



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

E.L.C NO. 198 OF 2016

M'ITHANA M'THIRING'A.....PLAINTIFF

VS

MURITHI M'AMBURUBUA.....DEFENDANTS

RULING

1. This application is dated 12th October, 2016 and seeks orders;-

1. That the defendants/respondent be restrained from entering into, alienating, use or in any way interfering with the plaintiff's/applicant's parcel of unadjudicated land measuring 8 acres located at Laciathuriu area within Buuri location in Tigania East sub-county either by himself or through his agents, employees or anybody else whatsoever claiming through him or at his behest pending hearing and determination of this application.

2. That the defendants/respondent be restrained from entering into, alienating, use or in any way interfering with the plaintiff's/ applicant's parcel of adjudicated land measuring 8 acres located at Laciathuriu area within Buuri location in Tigania East sub-county either by himself or through his agents, employees or anybody else whatsoever claiming through him or at his behest pending hearing and determination of this suit.

3. That costs be provided for.

2. The application has the following grounds.

1. That the applicant has been in occupation of the contiguous parcel measuring 8 acres located in Laciathuriu within Buuri location, Tigania East sub- county Meru County.

2. That he has been farming thereon since the year 1996.

3. That the defendants/Respondent is interfering with his peaceful user and occupation of the parcel.

4. That it is only fair and just that the orders be granted.

3. The application is supported by the affidavit of Kithure M'Ithana which states as follows;

1. That I am a an adult male of sound mind hence competent to make and swear this affidavit.

2. That I am the son of the applicant herein well versed with the mater deponed to hereunder hence competent to make and swear this affidavit.

3. That my father got into a parcel of unadjudicated land measuring 8 acres situated at Laciathuriu way back in the year 1996.

4. That I cut down the bushes and started farming thereon as a licensee from my father and I have carried our farming activities on the land since 1996.

5. That the piece of land is one contiguous parcel on which no other person had laid any claim since my father and I settled thereon.

6. That, inexplicably, the defendant/respondents forcibly moved into the land on 28/8/2016 and cut down the crops I had planted on the land which crops included cowpeas, tomatoes and pepper and further purported to apportion half (4acres) of the land to himself 9annexed and marked KMI a,b,c,d are copies of photographs showing the fenced off land and the damaged crops)

7. That these patently illegal activities necessitated intervention and I moved to the officer of the area chief who convened a meeting and with a group of elders made a decision that I was the rightful owner (annexed and marked KM2 is a copy of the decision)

8. That in spite of the intervention of the area chief, the respondent has persisted in the interference and will not stop of his own volition unless stopped by this honourable court.

9. That all what is deponed to herein above is true to the best of my knowledge and belief.

4. The application was slated for interpartes hearing on 8/11/2016 when the applicant's advocate told the court that though the respondent had been properly served he had failed or refused to come to court to participate in the intended proceedings.

5. I do note that the applicant had appeared before the Hon Lady Justice Lucy Waithaka at Nyeri on 25/10/2016 under a Certificate of Urgency. Although the matter was certified Urgent, the court at Nyeri did not grant Interim Orders. It directed that the application be served upon the respondent and be heard by this court.

6. Although the court does not cast aspersions on the service effected by the plaintiff/applicant's advocate, I do opine that that service evinces patent conflict of interest issues. Yes, the advocate has authority to effect the apposite service. However, being the advocate representing the applicant, there is no doubt in existence conflict of interest concerns.

7. The applicant's advocate asked the court to issue the injunction orders sought in this application because despite service the respondent had failed to come to court on the day slated for interpartes hearing.

8. I opine that it is not in all circumstances that courts can grant interlocutory orders just because the opposing parties have not opposed an application. It is the duty of the court to examine the germane pleadings and determine if or not the orders sought are meritorious. The misconception that in unopposed applications, sought orders must be granted stands debunked.

9. In the prayers sought in this matter, if granted, the defendants/respondents will be restrained from entering into, alienating, using or in any way interfering with the plaintiff's/applicant's parcel of unadjudicated land measuring 8 acres located at Laciathuriu area within Buuri location in Tigania East Sub-county either by himself or through his agents, employees or anybody whatsoever claiming through him or at his behest pending hearing and determination of this suit.

10. The plaintiff/applicant is unequivocal that the suit land is unadjudicated.
11. Article 61(2) of the constitution of Kenya classifies land as public, community or private.
12. The plaintiff/applicant prays for judgment against the defendants for;

(a) A declaratory judgment that the land parcel situated at Laciathuriu area within Buuri location in Tigania East sub-county and measuring 8 acres belongs exclusively to the plaintiff.

(b) Costs of the suit.

13. Article 64 of the constitution of Kenya decrees that private land consist of

(a) Registered land held by any person under a freehold tenure;

(b) Land held by any person under leasehold tenure;

(c) Any other land declared private land under an act of parliament.

