



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. CASE NO. 11 OF 2017

JOSEPHAT MULWA MUKIMA *alias*

JOSPHAT MULWA MUKIMA.....PLAINTIFF

VERSUS

JESSE NG'ANG'A GAKOBO.....1ST DEFENDANT

CHRISTOPHER MUTURI KIRUI.....2ND DEFENDANT

HENRY KURIA KINUTHIA.....3RD DEFENDANT

PIUS MATINGI.....4TH DEFENDANT

MBATHI MUTISYA.....5TH DEFENDANT

ANAH KALUKI KITHYOI.....6TH DEFENDANT

CHRISTOPHER MBATHA MUIA.....7TH DEFENDANT

AFYA INVESTMENT CO-OPERATIVE SOCIETY LIMITED...8TH DEFENDANT

WINNIE MUTHONI MARU, TABITHA MUGURE

NJOROGE & ROSEMARY NJAMBI NGUGI (*Being Trustees of*

MWITHIGE SELF HELP GROUP).....9TH DEFENDANT

HAZINA HOUSING CO-OPERATIVE SOCIETY LIMITED...10TH DEFENDANT

SAWA SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED.....11TH DEFENDANT

THE LAND REGISTRAR, MACHAKOS.....12TH DEFENDANT

RULING

1. In the Application dated 16th January, 2017, the Plaintiff is seeking for the following orders:

a. That pending the hearing and determination of the main suit, this Honourable Court be pleased to restrain the Defendants/Respondents by themselves, their servants, agents and or whomsoever in any means howsoever from continuing encroaching, sub-dividing, placing new beacons, selling, alienating, charging and/or in any other way interfering with all that parcel of land known as Title No. Donyo Sabuk/Komarock Block 1/373 (original) and the transfers thereof registered as Title Nos. Donyo Sabuk/Komarock Block 1/43342, 43343, 43344, 43345, 43346, 43347, 43348, 43349 together with the resultant sub-divisions and transfers thereof being Title Nos. Donyo Sabuk/Komarock Block 1/6033870, 60486, 0992440, 1059466, 60180-60317, 1700095, 59614, 67555-67696.

b. That pending hearing and determination of this suit, conservatory orders be issued staying further dealings in respect to Title Nos. Donyo Sabuk/Komarock Block 1/43342, 43343, 43344, 43345, 43346, 43347, 43348, 43349 together with the resultant sub-divisions and transfers thereof being Title Nos. Donyo Sabuk/Komarock Block 1/6033870, 60486, 0992440, 1059466, 60180-60317, 1700095, 59614, 67555-67696.

c. That leave be granted that service of court process be effected upon the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants/Respondents through substituted means of advertisement in the local newspaper with wide circulation. (spent).

d. That the OCPD and DCIO, Kangundo Police Division do oversee the implementation of court orders given.

e. That cost of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the owner of land known as Donyo Sabuk/Komarock Block 1/373 (original) having been allocated the same by Komarock Ranching & Farming Co-operative Society Limited (the Society) in 1993 and that he has been in possession of the said land since then.

3. According to the Plaintiff, he was issued with a Title Deed in respect to the said land which he misplaced; that he noticed that the suit land had, without his knowledge, been sub-divided into various portions of land and that the Defendants are in the process of selling the sub-divisions to other third parties.

4. It is the Plaintiff's deposition that the 1st -7th Defendants are the engineers of the fraudulent transfer of the suit land and that the 4th Defendant was charged in Kangundo SPM Criminal Case No. 1346/16 with the offence of fraudulently obtaining registration of land by false pretences.

5. The Plaintiff finally deponed that the sub-division and transfer of the suit land was an illegality and that all dealings in the suit land by the Defendants is null and void *ab initio*.

6. The Application was served on all the Defendants by way of advertisement in the Standard Newspaper of 13th February, 2017.

7. In response to the Application, the 4th Defendant, on his own behalf and on behalf of the 1st, 5th, 6th and 7th Defendants deponed that the Plaintiff has never reported to the police about the loss of his Title Deed; that him, together with the 1st, 5th, 6th and 7th Defendants purchased their respective parcels of land for valuable consideration from the Plaintiff and that it is not true that the Defendants have acted fraudulently in acquisition of the suit land.

8. It is the 4th Defendant's case that they were introduced to the Plaintiff by one Peter Mwema Muola in

the year 2006 and that after entering into several Sale Agreements, the Plaintiff accepted payments from the Defendants separately.

9. The 4th Defendant deponed that they obtained the consents of the Land Control Board on diverse dates and that on 4th July, 2016, the properties were subjected to boundary verification, which verification was done by the County Surveyor.

10. The 4th Defendant finally deponed that the consents for the sub-division of the suit land were given on various dates by the Matungulu Land Control Board and that the Plaintiff was fully involved in the exercise.

11. The 8th Defendant's Chief Executive Officer deponed that the 8th Defendant is the legal owner of parcels of land known as Donyo Sabuk/Komarock Block 1/43342, 43345, 43347 and 43348 which it purchased from the registered proprietor and that the Plaintiff has not attributed any fraud or illegality on the 8th Defendant.

