



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 50 OF 2015

**JAMES KIBERESH OLE KOISIKIR (SUING AS ADMINISTRATOR OF THE ESTATE OF
PARTOTI KOISIKIR (DECEASED).....PLAINTIFF/APPLICANT**

VERSUS

**DIPLOMATIQUE HOUSING CO-OPERATIVE SOCIETY
LTD.....DEFENDANT/RESPONDENT**

RULING

1. The two Applications before me are dated 20th February, 2015 and 24th February, 2016.
2. In the Application dated 20th February, 2015, the Plaintiff is seeking for the following orders:

a. That this Honourable Court be pleased to issue a Temporary Injunction restraining the Defendant/ Respondent by itself, its servants, agents and/or whomsoever acting under its authority from trespassing, encroaching, entering, alienating, interfering and/or dealing in any manner prejudicial to the Plaintiff's proprietary interests and those of beneficiaries in respect of sub-divisions of L.R. No. Ngong/Ngong/2209 namely; L.R. No. Ngong/Ngong/ 65585, L.R. No. Ngong/Ngong/65586, L.R. No. Ngong/ Ngong/65587, L.R. No. Ngong/Ngong/65588, L.R. No. Ngong/Ngong/65589 and L.R. No. Ngong/Ngong/65590 pending hearing and determination for this suit.

b. That the OCS Ngong Police Station to ensure compliance of the Court Orders.

c. The costs of this Application be borne by the Defendant/Respondent.

3. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the legal administrator of the Estate of the late Partoti Koisikir; that as at 22nd August, 2014, the deceased was the registered proprietor of parcel of land known as Ngong/Ngong/2209; that the land was transferred to him by way of transmission and that at no time did his late father sell the said property.
4. It is the Plaintiff's case that he caused the said parcel of land to be sub-divided into parcel of land numbers Ngong/Ngong/65585-65590.
5. The Plaintiff has deponed that strangely, the Defendant is now claiming parcel of land Ngong/Ngong/2209 and that during the Succession proceedings no one raised an objection.
6. The Plaintiff deponed that his late grandmother was buried on the suit land and that it was

inconceivable that his father could sell land on which he buried his mother.

7. In her response, the 1st Defendant's Secretary deponed that until sometimes in 1974, L.R Number Ngong/Ngong/2209 was owned by Partoti Ole Koisikir; that the said owner caused the said property to be sub-divided into two (2) parcels of land, namely parcels number 2436 measuring 26.36Ha and 2437 measuring 4.86Ha and that the two (2) portions were registered in favour of Mr. Partoti Ole Koisikir and Esther Wanjiku respectively.

8. It is the 1st Defendant's case that in June, 1975, the late Partoti sold parcel number 2436 to one John Hoseah Kahara; that Mr. Kahara sold the land to Kabiria Sunrise Stores Limited in August, 1987 and that Kabiria Stores sold the same land to the 1st Defendant in November, 1990.

9. The Defendant's Secretary finally depend that parcel of land known as Ngong/Ngong/2209 ceased to exist in 1974 upon sub-division; that on 21st January, 2015, the Land Registrar informed the Plaintiff that the Title Deeds of parcels of land numbers 65585-65590 derived out of parcel number 2209 are null and void and that the Plaintiff does not have a valid claim against the Defendant.

10. In its Application dated 24th February, 2016, the Defendant, pursuant to its counter-claim, sought for an order of injunction as against the Plaintiff.

11. The Application relied on the same grounds that the 1st Defendant raised in its Replying Affidavit which I have summarized above.

12. The Plaintiff's and the 1st Defendant's advocates filed submissions which I have considered.

13. It is not in dispute that the late Partoti Koisikir owned a parcel of land known as Ngong/Ngong/2209 measuring 31.22Ha.

14. What is in dispute is whether the late Partoti sub-divided the said land in 1974 in two (2) portions and sold the said portions.

15. The Plaintiff's case is that by the time Mr. Partoti died on 5th October, 1995, parcel of land known as Ngong/Ngong/2209 measuring 31.22Ha was intact and was still in his name.

16. The Plaintiff commenced succession proceedings after the death of his father. According to the Certificate of Confirmation, the Court allowed the Plaintiff to be registered as the owner of parcel number 2209.

17. It is trite that the Certificate of Confirmation is never published in the Kenya Gazette. To that end, the 1st Defendant cannot be faulted for not objecting to the Confirmation of Grant because it could not have known that parcel of land number 2209 had been bequeathed to the Plaintiff.

