

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC NO. 701 OF 2017

PIUS NYABUGA MACHOGE.....PLAINTIFF

VERSUS

NTININI OLE TAUTADEFENDANT

RULING

The application before this court is the Plaintiff's Notice of Motion dated 5th May, 2017 brought pursuant to Section 1A, 1B, 3 & 3A of the Civil Procedure Act, Order 40 & 51 of the Civil Procedure Rules and all the other enabling provisions of the law. The application is based on the following grounds which in summary are that the Plaintiff is the registered proprietor of land parcel number KAJIADO/LOODARIAK/159 (suit land) measuring 212 acres and has been in possession and peaceful occupation of the same. The Plaintiff has had a boundary dispute with the Defendant over the suit land. The Honourable Court at Machakos vide Misc App. No. 15 of 2012 gave an order of prohibition directed to the Defendant to immediately and unconditionally desist from interfering with the suit land. The Defendant has trespassed on the suit land and purported to take ownership while removing, destroying and/or altering the boundaries therein. The Plaintiff sought the intervention of the District Land Registrar to no avail. An independent Surveyor who was engaged by the Plaintiff established that the suit land exhibited a deficit of 152 acres which is being occupied by the Defendant.

The application is supported by the affidavit of PIUS NYABUGA MACHOGE the Plaintiff herein where he deposes that a title deed to the suit land was issued to him 30th April, 2014. He avers that in March 2014, together with MITON ENE OLOLOSHOO and MOROMPA OLE LOLOSHOO, they entered into an agreement for exchange of land wherein he was to exchange his parcels of land known as KAJIADO/ LOODARIAK/ 489 measuring 88 hectares, KAJIADO/ KEEKONYOKIE/ ILKISUMET/ 1874 measuring 37.56 hectares for KAJIADO/ LOODARIAK/ 159 measuring 86 hectares. He states that previously the suit parcel of land measuring 86 hectares was registered in the names of LOLOSHOO OLE DAGITUS who was the husband to MITON EN OLOLOSHOO and father to MOROMPA OLE LOLOSHOO and at no time did LOLOSHOO OLE DAGITUS ever transfer any acre of the said land to anyone. He further deposes that at the time of the exchange agreement, the parcel KAJIADO/ LOODARIAK/ 159 measuring 86 hectares was registered in the name of MITON ENE OLOLOSHOO and MOROMPA OLE LOLOSHOO and the same was held in trust with the authority of all beneficiaries to exchange the same with the Plaintiff's parcels of land and the above mentioned pursuant to a grant of letters of administration issued vide NAIROBI HIGH COURT SUCCESSION CAUSE NO. 3411 of 2005. He also states that due to boundary differences between the beneficiaries and the Defendant, the Defendant had instituted an application at the Land Disputes Tribunal Cause No. 31 of 2011 wherein the Defendant was granted orders to stay on the suit land. However these orders were quashed vide MACHAKOS MISC APPLICATION NO. 15 OF 2012 who further gave orders of prohibition directed at the Defendant to immediately vacate and unconditionally desist from interfering with the suit land. He avers that the Defendant has continuously acted in contempt of the said orders and he continues to trespass on the suit land.

The Defendant was served twice but failed to attend court on 29th May 2017 and 14th June, 2017 respectively, nor file a replying affidavit. The Court notes from the affidavit of service that the Defendant was properly served. On 14th June 2017, the hearing of the Notice of Motion dated the 5th May , 2017 proceeded unopposed.

The Plaintiff's counsel Mr. Kinyua reiterated the facts of the case and stated that they were seeking prayers 4, 6, and 7 of the Notice of Motion dated the 5th May, 2017 pending the hearing and determination of the suit.

Issues and Determination

Upon consideration of the materials presented and arguments canvassed by the Plaintiff/Applicant in respect to the Notice of Motion dated 5th May, 2017 the Court has analyzed that the main issue for determination is whether the Plaintiff is entitled to the injunctive orders sought.

The Court notes that the Plaintiff is the owner of the suit land as exhibited by the copy of the title deed annexed to the supporting affidavit as exhibit 'PNM 1". The issue of trespass had also been heard and determined vide MACHAKOS MISC APPLICATION NO. 15 OF 2012 who issued prohibition orders directing the Defendant to immediately vacate and unconditionally desist from interfering with the suit land as indicated in exhibit 'PNM 5' in the supporting affidavit.

Since the application proceeded unopposed and there is no evidence to rebut the claim by the Plaintiff, I will proceed to allow prayers 4 and 7 of the Notice of Motion dated the 5th May, 2017 as follows:

4) Pending the hearing and determination of this suit, a temporary injunction do issue to restrain the Defendant by himself or through his servants, agents and or any other person claiming under him from entering, trespassing and or interfering with and or any other manner whatsoever dealing with the suit property.

6) Pending the hearing land determination of this suit, an order that the District Land Surveyor visits the affected lands, establish and/or re-establish the boundaries therein and/or further carve out the said suit land measuring 212 acres.

The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 31st day of July, 2017.

CHRISTINE OCHIENG

JUDGE