



**REPUBLIC OF KENYA**  
**IN THE LAND AND ENVIRONMENT COURT**

**AT NAIROBI**

**ELC NO. NUMBER 1909 OF 2000**

**KURANI MOIKAI.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**MULINGE KILUNGU & 19 OTHERS.....DEFENDANT/RESPONDENTS**

**RULING**

The matter coming up for determination is the Plaintiff's Notice of Motion dated **4<sup>th</sup> March 2015**, brought under the provisions of Sections 3 & 3A of the *Civil Procedure Act, Order 40 Rule 7 of the Civil Procedure Rules 2010*, and all other enabling provisions of the Law. The applicant has sought for these orders:-

- a. That the ex parte order granted by this court on 9<sup>th</sup> day of October 2014, adversely affecting the right to sell, alienate, dispose of, transfer, charge or in any other way deal with parcels of land known as Kajiado/ Kaputei central 4056, 4057, 4058, 4059, 4060, 4061, 4062, 4063, 4064, 4065, & 4066 be vacated, varied, discharged, or set aside and all the cautions and restrictions registered thereon by the Land Registrar Kajiado on 13<sup>th</sup> October 2014, be immediately removed.***
- b. Such other orders be made as may be just and in the interest of justice.***
- c. Costs of the application be provided for.***

The application is premised on the grounds stated on the face of the application and on the supporting Affidavit of **Kurani Moikai**. These grounds are:-

- 1. That the said ex-parte order of 9<sup>th</sup> October 2014 was obtained by falsehood and concealment of material facts and in particular the fact that all the said eleven (11) titles Nos. 4056, 4057, 4058, 4059, 4060, 4061, 4062, 4063, 4064, 4065, & 4066 were created by subdivision from title No. Kajiado/ Kaputei central 2149 after failure by Boniface Kimeu Mweu and Simon Kavyu Mwasi the 15<sup>th</sup> & 16<sup>th</sup> Defendants respectively to comply with an order made by the Kajiado Land Tribunal and Kajiado SRM's Court to pay the balance of the purchase price to the Plaintiff/Applicant leaving title No. Kajiado/ Kaputei -Central 2150 awaiting the resolution of this case and the said title No. Kajiado/ Kaputei -Central 2150 is still intact.***
- 2. The said ex-parte order of 9<sup>th</sup> October, 2014 was meant to last for only fourteen (140 days).***
- 3. Except for title No. Kajiado/ Kaputei -Central 4061 all the other ten (1) titles herein are held***

*by third parties who are the beneficiaries of the estate of Moikai Makunte Dukuni (deceased) the owner of the said original title No. Kajiado/ Kaputei -Central 466.*

*4. Even if the Defendants herein succeed in their Counter –claims in this suit, the only remedy they may be entitled to in law is a refund of the alleged purchase price as all the alleged sale transactions have been voided by the provisions of Statutory and Judicial Law and the Plaintiff has stated on oath that she is able and willing to make such refunds as shall be found payable to any of the Defendants.*

*5. No case has been made by the Defendants for granting of injunction in the circumstances of this case.*

*6. The Plaintiff was condemned and unheard.*

In her Supporting Affidavit, the Plaintiff herein **Kurani Moikai** averred that she is the widow of the late **Moikai Makunte** (deceased) who as a member of **Imamen Group** ranch was the original owner of land title No. **Kajiado/ Kaputei -Central 466** measuring **99.5 Hectares** of which she got registered in 1995 after the death of her said husband. She further averred that on 20<sup>th</sup> November 2000, she sued the Defendants herein so that she could get them evicted from the said parcel of land so that she could get the same subdivided and transferred to her children who are all lawful beneficiaries of the estate of her said deceased husband.

