



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 913 OF 2017**

**KAVAI MUASYA.....1<sup>ST</sup> PLAINTIFF**

**BARNABAS MUTHUSI MUASYA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**AUGUSTINE MUTUA SAULI.....1<sup>ST</sup> DEFENDANT**

**WILLY MUTIE.....2<sup>ND</sup> DEFENDANT**

**SUSAN YEGO.....3<sup>RD</sup> DEFENDANT**

**CELESTINE JEPKOECH ROTICH.....4<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR, KAJIADO**

**LANDS REGISTRY.....5<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the 4<sup>th</sup> Defendant's Notice of Motion filed on 12<sup>th</sup> June, 2018 brought pursuant to Orders 51 (1) , 40 (1) of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A and 63 of the Civil Procedure Act, Article 159 (1) of the Constitution and all the other enabling provisions of the law. The Application seeks temporary and permanent orders of injunction barring the Land Registrar, Kajiado from reviewing as well as cancelling mutations for LR No. Ngong/ Ngong/ 90698 and Ngong/ Ngong/ 60413 pending the hearing and determination of the suit.

The application is supported by the affidavit of the 4<sup>th</sup> Defendant CELESTINE JEPKOECH ROTICH where she deposes that she is the beneficial owner of a plot on LR. No. Ngong/ Ngong/ 90698, hereinafter referred to as the 'suit land' which was sold to her by the 1<sup>st</sup> Defendant, and that was originally LR. No. Ngong/ Ngong/ 3771. She confirms being shown a mutation form which gave rise to the suit land and that the Court issued an order of status quo on 7<sup>th</sup> November, 2017, which have to be complied with by the Land Registrar who is a party to this suit. She claims the Land Registrar intends to interfere with the current mutation which is the subject of this suit and the instant application seeks to maintain status quo pending the hearing and determination of the application dated the 7<sup>th</sup> November, 2017, as well as the main suit.

The application is opposed by the Plaintiffs' who filed Grounds of Opposition where they aver that the instant application has been overtaken by events and lacks substratum. They claim the acts complained of are within the power of the 5<sup>th</sup> Defendant and the application is a scheme to delay the hearing and determination of the main suit. They insist the application is an abuse of the court process and ought to be dismissed with costs.

The 1<sup>st</sup> Plaintiff KAVAI MUTISYA further filed a replying affidavit where she deposed that the application as drafted is a nullity in law and the suit land is not part of the suit property which is Ngong/ Ngong/ 63412 unlawfully registered as Ngong/ Ngong/ 90698. She disputes the 4<sup>th</sup> Defendant's ownership of the suit land and challenged the contents of the Sale Agreement. She insists the 4<sup>th</sup> Defendant's alleged purchase of the suit land is tainted with illegalities including irregularities and the portion purportedly purchased by the 4<sup>th</sup> Defendant is an access road. Further, that the alleged vendor Augustine Mutua Sauli was not the registered proprietor of land parcel number Ngong/ Ngong/ 3771 and not the lawful administrator of the estate of the late Daniel Kioko. She insists as at 14<sup>th</sup> September, 2015, at the time of purchase, plot Ngong/ Ngong/ 3771 did not exist as it had been amalgamated with Ngong/ Ngong/ 2159 to form Ngong/ Ngong/ 63411. She explains that

