



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 1102 OF 2013

IN THE MATTER OF: ARTICLES 2, 19, 20, 21, 23, 25 (c), 27 & (2), 40, 47, 48, 50(1), 61(2), 64(a), 162(2), (b), 165(3), & (6), 258, 259 & 262 AND OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE, RULES, 2013.

IN THE MATTER OF: SECTIONS 13(1), (2), (5) AND (7), 14, 17, 19, 20 & 29 OF THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

IN THE MATTER OF: THE LAND ACT, 2012 AND THE LAND REGISTRATION ACT, 2012.

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 21, 40, 47(1) AND 50(1) OF THE CONSTITUTION OF KENYA 2010, SECTIONS 10, 16, 20, 21, 25(1), 26(1), 34 & 79 OF THE LAND REGISTRATION ACT, 2012.

AND

IN THE MATTER OF: ORIGINAL TITLE NO. KAJIADO/ELANGATAUWAS/717 AND ITS SUBSEQUENT SUBDIVISIONS LR. NO.(S) KAJIADO/ELANGAUWAS/1112, 1113, 1114,1115,1117 AND 1118

AND

IN THE MATTER OF: THE UNLAWFUL INTERFERENCE OF THE BOUNDARY LAWFUL ENCROACHMENT OF ALL THAT PORTION OF LAND TITLE NO. KAJIADO ELANGATAUWAS/1112 UPON CONTEMPLATED SUBDIVISION OF THE NEIGHBOURING PARCEL OF LAND ORIGINAL TITLE NO. KAJIADO/ELANGATUWAS/718 AND ITS CONSEQUENT SUBDIVISION

LR.NO.(S) 1029, 1039, 1031, 1032, 1033, 1034, 1035 AND 1036.

BETWEEN

SASUEK OLE NGOONI SANGITI.....PETITIONER

VERSUS

THE DISTRICT LAND REGISTRAR KAJIADO ...1ST RESPONDENT

THE DISTRICT LAND SURVEYOR KAJIADO2ND RESPONDENT

NEIYO KIMENEY KORES3RD RESPONDENT

ESTATE OF SAKIYA ENE NAYANGOPOLE.....4TH RESPONDENT

LEKORES (DECEASED)

AND

ALL INTERESTED PARTIES IN THE FOLLOWING:

ORIGINAL PARCEL OF LAND TITLE NO. KAJIADO/ELANGATAUWAS/718 TOGETHER WITH ALL SUB-DIVISIONS THERETO: KAJIADO/ELANGATAUWAS/1029, 1031, 1032, 1033, 1034, 1035 & 1036.

JUDGMENT

The Petitioner filed the present petition dated 17th September 2013 on 17th September 2013. The Petitioner alleges breach of his fundamental rights and freedoms as appertains to the enjoyment of his property rights as enshrined in the constitution. The petitioner alleges that his fundamental rights to enjoyment of his property have been violated to the extent that the Respondents have unlawfully and wantonly encroached onto his land and caused illegal subdivisions and appropriations extending to approximately 30 hectares to 48 hectares and unless the court intervenes the petitioner stands to be unlawfully deprived of his property contrary to the Constitutional safeguards against deprivation of property without prompt compensation being paid.

The petitioner states that he is or was the registered owner of the original parcel of land known as Title Number **Kajiado/Elangata Wuas/717** which has now been subdivided into portions that include title numbers **Kajiado/Elangatawuas/1112, 1113,1114,1115,1116, 1117 and 1118**. The petitioners original parcel of land **Kajiado/Elangatuwas/717** and the now excised portion **Kajiado/Elangatawuas/1112** borders the 3rd and 4th Respondents parcel of land Title number **Kajiado/Elangatauwawas/718**. The petitioner asserts that the 3rd and 4th Respondents have caused their parcel of land title number **Kajiado/Elangatauwawas/718** to be subdivided and avers that in doing so the 3rd and 4th Respondents have illegally and unlawfully interfered with the common boundary between the petitioners and the 3rd and 4th Respondents parcels of land with the result that there has been unlawful encroachment onto the petitioners land parcel **Kajiado/Elangalauwas/1112** of an area extending to approximately 30 Hectares to 48 hectares. The 3rd & 4th Respondents while purporting to subdivide their parcel of land title number **Kajiado/Elangalauwas/718** have curved parcel Nos. **1033, 1034, 1035 and 1036** on the encroached portion of the petitioner's land such that the said subtitles sit on what is otherwise the petitioner's title number **Kajiado/Elangatauwawas/1112**.

