



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

PETITION NO. 12 OF 2017

(Machakos HCCC No. 121 of 2011)

PARSALOI OLE MEIKOKI AND OTHERSPETITIONERS

VERSUS

THE COMMISSIONER OF LANDS.....1st RESPONDENT

THE HON. ATTORNEY GENERAL.....2nd RESPONDENT

KAJIADO DISTRICT SURVEYOR.....3rd RESPONDENT

KAJIADO DISTRICT LAND ADJUDICATION OFFICER.....4th RESPONDENT

AND

NKANUNA OLE LEMORORA1st INTERESTED PARTY

DANIEL NKAYIA OLE MUSENYA.....2nd INTERESTED PARTY

MATIPEI OLE NTEETU.....3rd INTERESTED PARTY

MOSES MOOKE LOONYSATI OLOLOUSA.....4th INTERESTED PARTY

FRANCIS MANTA SIKINAN.....5th INTERESTED PARTY

NTUMUNA OLE KOLEI NKOYKO.....6th INTERESTED PARTY

ADAM WITHEY.....INTENDED INTERESTED PARTY

RULING

The application before Court is a Notice of Motion dated 3rd February 2016, brought pursuant to Section 3A of the Civil Procedure Act, Order 40 Rule 2,3, and 4 & Order 51 Rule 1 of the Civil Procedure Rules and all the other enabling provisions of the Law.

The application is based on the grounds that the Applicant is the legal and rightful owner of KAJIADO/OLKIRAMATIAN/13. A restriction/caution was registered on 7th January, 2016 on the said Land on the basis of a Court Order vide HCCC No. 121 of 2011. The Applicant is not aware of the said

suit nor a party to it, has reason to believe that his Constitutional rights will be violated and fears that more orders may be delivered to his detriment.

The application is supported by the affidavit of ADAM WITHEY the Applicant herein where he deposes that on 7th January, 2016 he conducted an official search at the Ngong Land Registry, on his land parcel number KAJIADO/OLKIRAMATIAN/13 which revealed that a Court Order had been registered against his title without his knowledge restricting/inhibiting any dealings from being registered until further orders of court. He avers that the said restriction/inhibition was made through a court order dated 18th May, 2011 and this is in breach of his constitutionally entrenched right to ownership of property. He claims as a result of the said order, he is totally unable to deal with his land in any manner whatsoever therefore denying him the right to earn a living and fend for his family. He reiterates that no prejudice will be occasioned on the Respondents if the orders sought herein are allowed since his property is not part of the suit properties before court. He contends that the said court order may have been registered erroneously.

The application is opposed by the Petitioners who filed a replying affidavit sworn by the 1st Petitioner PETER PARSALOI where he deposes that they have a claim over KAJIADO/OLKIRAMATIAN/6/7/10/11/12/21/22/23/24 and 25 as they are indigenous inhabitants of the Olkiramatian Registration Section within Kajiado District which has been and was community land before it was adjudicated and registered in the names of the Interested parties herein. He avers that as per the title documents filed in court, it is one Moses Mooke Loontasati Ololouya who is the registered owner of Land Parcel Number KAJIADO/OLKIRAMATIAN/11 which was allocated to him after subdivision of parcel number KAJIADO/OLKIRAMATIAN/5. He states that the proposed interested party therefore is purporting to litigate under the same title as Moses Mooke Loontasati who by virtue of the orders issued herein on 18th May, 2011 could not transfer any legal right in the said land to the proposed interested party. He reiterates that the proposed interested party is unknown and stranger to all prior proceedings relating to the suit property and has not offered any explanation as to how he came about owning the piece of property. He insists that the current application as drawn and filed has not satisfied the criteria for joinder as the proposed interested party has not shown court that he has a good title to enable him be enjoined in the proceedings herein or that his participation in these proceedings would add value. He contends that the presence of the interested party can only be necessary to aid the determination of the dispute as to whether the adjudication and registration actions by the 1st to 4th Respondents was wrong or right, which is the main dispute before court. Further that should the court lift the aforesaid orders, the Petition herein will be rendered nugatory as the interested parties may move with haste to interfere with the suit land by carrying out dealings on the land which may be against their rights and heavily prejudice them.

The Applicant filed a further affidavit sworn by ADAM WITHEY where he reiterates that he acquired land parcel number KAJIADO/OLKIRAMATIAN/13 from Agricultural Finance Cooperation (AFC) through a Sale by public auction on 6th February, 2007. He deposes that the 4th Interested party informed him that KAJIADO/OLKIRAMATIAN/13 emanated from KAJIADO/OLKIRAMATIAN/11 which was subdivided in February, 1996 after the 4th Interested party made an application for subdivision and sold the land to Ms. Jennifer Wairimu Openda who had Charged it to AFC for Kshs. 4 million. He contends that AFC gave him a copy of the title and confirmed the Charge and informed him that Ms. Jennifer Wairimu Openda had failed to repay the loan prompting the auction. He confirms that he executed a Sale Agreement with AFC dated 6th February, 2007 and after paying the full purchase price amounting to Kshs. 1 million, a transfer dated 27th February, 2007 was executed, Consent of the Land Control Board was obtained on 3rd March, 2007, Stamp Duty paid on 8th March, 2007 and he was issued with a title deed on 12th March, 2007. He states that since March 2007 until 2015, he has always had a quiet and uninterrupted possession of the suit premises. Further that subdivision to KAJIADO/OLKIRAMATIAN/11 was done in 1996, fifteen years before the Petitioners filed any suit and therefore he is not in contempt of the Court Order as alleged. He insists he holds a legal title and the conservatory orders referred to in the Petitioners replying affidavit were per incuriam. Further that no prejudice whatsoever shall be occasioned upon the Respondents if he is allowed to enjoin the suit.