18. Although the Plaintiff has deponed that parcel of land number 2209 was transferred to him by transmission before he sub-divided it into numerous portions, the Plaintiff did not exhibit the consent of the Land Control Board allowing him to sub-divide the land. The Plaintiff has also not annexed the consent of the Board that allowed him to transfer parcel of land number 65588 to Christine Kwamboka on 3rd December, 2014.

19. The Defendant, on the other hand, has annexed on its Affidavits the Mutation forms in respect of parcel No. 2209 that was signed and registered on 26th September, 1974.

20. The Mutation forms shows that the late Mr. Partoti sub-divided the land into two (2) portions, to wit, parcel numbers 2436 and 2437. The duly stamped and registered Transfer documents showing the transfer of parcel of land number 2436 to John Hoseah Kahara dated 9th June, 1975 has also been

exhibited by the Defendant.

21. The Defendant produced before the court the consent of Oloolaiser Land Control Board showing that the Board consented to the transfer of sub-division number 2436 to Mr. John Hoseah Kahara after the Board held its meeting on 9th July, 1975.

22. Having purchased sub-division number 2436, the Defendant's Secretary deponed that the Defendant was issued with a Title Deed on 13th December, 1990. The copy of the said Title Deed and an official search dated 20th August, 2010 was exhibited by the Defendant.

23. The Transfer documents, the consent of the Board and the Applications for the consent of the Board are all certified by the Land Registrar as true copies of the original, meaning that those documents exist in the lands office.

24. The Defendant has annexed on its Affidavit a letter dated 21st January, 2015 by the Kajiado North District Land Registrar and addressed to the Plaintiff in which the Registrar states as follows:

“Investigations carried out by the office has established that according to the office records Ngong/Ngong/2209 which was initially registered in the name of Partoti Ole Koisikir on 3rd September, 1974 was closed on sub-division on 13th November, 1976 and new sub plots Ngong/Ngong/2436 and 2437 registered in the names of Partoti Ole Koisikir and Title Deeds issued. However either by Commission or Omission, the Land Register of Ngong/Ngong/2209 was erroneously left intact as it was not indicated Title Deed closed on sub-division as required by law.... Therefore the Title Deeds issued to you from the new sub-division of Ngong/Ngong/2209 i.e. Ngong/Ngong 65585-65590 which were irregularly issued to you on 25th November, 2014 are null and void ab initio and thus should be surrendered to the undersigned to enable the office rectify the land register as provided by Section 79(2) of the Land Registration Act No. 3 of 2012.”

25. The above letter clearly shows that the custodian of the records in matters pertaining to land confirmed the fact that the register for parcel number 2209 was closed in 1976.

26. From the foregoing, and in view of the documents presented to this court, the Defendant has shown, *prima facie*, that by the time the suit properties were being created, parcel of land number 2209 had already been sub-divided into two (2) parcels and the Defendant had purchased one of the sub-division way back in 1976.

27. The Defendant's Title Deed having been issued first in time, and view of the fact that the Defendant produced the certified consent of the Board, the duly registered Mutation form, the duly stamped and registered Transfer document and the Title Deed that was issued in its favour in 1976, I find and hold that it is the Defendant who has established a *prima facie* case with chances of success, and not the Plaintiff.

28. Indeed, considering that the Plaintiff has sub-divided the land into six (6) portions, it is the Defendant who is likely to suffer irreparable damage that cannot be compensated by way of damages unless the injunctive order is issued in its favour.

29. Of course, and strictly for the purposes of conclusively ascertaining the owner of the suit property, after trial, the Defendant should not alienate or transfer the land known as Ngong/Ngong/2346.

30. For those reasons, I dismiss the Plaintiff's Application dated 20th February, 2015 with costs and allow the Defendant's Application dated 24th February, 2015 in the following terms:

a. That an order for a temporary injunction be and is hereby issued restraining the Plaintiff by himself, his servants, agents, employees and/or any persons claiming from him from trespassing or otherwise meddling in any way whatsoever and or offering for sale the suit property known as

L.R. Ngong/Ngong/2346 for which the Plaintiff/Respondent hold Titles No. L.R. Ngong/Ngong/65585-68590 either by selling, advertising for sale, alienating, disposing off, subdividing, constructing upon, fencing nor otherwise dealing in any manner with the suit property pending the hearing and determination of this suit.

b. That the leave of this court be and is hereby granted to enjoin the District Land Registrar Kajiado North District as a First Third party in these proceedings.

c. That the leave of this Honourable Court be and is hereby granted to enjoin the Christine Kwamboka Ogeto who acquired a portion of land bearing title number L.R No. Ngong/Ngong/65588 as a second Third Party.

d. The Defendant should not transfer or alienate parcel of land known as Ngong/Ngong/2346 pending the hearing and determination of the suit.

e. The Plaintiff to pay the costs of the Application.

DATED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE