



**REPUBLIC OF KENYA**

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

**ELC NO. 517 OF 2017**

**(FORMERLY NAIROBI ELC NO. 1143 OF 2015)**

**LENGARE OLE NGAPE.....PLAINTIFF**

**VERSUS**

**MPAA OLE DAMO.....1ST DEFENDANT**

**THE ATTORNEY GENERAL.....2ND DEFENDANT**

**RULING**

The application before this court is a Notice of Motion dated 9th November, 2015 by the Plaintiff brought pursuant to Section 1A & 3A of the Civil Procedure Act, Order 40 Rule 1, 2, 3 and 4, & Order 51 of the Civil Procedure Rules, the Land Act (No. 6 of 2012) and all the other enabling provisions of the law. The application is based on the following grounds which in summary are that in the 1968 adjudication process, the Plaintiff was allocated all that piece of land known as LOITOKTOK/ENDONET/401 (suit land) which was in his name from 26th July, 1969 and remained so until 27th January, 2015 when the 1st Defendant fraudulently transferred the land to himself using forged documents. The Plaintiff has never executed documents to effect transfer of the suit land to the 1st Defendant or to any other person. The 1st Defendant has since been arrested and arraigned at the Principal Magistrate's Court at LOITOKTOK vide Criminal Case No.105 of 2015.

The application is supported by the affidavit of LENGARE OLE NGAPE the Plaintiff herein where he deposes that at the time of the adjudication process, the suit land was covered with bushes and was used communally for grazing but he had demarcated it and maintained its beacons until 1982 when he temporarily relocated to Tanzania to live with his relatives and returned in 2011. He avers that in 2011 he went to OLCHORRO Sub location where the suit land is situate to locate it, found the whole land cultivated, bushes cleared and numerous homesteads thereon with the land no longer used for grazing. He reported to the area Chief JACOB MUNKE who referred him to the Assistant Chief JAMES TEMUKA who failed to assist him as the land was already occupied by the family of the 1st Defendant. In March, 2014 with the assistance of a Surveyor he proceeded to process title to the suit land and was informed that the said land was already registered in the name of MPAA OLE DAMO the 1st Defendant herein. Through the assistance of the County Commissioner's Office, a meeting was convened by a Community Peace Maker NTUKAI OLE LEMBAA where the Plaintiff and the 1st Defendant's family attended and it was resolved that the 1st Defendant do furnish the Title Deed in the next meeting, but he failed to do so in two subsequent meetings. The Plaintiff further avers that the Assistant County Commissioner referred the matter to the Criminal Investigation Department (CID) who undertook investigation and arrested the 1st Defendant who was later charged in court. During the 1st Defendant's arrest, he was found in possession of several documents including Land Transfer; Land Control Board Consent to Transfer; Application for Consent of Land Control Board Forms; A forged National Identity Card of LENGARE OLE NGAPE; and a purported photo of LENGARE OLE NGAPE. The Plaintiff further deposes that the 1st Defendant is well known to him as his deceased father owned the land adjacent to the suit land namely LOITOKITOK/ENDONET/400 and he never executed any transfer instruments authorizing the transfer of the suit property to the 1st Defendant and the same was accomplished by means of forgery and fraud. He states that the Land Registrar at Kajiado wrongfully and unlawfully accepted the forged transfers lodged by the 1st Defendant without making adequate inquiries on the identity cards, PIN Certificates thereby allowing the 1st Defendant to perpetuate a fraud; he also deposed in a supplementary affidavit that the names LENGARE OLE NGAPE and LEMARON OLE NKIOK belong to him, and the 1st Defendant was well aware of this.

The 1st Defendant MPAA OLE DAMO opposed the application and swore a replying affidavit dated 15th March, 2017 where he deposed that he is the registered owner of the suit land wherein he was born, been residing and farming on it since the 1960s having been initially allocated to his late father by the land adjudication committee. He avers that as the registered owner of the suit land, he is entitled to absolute proprietorship together with all the rights of ownership and possession to use, abuse whether by cutting, burning trees, tiling, grazing cattle thereon and does not require consent from the Plaintiff. He states that it is not true that LENGARE OLE NGAPE and LEMARON OLE NKIOK are the same person as stated by the Plaintiff in his supplementary affidavit, and that the name LENGARE OLE NGAPE belongs to him. He avers that in furtherance of the Plaintiff's illegal action of impersonation, he swore an affidavit falsely to enable him change names in the register so that the Title deed would be issued to him, the Plaintiff was never issued with a Title Deed on 26th July, 1969 or at all and the same is buttressed by the fact that he has failed to annex a copy of the same. Further that the Plaintiff has not established a prima facie case to warrant the injunctive orders sought and the fact that there is a criminal case against him, does not make him guilty as he has

continued to suffer irreparable loss and damage at the instance of the Plaintiff.

Both parties filed their written submissions where they reiterated the facts to prove their respective claims. On 13th June, 2017 both parties highlighted their respective submissions.

### **Issues and determination**

Upon consideration of the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated 9th November, 2015 the Court has analyzed that the main issue for determination at this interlocutory stage is whether the Plaintiff is entitled to the injunctive orders sought.

In the first instance as to whether the Plaintiff/Applicant has demonstrated a prima facie case with probability of success, it is the Plaintiff's contention that he is the owner of the suit parcel having been allocated the same in 1968 during the land adjudication process. The 1st Defendant on the other hand has a title to the suit land and claims to have inherited it from his father and thereafter been registered as the absolute owner. The Plaintiff claims he conducted a search in January 2014 which revealed he was still the owner of the suit parcel while the 1st Defendant on the other hand got registered on the said parcel in 2015. The Plaintiff insists he never executed any transfer to the 1st Defendant and allege the 1st Defendant forged his PIN, ID and Photo to get registered as the owner of the suit parcel. As a result of the Plaintiff's complaints to the County Commissioner and CID, and after investigations, the 1st Defendant was arraigned in court. The 1st Defendant claims the Plaintiff is not LENGARE OLE NGAPE but that is his name. The Plaintiff on the other hand insists LENGARE OLE NGAPE and LEMARON OLE NKIOK are one and the same person. Although several issues are curious about how the Plaintiff after having been allocated land in 1968 failed to obtain a title, while the 1st Defendant on the other states that he inherited the suit land from his father but only got registered on the said land in 2015, the Court finds that the Plaintiff's claim is not baseless. I am persuaded by the Case of **Mrao Ltd V First American Bank of Kenya Limited & 2 others [2003]** where it was stated that a prima facie case included:

**".....a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."**

The Court finds that the Plaintiff has established a prima facie case with a probability of success.

On the second principle as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiff and 1st Defendant claim ownership of the suit land. There are also allegations of fraud by the Plaintiff as against the 1st Defendant with the criminal case at the LOITOKTOK Principal Magistrate's Court still pending. I am persuaded by the case of **UCB Vs Mukoome Agencies (1982) HCB22** 'that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'. In the instant case I find that it would be pertinent if both the Plaintiff and the 1st Defendant are granted an opportunity to be heard to enable the court make a determination on the ownership of the suit land. Since the 1st Defendant is already in possession of the suit land, and also holds a title that the Plaintiff claims was obtained fraudulently, the Court finds that the Plaintiff will indeed suffer irreparable loss which cannot be compensated by way of damages, if the orders sought are not granted.

On the question of balance of convenience, from the evidence presented by both the Plaintiff and 1st Defendant, I am not in doubt that if the title to the property is not preserved, it may be wasted away.

Since both the Plaintiff and the 1st Defendant are staking claim over the suit land, with the sanctity of the title being in dispute the Court finds that these are issues best determined at a full trial, I will decline to grant the orders as sought but make the following order:

'An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcel number LOITOKTOK/ENDONET/401 of any dealings, selling by private treaty, alienating, leasing or charging pending the hearing and determination of the suit.'

The costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 31<sup>st</sup> day of July, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**