit he states that **"the petitioner shall contend that the said decision was wrong and wanting"**.

7. How comes the petitioner is challenging the decision of the court before the same court?. Did the petitioner appeal against the decision of land dispute tribunal or the JR case NO. 71/09?. I have doubts that this petition is properly before me since when one is dissatisfied with the decision of a tribunal or a court, the decision is challenged through the provided appellate mechanisms. On this basis, I would not allow the application.

8. Secondly, I find that the interested party has availed a copy of title deed showing that she is the registered owner of Parcel No. KIBIRICHIA/KITHUINE/89 where the title deed was issued way back on 23/4/1997.

9. Section 24 (a) of the Land Registration Act provides that; **"The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto"**.

10. Section 26 (1) of the aforementioned Act provides that; **"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 - on**

the ground of fraud or misrepresentation to which the person proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

11. It follows that from the material so far presented to me, there is prima facie evidence that the interested party is the owner of parcel No. KIBIRICHIA/KATHUINE/89.

12. The issue of fraud raised by the petitioner is subject to prove. I do not wish to make any determination on disputed facts and issues. I will also not reinvent the wheel. **In Mbuthia versus Jimba Credit Corporation (1988) KLR**, it was held that **“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court judge had gone beyond his proper duties and made final findings of fact on disputed affidavits.”**

13. On the averments that petitioner has been in occupation of the land for many years, there is no evidence to support that claim. As rightly submitted by the interested party, why didn't the applicant at least avail photographs of his dwelling place?.

14. My conclusion on this matter is that the application is not merited, and the same is dismissed with costs to the interested party.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 11th APRIL, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Attorney General for 1st & 2nd Respondents absent

Munga holding brief for Kaimenyi for Interested Party present

HON. LUCY. N. MBUGUA

ELC JUDGE