



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 262 OF 2017**

**( formerly Machakos HCCC No. 218 of 2012)**

**STEPHEN KIRUMBA GICHURU.....PLAINTIFF**

**VERSUS**

**PARSITAU OLE SAYO.....DEFENDANT**

**JAMES KINTALEL SAYO.....INTENDED SECOND DEFENDANT**

**RULING**

What is before Court for determination is the Notice of Motion dated the 9<sup>th</sup> June, 2014 brought pursuant to section 1A, 1 B, 3 & 3A of the Civil Procedure Act, Order 1 rules 10 (2), 4 & 25, Order 51 rule 1 of the Civil Procedure Rules, Section 13 (7) & (9) of the Environment and Land Court Act and all the other enabling provisions of the law. It seeks the following orders:-

1. Spent
2. Pending the hearing and determination of this Application status quo prevails on land title number KAJIADO/ NTASHART/ 597
3. The Applicants be enjoined as Defendants in this case
4. Pending the hearing and determination of this suit status quo prevails on land title number KAJIADO/NTASHART/ 597
5. The costs of the Application in the cause

The Application is made on various grounds and supported by the affidavit of JAMES KINTALEL SAYO who avers that together with the rest of the Applicants, they have for the last several decades and prior to their forefathers and ancestors, been in active and open peaceable as well as uninterrupted possession including occupation of the land known as KAJIADO/ NTASHART/ 597 hereinafter referred to as the suit land. Further, that they have raised their extended families therein, established homesteads, permanent houses, farms, reared livestock and carried farming on large scale. He avers that together with the rest of the Applicants, they were surprised to learn that the suit land had been acquired by the Plaintiff, who sought to evict them. He contends that there was no court order for eviction, no summons from the Land Control Board to Consent to any transaction. He insists their occupation and possession of the land, defeats any rights and interests which the Plaintiff may be claiming over the suit land. He avers that they are desirous to be enjoined in this suit as Defendants so as to effectively prosecute and canvass their case including the complaint against the Plaintiff herein. He reiterates that it is fair and just if the orders sought for joinder as Defendants are granted as they are a necessary party given the nature, content and context of the suit as well as the interests they claim. Further, it is also important that the factual and legal issues arising from the adjudication are considered to enable the court make a proper determination and prevent multiplicity of suits. He contends that no party will suffer any prejudice and it is good public policy for cases to be determined with the parties participation and hearing of all the parties concerned. They are apprehensive that unless the orders sought are granted, they will suffer irreparable loss and if the orders sought are issued, the Respondents will suffer no prejudice.

The application is opposed by the Plaintiff who filed Grounds of Opposition dated the 24<sup>th</sup> July, 2014 where he stated that the Applicant had relied on non existent law which is Order 1 Rule 10 (25) of the Civil Procedure Rules and Section 13 (9) of the Environment and Land Court Act. He further stated that the application is frivolous, vexatious, without merit and an abuse of the process of the Court and the Applicants have failed to show how the suit land is an ancestral one. The Plaintiff insists the process of land adjudication extinguishes customary claim previously attached to the property bringing into effect indefeasible rights of ownership upon the registered owner. He states that the Defendant's consent for any transaction in respect to the suit land was not required and their application is unenforceable, as it has been overtaken by events since the suit land was already transferred to the Plaintiff. Further, that the 1<sup>st</sup> Defendant has not illustrated how the transfer to the Plaintiff's name was unlawful and the Defendants are not in occupation of the suit land. He reiterates that the Defendants' application is full of perjury, concealment of material particulars in an effort to misguide the court and get undeserved orders. He prays that the application be struck out.

The Plaintiff further filed a replying affidavit sworn by STEPHEN KIRUMBA GICHURU where he reiterated his claim and contended that he is a bona fide purchaser of the suit land who acquired it for value from a third party who passed vacant possession to him. He avers that his claim is strictly against the Defendant who has trespassed on the suit land and he seeks orders of eviction. He reiterates that the Applicants have not met the standard set out to be enjoined in this suit as they have not adduced proper reasons to support their claim. He denies that the Applicants are in actual possession of the suit land.

All the parties filed their respective submissions in respect of the Application, which I have considered.

### **Analysis and Determination**

Upon perusal of the 2<sup>nd</sup> – 9<sup>th</sup> intended defendant's Notice of Motion application dated 9<sup>th</sup> June, 2014 including the supporting affidavit the Grounds of Opposition and the respective submissions, the only issue for determination:

- Whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> intended Defendants can be enjoined in this suit.

The Applicants submitted that they have been in occupation of the suit land and would be affected by any decision made by the Court. They insisted they fit the description provided for under Order 1 rule 3 of the Civil Procedure Rules. They relied on the case of **Angata Bargoi Farmers Cooperative Society Limited Vs David Kiptunui Korir & 87 Others and Leonard Riopa Rorian Pasha Vs Elijah Tiende Ole Kula & 4 others (2018) eKLR** to support their claim. The Plaintiff/ Respondent submitted that he is a bona fide purchase for value having acquired the land from a third party and that it is the Defendant who has trespassed on his land. He contends that the Applicants have not demonstrated proper reasons as to why they should be enjoined in the suit. He relied on the case of **Francis Kariuki Muruatetu & Wilson Thirimbu Mwangi Vs Republic & 4 others, Supreme Court Petition No. 15 and 16 of 2015** and **Communications Commission of Kenya & 4 others Vs Royal Media Services Limited & 7 others, Petition No. 14 of 2014 (2014) eKLR Cited in the Case of Moses Wachira Vs Niels Bruels & 2 others (2015) eKLR** to support their arguments.

Order 1 Rule 10 of the Civil Procedure Rules stipulates as follows:

*'(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit. (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.'*

In the case of **Joseph Njau Kingori vs. Robert Maina Chege & 3 others** [2002]eKLR Nambuye J as she then was, provided the guiding principles to be adhered to when an intending interested party is to be joined in a suit: *'When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.'*

Further in the case of **Communications Commission of Kenya and 4 others Vs Royal Media Services Limited & 7 others, Petition No. 14 of 2014 (2014) eKLR** cited in **Moses Wachira Vs Niels Bruels & 2 others (2015) eKLR**, it was held that:

*'In determining whether the applicant should be admitted into these proceedings as an interested party, we are guided by this Court's decision in the Mumo Matemu Case (at paragraph 14 and 18) held" ' (An) interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.'*

I note that the Applicants claim they have been residing on the suit land over a period of time, which fact is disputed by the Plaintiff. I note in the Plaintiff, the Plaintiff admits he bought the suit land in 1988 and has never taken possession and was shocked to find the Defendant therein. I further note that in the Plaintiff, the Plaintiff is seeking orders of eviction as against the Defendant, and this in essence means evicting any other party allegedly trespassing on the suit land. Except for being the registered proprietor of the suit land, the Plaintiff has not demonstrated what prejudice he will suffer if the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> intended Defendants are enjoined in the suit.

In relying on the facts as presented including Order 1 Rule 10 of the Civil Procedure Rules and the above cited judicial authorities, it is evident that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> intended Defendants indeed meets the criteria set for a party interest in enjoining another as they reside on the suit land and their involvement will be necessary to enable the court effectually and completely adjudicate the suit. Further, that the ultimate orders made in this suit herein, will affect them and will not be enforced without their presence in the matter. I find that no prejudice will be suffered by the Plaintiff if the Applicants' were allowed to be enjoined in this instant suit.

It is against the foregoing that I find the Application dated the 9<sup>th</sup> June, 2014 merited and allow it.

The costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 18th day of June, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**