12. The 8th Defendant's Chief Executive Officer finally deponed that should the injunctive order be issued, it would be prevented from putting the property to its intended use and will suffer substantial loss and irreparable damages.

13. According to the 8th Defendant's Chief Executive Officer, since it purchased the land in the year 2014, the Defendant has been in active possession of the portions of land it purchased.

14. The 10th Defendant's Chairman deponed that the 10th Defendant is the registered proprietor of parcel of land known as Donyo Sabuk/Komarock Block 1/43346 which it purchased from the registered proprietor; that the Land Certificate Nos. 118 and 116 are not legally binding documents and that the 10th Defendant has always been in exclusive possession of parcel number 43346.

15. After purchasing the suit land, the 10th Defendant's Chairman deponed that the 10th Defendant sub-divided the parcel number 43346 and transferred the sub-divisions to its members and that the 10th Defendant cannot be liable for the remedies being sought by the Applicant.

16. The Chairperson of the 11th Defendant deponed that the 11th Defendant purchased parcel of land number Donyo Sabuk/Komarock Block 1/43349 from the 4th and 7th Defendants who were the registered proprietors.

17. According to the 11th Defendant's Chairperson, the 11th Defendant executed the Sale Agreement and obtained the consent for the transfer of the said land from the Land Control Board and then had the land sub-divided by its Surveyor for the purpose of allocating the sub-divisions to its members.

18. It is the 11th Defendant's case that the 11th Defendant is an innocent purchaser for value without notice of any defect and that the Plaintiff did in fact sell the entire parcel of land.

19. The Plaintiff and the 4th Defendants filed their respective Further Affidavits which I have considered.

20. The advocates for the Plaintiff and the Defendants filed their respective submissions which I have considered. I have also considered the filed authorities.

21. It is not in dispute that the Plaintiff was the registered proprietor of a parcel of land known as Donyo Sabuk/Komarock Block 1/373 measuring approximately 40.5Ha.

22. According to the copy of the register, the Plaintiff was registered as the proprietor of parcel number 373 on 28th September, 1993.

23. The copy of the register annexed on the Plaintiff's Supporting Affidavit shows that parcel of land known as Donyo Sabuk/Komarock Block 1/373 was closed upon sub-division on 18th September, 2013 with the resultant sub-plots being 43342 -43349.
24. It is the Plaintiff's case that after losing the original Title Deed for parcel number 373, he discovered that the land had been sub-divided and transferred to the 1st -7th Defendants who then sold the said sub-division to the 8th, 9th, 10th and 11th Defendants.
25. According to the Plaintiff, he has never sold parcel of land number 373 to the Defendants or at all.
26. The 1st, 4th, 5th, 6th and 7th Defendants have disputed the Plaintiff's assertion that he never sold to them parcel of land number 373.
27. According to the 4th Defendant's deposition, the Plaintiff entered into separate agreements with him and the other four Defendants.
28. The 4th Defendant has annexed on his Affidavit the Agreements dated 23rd February, 2006, 28th February, 2006, 15th February, 2006, 26th May, 2016, 11th May, 2006 and 20th April, 2006 which shows that the Plaintiff sold to the 4th, 7th, 6th, 1st and 5th Defendants parcel number 373 respectively.
29. According to the said Sale Agreements, the Plaintiff sold to the 4th, 7th, 6th, 1st and 5th Defendants 20 acres, 20 acres, 10 acres, 34 acres and 10 acres of parcel number 373 respectively.
30. From the Agreements, the total acreage that the Plaintiff sold was 94 acres (*approximately 37.6Ha*).
31. It is after the alleged purchase that the sub-divisions of parcel number 373 were transferred to the 1st - 7th Defendants between 27th August, 2014 and 17th March, 2015. The 1st -7th Defendants then transferred the said sub-divisions to the 8th, 9th, 10th and 11th Defendants who also sub-divided the sub-divisions further.
32. Although the total amount that ought to have been paid to the Plaintiff by the 1st, 4th, 5th, 6th and 7th Defendants, according to the Agreements, is Kshs. 7,600,000 for the entire parcel of land, no evidence has been produced by the Defendants to show how this amount was paid to the Plaintiff.
33. The Defendants will therefore have to show at the hearing how they purchased the suit land from the Plaintiff and whether indeed the Plaintiff signed the purported agreements and the application for the consent of the Land Control Board to sub-divide the suit property and to have it transferred to them.
34. In the absence of evidence to show that indeed the Plaintiff was paid the purchase price, the Plaintiffs assertion that the 1st-7th Defendants fraudulently acquired the suit land is not frivolous.
35. Considering that the 8th, 9th, 10th and 11th Defendants purchased the resultant sub-divisions of parcel number 373 from the 1st to the 7th Defendants, their case is wholly hinged on the success of the 1st - 7th Defendants' case.
36. If the Plaintiff shows at trial that indeed the 1st - 7th Defendants acquired the suit land fraudulently, then the purchase of the resultant sub-division by the rest of the Defendants will be declared as null and void.
37. As I have stated above, the Plaintiff has shown that he has a prima facie case with chances of success and unless the injunctive order is granted, the suit land is likely to be transferred further to other third parties.

38. For those reasons, I allow the Plaintiff's Application dated 16th January, 2017 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2017.

O.A. ANGOTE

JUDGE