Ngong/ Ngong/ 63411 was later subdivided and registered as Ngong/ Ngong/ 90698 and Ngong/ Ngong/ 63412 respectively, with a provision of an access road, to serve the two parcels of land. She confirms that they subdivided Ngong/ Ngong/ 63413 into 23 plots and sold to third parties. She avers that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants caused amendment of the mutations dated the 29<sup>th</sup> May, 2014 on 14<sup>th</sup> September, 2017 and caused to remove the nine (9) metre road from the mutations and created an unlawful access road within Ngong/ Ngong/ 63412. Further, the mutation gave rise to Ngong/ Ngong/ 90698 in place of Ngong/ Ngong/ 63412. She reiterates that vide a letter dated the 13<sup>th</sup> October, 2017, the District Surveyor informed the 5<sup>th</sup> Defendant that he had cancelled the mutation serial number 04257138 (amended mutations) and retained mutation serial number 04058799 (mutation dated 29<sup>th</sup> May, 2014) noting that due process was not adhered to, in the creation of the amended mutation. Further, vide a letter dated the 30<sup>th</sup> October, 2017, the 5<sup>th</sup> Defendant called for surrender of title Ngong/ Ngong/ 90698 noting due process was not adhered. She further explains that vide a Kenya Gazette issue of 15<sup>th</sup> December, 2017, the 5<sup>th</sup> Defendant issued a thirty (30) days notice for surrender of title Ngong/ Ngong/ 90698 for cancellation and issuance of correct title number Ngong/ Ngong/ 63412. Further, through a letter dated the 6<sup>th</sup> February, 2018, the 5<sup>th</sup> Defendant informed the District Land Surveyor that title Ngong/ Ngong/ 90698 had been nullified vide gazette notice and requested him to amend the Registry Index Map to reflect the correct title number Ngong/ Ngong/ 63412. She avers that the 4<sup>th</sup> Defendant has erected illegal structures on a road reserve and the act complained of has already been undertaken.

Both the Plaintiffs and the 4<sup>th</sup> Defendant submitted on the application, which arguments I have considered.

### **Analysis and Determination**

Upon perusal of the Notice of Motion filed on 12<sup>th</sup> June, 2018 together with the supporting and replying affidavits including the Grounds of Opposition the only issue for determination at this juncture, is whether the temporary injunction sought by the 4<sup>th</sup> Defendant ought to be granted pending the hearing and determination of the main suit.

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

In line with this principle, the Court will proceed to interrogate whether the 4<sup>th</sup> Defendant 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, the 4<sup>th</sup> Defendant claims to be a beneficial owner of land parcel number Ngong/ Ngong/ 90698 and seeks the court's intervention to bar the 5<sup>th</sup> Defendant who is the Land Registrar, Kajiado from reviewing as well as cancelling mutations for LR No. and Ngong/ Ngong/ 60413. She contends that Ngong/ Ngong/ 90698 was a resultant subdivision of Ngong/ Ngong/ 3771. Except for the Sale Agreement dated the 14<sup>th</sup> September, 2015 between herself and one Augustine Mutua Sauli, she has not presented any other documents to prove her title.

Looking at the documents presented by the 4<sup>th</sup> Defendant as well as the Plaintiffs, I note vide a letter dated the 30<sup>th</sup> October, 2017, the 5<sup>th</sup> Defendant called for surrender of title Ngong/ Ngong/ 90698 noting due process was not adhered to when it was issued. Further, through a Kenya Gazette issue of 15<sup>th</sup> December, 2017, he issued a thirty (30) days' notice for surrender of the said title for cancellation and issuance of correct title number Ngong/ Ngong/ 63412. From a letter dated the 6<sup>th</sup> February, 2018, the 5<sup>th</sup> Defendant informed the District Land Surveyor that title Ngong/ Ngong/ 90698 had been nullified vide gazette notice and directed that the Registry Index Map (RIM) was to be amended to reflect the correct title number Ngong/ Ngong/ 63412. From the said developments, I opine that the 4<sup>th</sup> Defendant has come to court in June 2018 which is too late as the acts complained of had already taken place and the Land Register rectified in 2017.

On the second principle as to whether the Applicant will suffer irreparable loss which cannot be compensated by way of damages. I find that the instant application has been overtaken by events and the 4<sup>th</sup> Defendant can claim compensation of damages against the 1<sup>st</sup> Defendant who was the vendor.

On the question of balance of convenience, from the evidence presented by the parties, I find that at this juncture, the balance does not tilt in favour of the 4<sup>th</sup> Defendant as the alleged actions complained of, had already taken place before the instant application was filed.

It is against the foregoing that I find the application dated the 12<sup>th</sup> June, 2018 unmerited and dismiss it. Costs will be in the cause.

The 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 12th day of November, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**