



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 960 OF 2017

MUNKETPULEI (Suing as personal and legal representative of

KASAIN PULEI alias KASAIN OLE PULEI (Deceased).....PLAINTIFF

VERSUS

MENTA ENERISA PULEI.....1ST DEFENDANT

MATPEI OLE RISA.....2ND DEFENDANT

KIPIRORI OLE RISA.....3RD DEFENDANT

MPOYE OLE RISA.....4TH DEFENDANT

KIPENO ENERISA.....5TH DEFENDANT

KONGO OLE RISA MUNIL.....6TH DEFENDANT

COUNTY LAND REGISTRAR, KAJIADO DISTRICT.....7TH DEFENDANT

COUNTY SURVEYOR, KAJIADO DISTRICT.....8TH DEFENDANT

RULING

The application before me for determination is the Plaintiff's Notice of Motion dated the 14th December, 2017 brought pursuant to section 1A, 1B, 3, 3A and 63 of the Civil Procedure Act and Order 40 rule 1 (b) and Order 51 rule 1 of the Civil Procedure Rules and all the other enabling provisions of the law.

It is premised on the following grounds, which in summary is that on 17th July, 1993, the Plaintiff's father KASAIN PULEI KINYOEI alias KASAIN OLE PULEI (deceased) jointly with one RISA OLE MUNII PULEI (deceased) were registered proprietor of land parcel number KAJIADO/ KIPETO/ 44 measuring approximately 232.5 hectares. On 30th October, 1991, they sold a portion of land parcel number KAJIADO/ KIPETO/ 44 measuring 20.24 hectares to one MOSES TING'A and divided themselves the remaining portion equally with each one of them getting approximately 106.13 hectares. Consequently, land parcel number KAJIADO/ KIPETO/ 44 register was closed on subdivision and three new parcels were created namely KAJIADO/ KIPETO/ 347 registered in the name of RISA OLE MUNII PULEI; KAJIADO/ KIPETO/ 348 registered in the name of the Plaintiff's father and KAJIADO/ KIPETO/ 349 registered in the name of MOSES TINGA. The 7th Defendant subsequently issued title deeds for the three portions, capturing the surface area for parcels number KAJIADO/ KIPETO/ 347 and KAJIADO/ KIPETO/ 348 as measuring 103.2 hectares each while KAJIADO/ KIPETO/ 349 as measuring 20.24 hectares. Later on 29th November, 1991, land parcel number KAJIADO/ KIPETO/ 347 was subdivided and created KAJIADO/ KIPETO/ 1792; KAJIADO/ KIPETO/ 1793; KAJIADO/KIPETO/ 1794; KAJIADO/ KIPETO/ 1795; KAJIADO/ KIPETO/ 1796; and KAJIADO/ KIPETO/ 1797 registered in the names of the 1st to 6th Defendants herein, who may have subdivided their respective portions further. Recently after resurveying land parcel number KAJIADO/ KIPETO/ 348 with a view to sharing the same among his siblings vide KAJIADO SUCCESSION CAUSE NO. 99 OF 2015, the Plaintiff learnt that his father's parcel of land surface area had been reduced to 96.86 hectares from 103.2 hectares as appearing in the title deed. Further, that as a result of a survey conducted by ACME LAND SURVEYORS, which was also consented to by the 1st – 6th Defendants, it revealed that while parcel number KAJIADO/ KIPETO/ 348 maintained the same surface area as recorded in the lands registry, the Defendants jointly and severally had fraudulently increased surface area of land parcel formerly known as KAJIADO/ KIPETO/ 347 to 125.73 hectares up from 103.3 hectares, hiving off a portion measuring 14.44 hectares from KAJIADO/ KIPETO/ 348. The Plaintiff has sought audience with the Defendants with a view to undertaking a joint survey exercise with a view to first, establishing the surface area of land parcel number KAJIADO/ KIPETO/ 348 and the parcel formerly known as KAJIADO/

KIPETO/ 347 to divide them equally and fix boundary beacons but this has been in vain. Further, the 1st to 6th Defendants and their successors are currently busy disposing the resultant subdivisions to third parties purposely to defeat the ends of justice. The Plaintiff will suffer irreparable loss if the orders sought are not granted.

