



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 504 OF 2017**

**MAILUA ESTATES LIMITED.....PLAINTIFF**

**VERSUS**

**PUSHAN MIATO.....1ST DEFENDANT**

**SELEYIAN MIATO.....2ND DEFENDANT**

**KETUKEI MIATO.....3RD DEFENDANT**

**REUBEN OLE NAKUO.....4TH DEFENDANT**

**COUNTY LAND REGISTRAR, KAJIADO COUNTY....5TH DEFENDANT**

**THE HON. ATTORNEY GENERAL.....6TH DEFENDANT**

**RULING**

The application before this Court is a Notice of Motion dated 31st January 2017 by the Plaintiff brought pursuant to Order 13 rule 2 and Order 2 Rule 15(1)(b)(c) and (d) of the Civil Procedure Rules. The application is based on the following grounds which in summary are that the 4th Defendant in his Defence admits he does not wish to pursue the matter and as an earlier owner of the suit parcel, charged it to the National Bank of Kenya and defaulted in repaying the loan leading to the Bank exercising its statutory power of sale by selling suit land through a public auction to the Plaintiff. Further that the 4th Defendant in his statement confirms he lost capacity to deal with the suit property when it was auctioned and the 1st, 2nd & 3rd Defendants were not proprietors of the suit land at the time it was sold by public auction, therefore they have neither *locus standi* and/or any proprietary right over the same. The 1st, 2nd & 3rd Defendants' right to the suit land was long extinguished once they sold and transferred it to the 4th Defendant in 1994 and their Defence is vexatious, a time buying gimmick calculated to delay fair trial.

The application is supported by the affidavit of WAIGWA MURAGE who is the Director of the Plaintiff/Applicant where he deposes that the Company is the proprietor of the suit land number KAJIADO/MAILUA/684 which it purchased from National Bank Kenya Limited through a public auction in 2004. He avers that on 6th November, 2013 he learnt there were surveyors subdividing the suit land on instructions from 1st, 2nd, 3rd and 4th Defendants. He states that he learnt the 1st, 2nd, 3rd and 4th Defendant were subdividing the suit land pursuant to a Court Order from the Kajiado Principal Magistrate's Court vide Kajiado SPM Land Disputes Tribunal Case No. 41 of 2009 emanating from a decision of the Land Disputes Tribunal to which the Plaintiff/Applicant was never a party notwithstanding it was the registered proprietor. He further deposes that the 4th Defendant who was the earlier proprietor of the suit land, charged it to the Bank as stated in his Defence that he has no claim over the said suit land and no *locus standi* to deal with the suit property. He further avers that the 1st, 2nd and

3rd Defendants state in their Defence that the said public auction was unprocedural and have annexed a Sale Agreement where they sold the suit land to the 4th Defendant and transferred it to him on 23rd January, 1994.

The 1st, 2nd and 3rd Defendant opposed the application and filed a replying affidavit sworn by KETUKEI MIATO, the 3rd Defendant herein, on their behalf, where he deposed that the mere fact the 4th Defendant has made admissions which they do not recognize does not divest them of their Defence. He avers that the 1st, 2nd and 3rd Defendant have been in occupation of the suit land for over 12 years, built structures thereon and that the 1st and 2nd Defendant were first registered as owners of the said land since 26th April, 1995. He states that on 26th April, 1995 the 4th Defendant caused the suit land to be registered in his names fraudulently, with the said fraud being discovered in 2012 whereupon they filed a case at the tribunal vide case no. 41 of 2012. He avers that the 4th Defendant was not a son to the late MIATO and did not involve the 1st, 2nd and 3rd Defendant in Succession proceedings and caused the 1st and 2nd Defendant including himself to be registered as owners of the suit property. He further avers that the auction was not advertised nor took place and that the application and entire suit is time barred in view of section 4 & 7 of the Limitation of Actions Act.

The 4th Defendant REUBEN OLE NAKUO filed a replying affidavit where he categorically indicated that he was not a party to the instant proceedings by virtue of lack of capacity and reiterated that he has no interest in the subject matter herein. He avers that he does not know the legal proprietor after the suit property was auctioned to a party he is not aware of. He denies any instructions for the alleged subdivision of the suit land and being a party to the proceedings that culminated into the said order. He states that he legally obtained the suit land, he should not have been sued and the court should strike out the claim against him.

The Plaintiff, 1st, 2nd, 3rd and 4th Defendants filed their respective submissions reiterating their respective cases and on 29th May, 2017 Counsel for the Plaintiff was present and highlighted his submissions. I have considered the said submissions.

### **Issues and determination**

Upon perusal of the materials presented by the Plaintiff and the 1st, 2nd, 3rd & 4th in respect of the Notice of Motion dated 31st January 2017 and upon hearing submissions from the respective Counsels, I find that the following are the issues for determination:

- whether there is judgement on admission as against the 4th Defendant
- whether the Defence of the 1st, 2nd and 3rd Defendant is scandalous, frivolous, vexatious and calculated to delay trial and an abuse of Court process

In the first instance as to whether the 4th Defendant's Defence amounts to an admission, the Court notes that the 4th Defendant denied the Plaintiff's allegations pleaded that the suit is a non starter, verifying affidavit is defective and the suit is filed by strangers. From the pleadings filed, the Court notes that the 4th Defendant is the one who charged the suit Property to National Bank of Kenya and thereafter failed to repay the loan culminating in the same being auctioned to the Plaintiff. The 1st, 2nd, and 3rd Defendant on the other hand claim the suit property is theirs. The Court finds that these are issues which cannot be determined through this instant application but require that oral evidence be adduced before the suit is determined. In as much as the 4th Defendant pleaded that he has no *locus standi* in this suit, the Court however notes that from annexure 'KM - 2' within the replying affidavit of KETUKEI MIATO, which are the proceedings of the Kajiado Land Disputes Tribunal, it is indicated that the 4th Defendant personally confessed that he only managed to pay for 100 acres of the suit land while the reminder 200 acres still belong to the Claimants who are the 1st, 2nd and 3rd Defendant herein. It is the Court's findings that it is pertinent for the 4th Defendant to be retained in this suit.

As to whether the Defence of the 1st, 2nd and 3rd Defendants is scandalous, frivolous, vexatious and calculated to delay trial and an abuse of Court process. Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 which provides as follows:-

**“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-**

**(b) it is scandalous, frivolous or vexatious; or**

**(c) it may prejudice, embarrass or delay the fair trial of the action; or**

**(d) it is an abuse of the process of the court.”**

I note that within the said Defence the 1st, 2nd and 3rd Defendants claim ownership of the suit land and allege that the land was fraudulently taken away from them. Further that they instituted proceedings at the Land Disputes Tribunal and were awarded 200 acres of the suit parcel, which award was later adopted by the Kajiado SPM's Court. These are triable issues which cannot be deemed scandalous, frivolous or vexatious; or which may prejudice, embarrass or delay the fair trial of the action; or which amount to an abuse of the process of the court. It is my finding that the 1st, 2nd and 3rd Defendants defence raise triable issues relating to land which is an emotive issue and it is pertinent that parties are heard and determination made.

Further in terms of the 1st, 2nd, and 3rd Defendants allegations of fraud, 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 the 1st , 2nd, & 3rd Defendants were granted an opportunity to be heard to enable the court make a determination on the ownership of the suit land.

The Court notes that the Plaintiff has complied with Order 11 and will suffer no prejudice if matter goes to full trial.

The upshot of the matter is that the Notice of Motion dated the 31st January 2017 is not merited and is disallowed. Costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 25<sup>th</sup> September, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**