It was her contention that some of the Defendants including the **15<sup>th</sup>, 16<sup>th</sup>, and 18<sup>th</sup>** Defendants herein had used all sorts of delaying tactics and tricks to evade eviction by filing multiplicity of cases before the lower courts and then the Land Disputes Tribunals which she variously defendant leading to Orders by the Tribunal and Kajiado SRM's Court in 2007 for subdivision of land title No.466 into two titles Nos. 2149 ( 96.72 hectares) and 2150 (2.83 hectares) to wait compliance by the said Defendant with the Orders of the said Tribunal and the Kajiado SRM's Court to pay the balances of the purchase price so that she could transfer title No2150 ( 2.83 hectares) to the defendants. (Attached hereto and marked "**KM1 (a),(b) & (c)**") are copies of the extract of title No. 466 and Certificates of Official Search dated 18<sup>th</sup> November ,2013).

She further contended that the said title deed was released to her in February ,2014 after the approval of the relevant Land Control Board and she instructed **M/s Geomatics Services Licensed Surveyors** to sub-divide the said title **No.Kajiado/Kaputei –Central/ 2149** into eleven ( 11) sub-titles , 10 of which she transferred to the beneficiaries of the estate of her deceased husband except **No.4061** which she retained but have now sold to pay the estate debts and school fees ( as evidenced by annexure "**KM 3 a-1**" ) which are photocopies of the Mutation Form dated 20<sup>th</sup> February 2014, and the Certificates of Official Search for the eleven titles.

She also contended that she never acted against any court order and therefore the order made by this Honourable Court ex-parte on 9<sup>th</sup> October 2014, denied her the chance to be heard and she has a reason and verily believe that had this Honourable Court heard her before making the said ex-parte Order of 9<sup>th</sup> October 2014, the said order would not have been made on the basis of the Defendants application dated 7<sup>th</sup> October 2014, which was based on falsehoods and concealment by the 18<sup>th</sup> Defendant and she prayed for the said orders be vacated ,varied, discharged or set aside. The applicant urged the Court to allow her application.

The application is opposed. The Firm of **Odero Olonde & Co. Advocates** filed grounds of opposition and averred that:-

**1. That the said application is misconceived, incompetent and an abuse of the Court process.**

**2. That the said application lacks merits and offends the basic principles of law.**

**3. That the Application is mischievous and is made in bad faith and is unwarranted.**

**4. That for the fair determination of the issues before the Honourable Court is just and fair that the subject matter of this suit be preserved.**

**5. That granting the orders sought will defeat the purpose of the suit and counterclaim herein which will be rendered academic.**

The Defendants prayed for the dismissal of the suit. Further, the 17<sup>th</sup> Defendant **John Mutua Mutisya**, filed a Replying Affidavit and averred that he is the 17<sup>th</sup> Defendant herein hence competent to swear this Affidavit. Further that they got an ex-parte injunction on the 9<sup>th</sup> day of October 2014, restraining dealings in sub-divisions of **Kajiado/Kaputei Central/466** by the Plaintiff and her agents.

He also averred that this suit came for inter partes hearing on 22<sup>nd</sup> October 2014, and it was agreed by consent of the parties that the **Status Quo** be maintained pending the hearing and determination of the suit herein. It was his contention that the reason for the said application was that the Plaintiff was busy subdividing and alienating the said land hence defeating the substratum and purpose of the suit herein.

Further, he contended that the suit herein has taken long time and it has not been possible to set it down for hearing as some of the Defendants are now deceased and have not been substituted. It was also his further contention that besides this suit, there is another pending before the High Court in Machakos **Misc.Civil Application No.ELC 87 of 2015 (OS)** in which the Defendants are seeking ownership of the various subdivisions of **Kajiado/Kaputei Central/466** by adverse possession.

The deponent deposed that to fully and exhaustively determine the matters touching on the said parcels they should at an appropriate time apply for consolidation of this suit and the Originating Summons so that the rights of the parties herein are determined. He further deposed that the issues before the court go beyond the quest for refunds of monies paid as they settled on property the subject matter of this suit and some of them have even buried their relatives on the said parcel.

It was his further disposition that they have further developed permanent structures on the said parcels and they have no other homes. He alleged that the plaintiff is seeking removal of the restrictions placed on the parcels to enable her dispose of the land and defeat the purpose of this suit and the counterclaim filed herein. He further alleged that since the orders for maintenance of **status quo** were entered by consent of both parties, the application as drawn and filed is incompetent as it does not meet the threshold set for setting aside of a consent order.