The petitioner claims the encroachment is within the 3rd and 4th Respondents knowledge and efforts to have the anomaly rectified have not yielded any cooperation from the 3rd and 4th Respondents and the 1st

and 2nd Respondents have been presented with the relevant mutation forms evidencing the subdivisions of the parcels of land complained of by the petitioner for purposes of effecting amendments to the Registry index Map (RIM) and issuance of titles thereof. The petitioner is apprehensive that he will be deprived of his land unless the court intervenes and orders rectification and restoration of the boundary as per the original parcels of land being land parcel numbers **Kajiado/Elangata Wuas/717 and 718.**

The petitioner seeks the following substantive reliefs:-

1. A Conservatory Order do issue restraining the Respondents, by themselves, their officers, employees, servants and/or agents or otherwise howsoever from further entering into or further allowing any person to enter into or giving authority to any person to take possession of, to remain upon and/or to occupy such or any part and/or portion(s) unlawfully derived from and/or excised from and/or illegally sub-divided from the parcel of land known as Title NO. **Kajiado/Elangatauwias/1112**, howsoever registered or described and/or from surveying, subdividing the same or any part thereof, from allocating and/or issuing any title deeds to any person to any part of the whole or any portion (s) or plot(s) of land illegally derived therefrom and from further interfering with the Petitioner's right to occupation of the said of land or any part hereof, or its boundaries, however registered as described and from further interfering with the existing registered particulars of proprietorship and its demarcation of the parcel of land known as Title No. **Kajiado/Elangatauwias/1112** or over any part of portion of land allegedly excised or to be excised or apart and/or illegally sub-divided from the same howsoever subsequently described and/or registered, initially pending the inter-partes hearing of the application and/or further orders of this Honourable Court to otherwise ordered.
2. A Conservatory Order do issue staying all the registration of any contemplated dealings, to wit all surveys, allocations, allotments, transfers, charges, cautions, transmissions under the Land Registration Act, 2012 Laws of Kenya and under any other law by Respondents by themselves, their officers, employees, servants, and/or agents in respect of the Title NO. **Kajiado/Elangatauwias/718** and its subsequent sub-divisions, more in particular, parcels No.(s) **Kajiado/Elangatauwias/1033, 1034, 1035 & 1036** (to wit form part of encroachment into suit land **Kajiado/Elangatauwias/1112**) howsoever described and/or registered, initially pending the hearing of the application herein inter-partes and after the inter-partes, pending hearing and determination of the petition filed herein and/or further orders of this Honourable Court or otherwise ordered.
3. A Conservatory Order do issue restraining all the respondents herein and all persons allotted and portion (s) or part of land Title **NO. Kajiado/Elangatauwias/718**, more in particular parcels No.(s) **Kajiado/Elangatauwias/1033, 1034, 1035 & 1036** to (wit form part of encroachment into suit land **Kajiado/Elangatauwias/1112**) herein and/or all persons interested in the said parcels of land mentioned herein as lessee, licensee, assignee or otherwise and all the persons intending to occupy or take possession or taking possession of any part thereof the said parcel (s) of land allegedly excised from original Title NO. **Kajiado/Elangatauwias/718** herein referred as parcel No. **Kajiado/Elangatauwias/1033, 1034, 1035 and 1036** (all to wit, form part of encroachment into suit land herein **Kajiado/Elangatauwias/1112**), by themselves, their officers, employees, servants and/or agents or otherwise howsoever from commencing and continuing to further interfere or constructions of any structures of any kind, performing any further acts of digging holes, and trenches, fencing off portions of the same, digging and clearing the ground, digging and laying foundations, constructing any walls, buildings, houses or any structures whatsoever upon the said suit land **Kajiado/Elangatauwias/1112** and/or its boundary and/or interfering with the same in any way, initially pending the hearing and final determination of the Petition filed herein.
4. A conservatory Order do issue restraining any person not named herein who is interested as a lessee, licensee, assignee or otherwise of the land parcels mentioned herein below and the allotment thereto who is currently not in possession of the said parcels of land, and who is not occupying any of the parcel of land below or any part thereof or the allotments thereto and all the Respondents and all persons who have not taken possession of the parcel(s) of land mentioned herein, that is to say parcels of land described and/or registered thereto as **Kajiado/Elangatauwias/1033, 1034, 1035 and 1036** (all to wit form part of encroachment into suit land herein **Kajiado/Elangatauwias/1112**), by themselves, their officers, employees, servants