On 21st September, 2017, Counsel for the 1st to 6th interested parties informed the Court they were not

opposed to the instant application.

Both the Petitioners and Applicant filed written submissions which I have considered.

Analysis and Determination

Upon perusal of the proposed 7th interested party's Notice of Motion application dated 3rd February 2016 including the supporting, replying and further affidavits plus the annexures thereon, the following are the issues for determination:

- Whether the 7th intended interested party can be enjoined in this Petition
- Whether the Court should vacate/set aside the orders granted on 18th May, 2011 restricting dealings on the 7th Intended Interested party's land KAJIADO/OLKIRAMATIAN/13 culminating in the registration of a restriction/caution over it.

On the question as to whether the interested party can be enjoined in this Petition, the question we need to ask is who is an interested party. Black's Law Dictionary 9th Edition, page 1232 defines an interested party as;

"A party who has a recognizable stake (and therefore standing) in the matter"

The 7th intended interested party seeks to enjoin the suit as he bought land parcel KAJIADO /OLKIRAMATIAN /13 through a public auction, which was a resultant subdivision from KAJIADO /OLKIRAMATIAN /11 He avers that he is adversely affected by the Court Order dated 18th May, 2011 which led to the registration of a restriction/caution over his land. He states that it would be pertinent for him to be enjoined in this Petition as the Court can make orders in future that adversely affect him.

The 1st - 6th Interested parties are not opposed to the intended 7th Interested party being enjoined in the Petition. However, the Petitioners opposed the application and claim that the 7th intended interested party does not satisfy the criteria for joinder as he has not shown court that he has a good title to enable him be enjoined in the proceedings herein or that his participation in the proceedings herein would add value to the matter.

Order 1 Rule 10 of the Civil Procedure Rules stipulates as follows:

'(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit. (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.'

In the case of *Trusted Society Of Human Rights v Mumo Matemo & 5 others* [2014]eKLR , the Supreme Court held that: ***' an interested party is one who has a stake in the proceedings though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.'***

Further in the case of *Joseph Njau Kingori vs. Robert Maina Chege & 3 others* [2002]eKLR Nambuye J as she then was, provided the guiding principles to be adhered to when an intending interested party is to be joined in a suit: ***' When the above principles are applied to the facts of these applications it is clear***

that the guiding principles when an intending party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.'

I note that the Applicant is the absolute proprietor of land parcel number KAJIADO/OLKIRAMATIAN /13 which he bought through a public auction. I note that he claims to have been adversely affected by the orders of the Court granted on 18th May, 2011. In relying on the facts presented, Order 1 Rule 10 of the Civil Procedure Rules and Case Law above, it is evident that the 7th proposed interested party indeed meets the criteria set for an interested party and his involvement in that suit will be necessary to enable the court effectually and completely adjudicate upon this Petition. Further that the ultimate orders and decree made in the Petition herein will not be enforced without his presence in the matter . I find that the 7th intended interested party has a constitutional right of being heard in a Court of law and will allow him to be enjoined as the 7th interested third party in this Petition. I further find that no prejudice will be suffered by the Petitioners if the Applicant is allowed to be enjoined in this Petition.

- Whether the Court should vacate/set aside the orders granted on 18th May, 2011 restricting dealings on the 7th Intended Interested party's land KAJIADO/OLKIRAMATIAN/13 culminating in the registration of a restriction/caution over it.

The Applicant contends that subdivision to KAJIADO/OLKIRAMATIAN/11 was done in 1996, fifteen years before the Petitioners filed any suit and he holds a legal title and the conservatory orders issued were per incuriam.

The Petitioners insist that the court should not lift the Orders granted on 18th May, 2011 as the , the interested parties may move with haste to interfere with the suit land and heavily prejudice them.

I note the Court Order issued on 18th May, 2011 restricted any dealings in KAJIADO/OLKIRAMATIAN/11 which had already been subdivided in 1996 before the Petition herein was filed in Court. Further that KAJIADO/OLKIRAMATIAN/13 which is a resultant parcel of land from the said subdivision is owned by the Applicant and was not strictly included in the Court Order. It is clear the Petitioners failed to disclose to the Court that that KAJIADO/OLKIRAMATIAN/11 did not exist and that there could have been other parties involved who needed to be heard. However I note that the Conservatory Orders issued by this Court on 18th May, 2011 touch on other properties including KAJIADO/OLKIRAMATIAN/6/7/10/11/12/21/22/23/24 and 25 and they were issued pending the hearing and determination of the suit. I find that it would be prejudicial to vary and or set aside the said orders at this juncture as it is important to preserve the subject matter until the suit is heard and determined. Since the Applicant and the Petitioners are staking claim over the suit land, with the sanctity of the title being in dispute, I will decline to set aside the conservatory orders issued on 18th May, 2011 until this Petition is heard and determined.

The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 15th day of November, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION:

Oleo for intended interested party/applicant

No appearance for respondent

Court Assistant Mpoye