The application is supported by the affidavit of MUNKET PULEI where he reiterated his claim and averred that his claim against the Defendants' jointly and severally is for an order directing the 7th and 8th Defendants to recall and revoke/ cancel title deeds for land parcels number KAJIADO/ KIPETO/ 1792; KAJIADO/ KIPETO/ 1793; KAJIADO/ KIPETO/ 1794; KAJIADO/ KIPETO/ 1795; KAJIADO/ KIPETO/ 1796 and KAJIADO/ KIPETO/ 1797, together with their respective subsequent subdivisions, reverting the same to the parent title land parcel number KAJIADO/ KIPETO/ 347 and KAJIADO/ KIPETO/ 348 to establish the total acreage, dividing the same into two equal portions and re – establish boundary beacons.

The application is opposed by the 1st - 6th Defendants who filed a replying affidavit sworn by KIPIRORI OLE RISA the 3rd Defendant herein who deposes that the suit herein is scandalous, vexatious, frivolous and an abuse of due process of the court and the same ought to be dismissed with costs. He challenges the Plaintiff's averments that property measuring 20.24 hectares was sold to MOSES TINGA and insists there has to be thorough interrogation of the Plaintiff's claim. He confirms that land parcel number KAJIADO/ KIPETO/ 347 was subdivided in 1997 and created KAJIADO/ KIPETO/ 1792; KAJIADO/ KIPETO/ 1793; KAJIADO/KIPETO/ 1794; KAJIADO/ KIPETO/ 1795; KAJIADO/ KIPETO/ 1796; and KAJIADO/ KIPETO/ 1797 which were then transferred to the 1st to 6th Defendants' respectively. He contends that after the said subdivisions the 1st to 6th Defendants dealt with their properties in accordance to the rights conferred to an owner of the property and disposed to third parties. Further that KAJIADO/ KIPETO/ 1794 and KAJIADO/ KIPETO/ 1792 registered in the names of KIPIROR OLE RISA and ROBERT MATIPEI OLE RISA respectively are both charged to the Agricultural Finance Corporation. He insists the properties have been sold to third parties who are not party to this suit and the Defendants are not able to confirm the actual position. He contends that the Plaintiff has failed to furnish the Court as well as the Defendants with the report from ACME Land Surveyors & Consultants and he is not privy to the fact that land parcel number KAJIADO/ KIPETO/ 348 has been reduced from 103. 2 hectares to 96.86 hectares as alleged. Further that the Plaintiff had not adduced any documentary proof to confirm that KAJIADO/ KIPETO/ 347 has increased in acreage from 103.13 hectares to 125.73 hectares. He claims that the true area of a property is usually an approximation and not an accurate representation of the exact area and therefore minor discrepancies are expected. He denies that the Plaintiff sought for audience with the other Defendants and insists the subdivisions were done over 20 years ago, with numerous subsequent dealings being registered thereon. He reiterates that the Defendants are being called upon to defend a rather hopeless and unsubstantiated allegations of fraud in a futile attempt to circumnavigate the limitation of actions since their claim of right (if any) was extinguished by the long passage of time of over twenty years.

The Applicant filed a further affidavit where he reiterated his claim and insisted that the County Land Registrar who is the 7th Defendant herein refused to supply him with copies of register for land parcels numbers KAJIADO/ KIPETO/ 44; KAJIADO/ KIPETO/ 347 and its subsequent subdivisions; KAJIADO/KIPETO/ 348 and KAJIADO/ KIPETO/ 349 unless copies of title deeds in respect of the registers are produced. He contends that the survey he commissioned, whose report is before court, is self- explanatory and was conducted by a professional surveyor. He claims the Respondents' response is evasive and largely mere denials as the same is not meant to assist the honourable court in resolution of the dispute at hand.

The Plaintiff filed his written submissions but the 1st to 6th Defendants only brought their submissions on 12th June, 2018 , despite being granted leave of 21days on 12th March, 2018, to do so.

Analysis and Determination

Upon perusal of the materials, affidavits and submissions presented in respect of the Notice of Motion dated the 14th December, 2017, the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.

The fulcrum of the suit revolves around establishing and reconciling the total acreage of KAJIADO/ KIPETO/ 347 and KAJIADO/ KIPETO/ 348 respectively, dividing the same into two equal portions as well as re – establishing the boundary beacons. The Plaintiff contends that the Defendants dishonestly encroached on land parcel number KAJIADO/KIPETO/ 348 thereby reducing its surface area to 96.86 hectares while enlarging KAJIADO/KIPETO/347 to 125.73 hectares which has since been subdivided to KAJIADO/ KIPETO/ 1792; KAJIADO/ KIPETO/ 1793; KAJIADO/KIPETO/ 1794; KAJIADO/ KIPETO/ 1795; KAJIADO/ KIPETO/ 1796; and KAJIADO/ KIPETO/ 1797 respectively. The 1st to 6th Defendants opposed the application, dismissed the allegations of fraud and contended that they dealt with the resultant subdivisions as owners with rights to do so. Further, that the Plaintiff's claim is statute barred and challenged the Surveyor's report. In his submissions, the Plaintiff cited the following judicial authorities: **Ahmed Siad Mohammed Vs Municipal Council of Garissa & Anor Nyeri Civil Appeal No. 213 of 2012; Giella Vs Cassman Brown & Company Limited (1973) 1 EA 358** as well as **Chauhan Vs Omagwa Kisii Civil Appeal No. 12**, to support his claim.