and/or agents or otherwise howsoever from entering into the said encroachment part of the said suit land as whole as aforesaid or remain upon and/or from taking possession of the same in any manner, commencing any act of proprietorship of the same or any portion thereof, commencing constructions of any structures of any kind, performing any acts of digging or clearing the ground, digging holes, trenches, fencing off portions of the same, laying foundations, construction any walls, building or any structures whatsoever thereof and/or committing further acts of waster, unlawful entry howsoever upon the said suit land as a whole and/or its parts and/or interfering in any manner with its boundary, pending the inter-partes hearing and determination of the Petition filed hereby and/or otherwise further orders by this Honourable court.

5. A Conservatory Order issue do issue restraining the Respondent by themselves, their officers, employees, servants and/or agents or otherwise howsoever from amending altering, changing or interfering in any way with its boundary and/or with the register of Lands parcel Title Number **Kajiado/Elangatawas/1112**, pending the hearing of the application herein inter-partes and after the inter-partes hearing, pending the hearing and determination of the petition filed herein.
6. This Honourable Court do grant contemporaneously with the Certificate of Urgency, leave to the Applicant to file Supplementary Affidavits of any evidential documents or otherwise concerning this cause, on any terms that may be found fair and just.
7. The petitioner be at liberty to apply for further orders and/or directions as this Honourable Court may deem fit and just to grant.

The Respondents were served with the petition and the Notice of Motion filed contemporaneously with the petition vide which the petitioner sought conservatory orders pending the hearing of the petition. The petition was listed for directions on 30th October 2013 when the petitioner and the 4th Respondent were represented by counsel. There was no representation for the 1st, 2nd and 3rd Respondents. The court then granted leave to the Respondents to file their responses to the petition within 21 days from the date thereof. The court granted a conservatory order pending the hearing of the Notice of Motion interpartes on 22nd January 2014. The Respondent as at 22nd January 2014 had not filed any responses and at the request of the 4th Respondent's counsel the hearing of the Notice of Motion was fixed for interpartes hearing on 11th March 2014 and the Respondents yet again granted leave of 21 days to file their responses.

On 11th March 2014 none of the Respondents attended court and none had filed any response to the Notice of Motion dated 17th September 2013. As the application was unopposed the court confirmed the conservatory orders pending the hearing of the petition.

The petitioner listed the petition for directions on the hearing of the same on 22nd September 2014 when none of the Respondents attended court. The court after hearing counsel for the petitioner made directions in the following terms:-

“As this matter clearly involves the encroachment of land and to some extent the establishment of boundaries the court considers that the County Land Registrar and the County Surveyor have a pivotal role to play in the resolution of this dispute. The court in the circumstances issues summons for both the County Land Registrar, Kajiado to attend court on 29th October 2014 to explain to the court the status of Title Numbers KAJIADO/ELENGATAUWAS/1112 and Title Number KAJIADO/ELANGATAUWAS/718 and any resulting subdivisions, if any. The County Surveyors to furnish the court with a Survey Map showing the delineation of the above parcels of land and/or any resultant subdivisions”.

