



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**ELC CASE NO. 8 OF 2016**

**ANDREW NJUE.....PLAINTIFF/APPLICANT**

**VERSUS**

**MARTHA MUTHONI MUCHUNGU.....DEFENDANT/RESPONDENT**

**RULING**

The plaintiff filed this suit on 4th February 2016 seeking among other remedies, a declaration that he is the absolute owner of the whole of the land parcel known as MBETI/KIAMURINGA/313 and that the award of the Gachoka Land Disputes Tribunal as adopted by the Senior Principal Magistrate's Court at Siakago is illegal, null and void.

Simultaneously with that plaint, the plaintiff filed a Notice of Motion citing **Article 40 (2) of the Constitution, Order 50 Rule 10 of the Civil Procedure Rules** and **Sections 1A and 3A of the Civil Procedure Act** seeking the following orders:-

1. *Spent.*
2. *Spent.*
3. ***“That this Honourable Court be pleased to prohibitory (sic) order against land parcel No. MBETI/KIAMURINGA/313 pending the hearing and determination of the main suit herein”***
4. ***“That costs of this application be provided for”.***

The application is based on the grounds set out therein and also supported by the plaintiff's affidavit. From the grounds on which the application is based together with the supporting affidavit, the plaintiff's case is that whereas he is the registered proprietor of the land parcel No. MBETI/KIAMURINGA/313 (the suit land), the Land Disputes Tribunal at Gachoka awarded the defendant 15 acres out of the said land and that decision was adopted by the Magistrate's Court at Siakago on 8th March 2012. The defendant has now moved that Court to sign all the transfer documents to give effect to that decision.

The defendant has opposed the application and in her replying affidavit, she depones, inter alia, that the dispute has been heard and determined by the Land Disputes Tribunal and a decree has been drawn from which there has been no appeal. That the plaintiff had filed **EMBU HIGH COURT ELC CASE No. 55 of 2012** which was later transferred to **KERUGOYA ELC** and later again re-transferred back to **EMBU ELC** before being withdrawn. Following that withdrawal, the plaintiff moved to this Court upon realizing that the defendant was in the process of executing the decree.

Submissions have been filed on the application both by Mr. Victor Andande advocate for the plaintiff and Ms Beth Ndorongo advocate for the defendant.

I have considered the application, the rival affidavits and the submissions of counsel.

Although poorly drafted and citing the wrong provisions of the law, this application simply seeks that an order of inhibition be issued against the land parcel No. MBETI/KIAMURINGA/313 pending the hearing of the suit herein. Invoking the provisions of **Article 159 (2) (d) of the Constitution**, as well as the provisions of **Order 51 Rule 10 (2) of the Civil Procedure Rules**, I will not penalize the plaintiff. However, where counsel is seized of a matter, it is to be expected that pleadings shall cite the proper provisions on which they are founded. That is what makes a difference between a pleading drawn by a person trained in legal practice and procedure and a “*home-made*” pleading drawn by a lay person.

**Section 68 (1) of the Land Registration Act** provides as follows:-

***“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge”***

That is the order that I understand the plaintiff to be seeking. In deciding whether or not to grant that order, the Court will consider the following:-

- a. ***Whether the property subject of the suit is in danger of being alienated or transferred unless the order is issued.***
- b. ***Whether the suit may be rendered nugatory unless the order is issued.***
- c. ***Whether the applicant has an arguable case.***
- d. ***The conduct of the parties.***
- e. ***Any prejudice that may be caused to the other party.***

This dispute was the subject of litigation in the Land Disputes Tribunal whose award was adopted by the Siakago Court. The dispute itself concerns registered land part of which the said Tribunal ordered to be transferred to the defendant. It is common knowledge that a Land Disputes Tribunal exercising its jurisdiction under the **repealed Land Disputes Tribunal Act** had no jurisdiction to hear and determine disputes concerning ownership of registered land – **JOTHAM AMUNAVI VS CHAIRMAN SABATIA LAND DISPUTE TRIBUNAL & ANOTHER C.A CIVIL APPEAL NO. 256 of 2002 (KISUMU)**. That is why the plaintiff has moved to this Court to declare that award and its adoptive judgment as illegal, null and void. It is clear from the Court of Appeal’s decision in **JOHANA BUTI VS WALTER RASUGU OMARIBA & OTHERS C.A CIVIL APPEAL No. 182 of 2006** that a party is entitled to move the superior Court seeking declaratory orders to impeach a judgment or order arrived at by a subordinate Court or other Tribunal in excess of its jurisdiction. Counsel for the defendant has submitted that this suit is res-judicata since the plaintiff withdrew the previous suit. Where a previous suit has been withdrawn, it cannot be said to have “***been heard and finally decided***” and therefore res-judicata, as defined under **Section 7 of the Civil Procedure Act** would not be applicable. A declaratory judgment, however, has no coercive force. It simply declares what the legal rights of the parties to the proceedings are. It is unlikely therefore that the order of eviction of the defendant from the suit land which is part of the remedy sought herein can be granted. Bearing in mind the plaintiff’s claim that the Land Dispute Tribunal at Gachoka which determined this dispute involving registered land had no jurisdiction to do so, I am satisfied that the plaintiff has an arguable case which may be rendered nugatory if the suit land is alienated before the suit is determined. I do not see what prejudice the defendant will suffer if the order is granted.

I am accordingly satisfied that this is a proper case in which to issue an order of inhibition inhibiting the registration of any dealing with land parcel No. MBETI/KIAMURINGA/313 pending the hearing and determination of this suit.

Costs in the cause.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> JUNE, 2016**

Ruling dated, delivered and signed this 9<sup>th</sup> day of June 2016.

Mr. Andande for the Applicant present

Ms Ndorongo for the Respondent present.