The principles for granting an injunction are well established in the case of **Giella Vs Casman Brown (1973) E.A 358** where the Court held as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

As to whether the Plaintiff has established a prima facie case with a probability of success, I note it is not disputed that the Plaintiff's father KASAIN PULEI KINYOEI alias KASAIN OLE PULEI (deceased) jointly with one RISA OLE MUNII PULEI (deceased) were registered proprietors of land parcel number KAJIADO/ KIPETO/ 44 measuring approximately 232.5 hectares. It is further not disputed that KAJIADO/ KIPETO/ 347 registered in the name of RISA OLE MUNII PULEI and KAJIADO/ KIPETO/ 348 registered in the name of the Plaintiff's father were resultant subdivisions of KAJIADO/ KIPETO/ 44 which register was closed. What is in dispute is the determination

of the surface acreage of KAJIADO/ KIPETO/ 347 and KAJIADO/ KIPETO/ 348 respectively.

The Plaintiff alleges fraud on the part of the Defendants in the increase of surface acreage of KAJIADO/ KIPETO/ 347 from 103.13 hectares to 125.73 hectares while decrease in surface acreage of KAJIADO/ KIPETO/ 348 from 103.2 hectares to 96.86 hectares. It is the 1st - 6th Defendants' Defence that KAJIADO/ KIPETO/ 347 had been subdivided as enumerated hereinabove and some of those portions sold to third parties except for KAJIADO/KIPETO 1792 and 1794 that are charged to Agricultural Finance Corporation.

In the case of **Ahmed Siad Mohammed Vs Municipal Council of Garissa & Another, Nyeri Civil Appeal No. 213 of 2012** the Court of Appeal stated as follows: *'Section 26 of the Limitation of Actions Act makes it very clear that in claims where fraud or mistake is alleged, time starts to run from the moment such fraud or mistake is discovered. Fraud is alleged in this case and therefore under the provisions of section 26 time started to run when the fraud was discovered in this case. It is alleged that the fraud was discovered in the year 2010.....The prudent thing for a court to do where fraud is alleged in a claim is to allow the parties to proceed to full trial so that the parties can present facts for and against the alleged fraud for the court to make a determination on the matter. It would be against the dictates of fair play and justice to decide such a case at a preliminary stage.'*

Further, in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125** the Court described a prima facie case as follows:

".... is a case 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".

In relying on the facts as presented and the above cited judicial authorities, I find that the Plaintiff has indeed established a prima facie case with a probability of success as there is apparently his right infringed upon by the Defendants.

As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages, I note the Plaintiff is suing as a representative of the estate of KASAINI PULEI KINYOEI alias KASAINI OLE PULEI who was the owner of land parcel number KAJIADO/ KIPETO/ 348 whose surface acreage as allegedly been decreased while KAJIADO/ KIPETO/ 347 surface acreage has been increased and subsequently subdivided, with some resultant subdivisions being disposed of. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that *'...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages.'*

In relying on the case above and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are not speculative as he has demonstrated the harm he will suffer if the injunctive orders are denied.

On the question of balance of convenience, from the evidence presented by the parties, I find that the balance tilts in favour of the Plaintiff whose rights have been infringed upon by the Defendants'.

From the above, it is clear that Plaintiff has established a prima facie case to meet the threshold for the grant of orders of injunction. In so far as I find that Plaintiff's Notice of Motion dated the 14th December, 2017 is merited, I note that the land parcel number KAJIADO/ KIPETO/347 has been subdivided with the resultant subdivisions already transacted on and perhaps disposed to third parties who are not party to this suit. In the circumstances, I proceed to make the following order:

- i. The prevailing status quo be maintained pending the hearing and determination of the suit.
- ii. Costs will be in the cause

Parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 13th day of June, 2018

CHRISTINE OCHIENG

JUDGE