On 29th October 2014 both the Land Registrar, Kajiado and the County Surveyor attended court in obedience to the court summons. The petitioner and the 1st and 2nd Respondents were represented by counsel. The surveyor, **Mr. Julius Kibuba** informed the court that the records held by the office show there has been some overlap following the subdivision of parcel number 718 and 717. He stated that parcel number 1112 was affected as the subdivisions of parcel Number 718 encroached thereon.

Upon hearing the Land Registrar and the surveyor the court issued further directions to the effect that:-

- i. The surveyor and the Land Registrar upon giving notice to all parties likely to be affected to visit the suit properties within a period of 60 days from the 29th October 2014 with a view of establishing whether there has been any encroachment upon any party's parcel of land, and if so to what extent.
- ii. The Land Registrar and the surveyor consequent to the site visit were to prepare a comprehensive report on the findings with recommendations as to how any anomaly detected could be rectified and have the report filed in court.

The District Surveyor filed their report in court on 7th May 2015 and the court on 12th May 2015 directed that the surveyor's report filed in court be furnished to all the parties. The record shows that the petitioner's Advocates forwarded the report to the Respondents vide the letter dated 13th May 2015. The matter came up for further directions on 24th June 2015 when the court reserved judgment.

The court has set out above the facts of the suit as set out in the petition and the sequence of the proceedings leading the court to call for the report from the District surveyor and the Land Registrar. The court took notice that indeed the matter is one that touched on boundaries between the various parcels of land the subject of the suit and specifically the delineation of the original land parcels **Kajiado/Elagatawuasi/717 and 718** which were owned by the petitioner and the 3rd & 4th Respondents respectively. The parcels of land have since been subdivided into various subtitles and it is the petitioner's contention that the Respondents encroached onto land parcel **Kajiado/Elagata Wuas/717** and hived off therefrom over **100 acres** of the petitioner's land. The District surveyor in the court's view was the appropriate person to verify the status of the suit properties having regard to the records held by the office.

The Respondents did not file any response to the petition and thus the petitioner's assertions remain uncontraverted. The surveyor's report filed in court supports the contentions by the petitioner. The Respondents have not challenged the report by the District Surveyor and the court has no reason not to accept the findings by the Surveyor as being the correct representation of the status on the ground as regards the subdivisions and the positioning of the respective parcels of land. The court hereby accepts the surveyor's report filed in court as evidence in this petition.

The Surveyor's Report

As the determination of the petition will be largely influenced by the report by the District Surveyor which is the only other evidence the court has been presented with apart from the petitioner's evidence as per the filed affidavit and the enclosures thereto it is necessary to set out the salient features and findings as per the surveyor's report. The report sets out the basis of its mandate being the court order of 29th October 2014 issued on 30th October 2014. The Surveyor states all the previous mutation survey documents were used to undertake field surveys from the original parcels to the present and the Registry index map. The surveyor confirmed a site visit was undertaken and measurements were taken on the ground using hand held G.P.S equipment and comparison was made with the Registry Index Map. The surveyor made the following observations:-

1. The shape of parcel NO. **Kajiado/Elangata Wuas/718** changed from the one shown on the Registry Index Map after the subdivision survey done in November 2011 by **Neiyo Kimerei Koros** and **Sakiya Ene Nayangepole Lekores (deceased)**.
2. This change inflated the acreage of parcel **Kajiado/Elangata Wuas/718** from a registered area of 109.3 Hectares (approximately) to 158.2 Hectares (approximately) causing difference of an extra 48.9 Hectares (approximately).
3. The shape of parcel **Kajiado/Elangata Wuas/717** also changed when compared to the Registry Index Map showing a decrement.