It was also contended that it would be unfair for the Plaintiff to take up further proceedings or acts relating to the land when about 4 deceased Defendants are unrepresented and therefore unable to take part in the said discussions. Therefore it is in the interest of justice, that the property, the subject matter of this suit is not dealt with any further.

The Court on 21<sup>st</sup> July 2015, directed the parties to canvass the Notice of Motion by way of Written Submissions. The Law Firm of **Ocharo & Co. Advocates** filed their submissions on 29<sup>th</sup> July 2015, whereas the Law Firm of **Odero –Olonde & Co. Advocates** for the defendants filed their submissions on 7<sup>th</sup> August 2015.

This Court has now carefully considered the filed submissions, the instant Notice of Motion and the relevant Laws and the Court makes the following findings:-

The Court is called upon to set aside the ex-parte injunctive orders that were given by this Court on 9<sup>th</sup> October 2014. This Court has considered the Court record of 9<sup>th</sup> October 2014, and indeed noted that the court allowed the Notice of Motion dated 7<sup>th</sup> October 2014, in terms of prayer No.2 for 14 days. The said prayer No.2 reads as follows;- *That the Plaintiff whether by herself, servants, agents or any one of the*

howsoever be restrained from selling ,alienating, disposing, transferring, charging or in other way dealing with parcels of land known as **Kajiado/Kaputei Central/4056, 4057,4058, 4059,4060,4061, 4062,4063, 4064, 4065,and 4066** which are sub-divisions of **Kajiado/Kaputei Central/466** ( the derivatives of the subject matter of this suit) pending the hearing of this application interpartes and further pending the hearing and determination of this suit. The said injunctive orders were to last for **14 days** only.

A careful consideration of the Order issued by the court on 9<sup>th</sup> October 2014, shows that the injunctive orders were to remain in force for 14 days only. If after 14 days the said orders were not extended, then the said orders did lapse automatically after 14 days. From the courts understanding, this injunctive orders did lapse after 14 days if they were indeed not extended.

I have noted that on 22<sup>nd</sup> October, 2014 when the matter was in court before Gitumbi J, the Interim orders were not extended but an order of Status Quo was issued. The Court directed that Status Quo be maintained until the next Court appearance. It is evident that on this particular day, the order which was given was maintenance of **Status Quo** which **Status Quo** was not defined. This court therefore cannot vary the order that was issued by another court of competent jurisdiction. However, a for the orders that this court issued on 9<sup>th</sup> October 2014, they were to last for 14 days and it is evident that they did lapse on 22<sup>nd</sup> October 2014, since the said orders were not extended .

This is an application brought by the Plaintiff herein to vary or set aside orders that were given in regard to a pending application. The Court finds that instead of the applicant filing this kind of an application, she should have set the Notice of Motion dated 7<sup>th</sup> October 2014, down for hearing or sought for its dismissal for want of prosecution.

Alternatively, she ought to have filed a substantive application for removal of the cautions or restrictions on the stated parcels of land and serve the registered owners of the same so that clear reasons would have been advanced for necessity to remove the said restrictions and cautions.

Having now carefully considered the instant notice of Motion, the Court finds it not merited and it is consequently dismissed entirely with costs being in the cause.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **4<sup>th</sup>** day of **March, 2016**.

**L.GACHERU**

**JUDGE**

4/3/2016

Before L. Gacheru Judge

Hilda : Court Clerk

Mr Olonde for the Defendants/Respondents

None attendance for the Plaintiff/Applicant

**L.GACHERU**

**JUDGE**

**Court:**

Ruling read in the presence of Mr OLonde for the Defendants/Respondents and absence of Plaintiff's Advocates though aware of the Ruling date as it was taken in Court in the presence of **Mr Mogo** for Plaintiff/Applicant on **9<sup>th</sup> December,2015**.

**L.GACHERU**

**JUDGE**