Arising from the observations made by the surveyor on the ground following the site visit and after taking

measurements the surveyor made the following findings:-

- i. That there was an overlap/encroachment of parcel NO. **Kajiado/Elangata Wuas/717** which resulted into an increment in acreage of parcel NO. **Kajiado/Elangata Wuas/718** during the subdivision.
- ii. The mutation survey done on parcel NO. **Kajiado/Elangata Wuas/718** gave rise to parcel NOS. **Kajiado/Elangata Wuas/1029, 1030, 1031, 1032, 1033, 1034, 1035 and 1036**. This survey was not properly executed with respect to the Registry Index Map.
- iii. The subdivision survey done on parcel NO. **Kajiado/Elangatawuas/717** gave rise to land parcel Nos. **Kajiado/Elangatawuas/1112, 1113,1114,1115,1116,1117 and 1118** and was properly executed as per the Registry Index Map.

As observed earlier the Respondents did not file any response to the petition and in spite of being notified of the report by the District surveyor requisitioned and prepared a the instance of the court the Respondents have not raised any challenge against the report. The surveyor's report corroborates the petitioner's assertions in all material respects and the court finds and holds that the petitioner's rights to property have been violated to the extent that his property **L.R.NO. Kajiado/Elangata Wuas.717** (now subdivided into portions **1112 to 1118**) has been encroached into by the 3rd and 4th Respondents. The subdivision of the 3rd & 4th Respondents Land parcel number **Kajiado/Elangatawuas/1033, 1034, 1035 and 1036** which fell onto the petitioner's subdivision land parcel number **Kajiado/Elangatawas/1112** was unlawful and illegal as it resulted in encroachment onto the petitioner's parcel of land. Thus the subdivisions **Kajiado/Elangatauwes/1033-1036** were irregular and null and void and the same ought to be nullified and cancelled. The court accordingly orders subdivisions **Kajiado/Elangatawuas/1033, 1034, 1035 and 1036** to be cancelled for having been irregularly created on the petitioner's parcel of land.

The court in the premises allows the petition and declares the subtitles **Kajiado/Elangatauwes/1033-1036** created on the encroached portion of the petitioners land (**now Kajiado/Elangatauwes/1112**) null and void and directs that the same be cancelled and the appropriate boundaries to be rectified in Registry Index Map to reflect the correct boundaries as per the report by the District Surveyor, Kajiado filed in court.

The District Land Registrar and the District Surveyor Kajiado are directed to correct the anomaly and cause a resurvey of the parcels of land to be undertaken using the original mutation and boundaries of land parcels **Kajiado/Elangatauwes/717 and 718**. The resulting subdivisions have to be rectified appropriately and any titles found to be not in conformity with the rectified Registry Index Map to be de registered and rectified appropriately.

In the event the 3rd and 4th Respondents are in possession of land that the resurvey shows to belong to the petitioner, the 3rd & 4th Respondents and/or their agents and servants are to vacate and deliver vacant possession to the petitioner within a period of 60 days from the date the boundaries are re established failing which the petitioner shall be entitled to an order of eviction on application.

The petitioner had in the petition prayed for general damages for trespass. I however do not consider that a proper basis has been laid for an award of general damages. The evidence shows there was a botched up subdivision survey which resulted in the encroachment into the petitioner's land. From the report by the surveyor, there is indication that both the petitioner and the 3rd & 4th Respondents used the same surveyor for the subdivision survey who it would appear used the wrong and incorrect beacons in carrying out the survey. There is no evidence that the trespass was deliberate. I will thereof not award any general damages.

The upshot is that I find the petition proved on a balance of probabilities and I enter judgment in favour of the petitioner and make orders in the terms set out above. I direct that each party shall bear their own costs of the petition.

Judgment dated, signed and delivered this **23RD** day of **JULY** 2015.

J.M. MUTUNGI

JUDGE

In the presence of:

..... for the Applicant

..... For the Respondents