14. In my view, the plaintiff/applicant has not demonstrated to this court that he holds the suit land under a freehold or leasehold tenure or that the suit land has been declared private land by parliament.

15. The Land Adjudication Act provides a procedure for ascertainment and recording of rights and interests in Trust land.

16. The Land Consolidation Act, Cap 283 provides for the ascertainment of rights and interests in, and for the consolidation of, Land in the special areas. It also provides for registration of title and of transactions and devolution affecting such land and other land in the special areas.

17. The plaintiff has not claimed that his land has been subjected to the processes contemplated by either the Land Adjudication Act or the Land Consolidation Act.

18. This court has no jurisdiction to usurp the powers of the institutions created by the 2 Acts of parliament. If the court attempts to do so, this would render the concerned institutions superfluous and as dead as dodos. This can never be the intention of the law.

19. The Supreme Court of Kenya in Civil Application No. 2 of 2011 (SK Macharia & Another Versus KCB and 2 others) opined as follows;

“ A Court's Jurisdiction flows from either the Constitution or legislation or both: Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written Law. It can not arrogate to itself jurisdiction exceeding that which is conferred upon it law. We agree with counsel for the first and second respondents in his submissions that the issues as to whether a court of law had jurisdiction to entertain a matter before it, is not one of more procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.....”

20. The plaintiff/applicant has to show that the land he claims falls under the classification decreed by the constitution of Kenya as private land. If it is public land or community land, ipso Facto, the orders he seeks are not tenable.

21. He has also not shown that a process of adjudication or consolidation is ongoing and that such a process has infringed on his rights.

22. Should this court grant the orders sought in this application, it will, prima facie be asserting that the plaintiff/applicant has such rights. The court will be usurping the powers conferred by other institutions

by the Land Adjudication Act and the Land consolidation Act. The court's decision will also fly in the face of clear constitutional provisions.

23. The applicant may seek the assistance of the County Government and the National Land Commission which may have a say in handling matters concerning unadjudicated land. Perhaps, the Njuri Ncheke may come in handy.

24. The applicant has not claimed that the land he is claiming is ancestral land. If it were that the land is ancestral land then ownership rights would be determined in accordance with the provisions of existing statutory Law.

25. The applicant does not claim that he is occupying community land. If the claim concerned community land, there would be need for the existence of a registered community in accordance with the provisions of the Community Land Act, which became operational on 7th September, 2016, before this suit was filed. I note that section 27 (3) and 4 of the Community Land Act provides as follows;

S27 (3) – an individual entitlement under subsection (1) shall not be superior to community title in any way.

27 (4) – A member granted exclusive use of a parcel of land under this section;-

(a) Shall pay to the registered community such premiums or fees commensurate to the use as may be determined by the community from time to time.

(b) May develop the land subject to the provisions of any laws and regulations relating to land use.

(c) May not assign or leave the land to a third party who is not a member of the community.

(d) Shall put the land into lawful use.

(c) Shall surrender the land back to the community if the member no longer shall be entitled to quiet enjoyment of the land.

26. This court can not recommend the employment of dispute resolution mechanisms contemplated by sections 39, 40 and 41 of the Community Land Act because it is clear that the applicant has not demonstrated that the land he claims is community land.

27. Ipso facto, the applicant cannot resort to judicial Review proceedings as contemplated by Section 41 of the Community Land Act.

28. Attempts have been made by litigants in the past of move a step faster than adjudication processes by trying to stake claims in courts over unadjudicated land where they are aware that adjudication processes are about to commence. They file suits, claim that they had served the mentioned defendants, obtain interlocutory judgments and then seek to have such judgments formally proved. The intention is to later on foist orders obtained upon adjudication officers and claim that courts had already declared them owners of the disputed land. I opine that such attempts will have the effect of obviating the operation of processes well guided by statutes. Ancestral and other claims must be adjudicated in the manner which is unequivocally delineated by law.

29. In view of some of the issues that have come out during my consideration of this application, and in view of the fact that Article 67 (2) (a) of the Constitution of Kenya mandates the National Land Commission to manage public land on behalf of the National and County Governments, I will direct that a copy of this ruling be transmitted to the National Land Commission for information and, if it finds it necessary, for further action including moving parliament to clarify the situation involving unadjudicated land and ancestral rights.

30. The Court of Appeal in the celebrated case of “The MV Lilian “S” [1989]KLRI, offered erudite guidance with regard to the question of jurisdiction. Justice Nyarangi, JA opined As follows;

“ Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment that it holds the opinion that it is without jurisdiction”.

31. I find that I have no jurisdiction to handle matters concerning unadjudicated land until it is demonstrated that the apposite land is held under a known legal system. I find that this is not the case in this application and in this suit.

32. In the circumstances, I issue the following orders.

1. This application is dismissed.
2. This suit is dismissed in its entirety.
3. This ruling be transmitted to the National Land Commission for information and for consideration of the issues that have come out during the courts determination of this application.
4. No costs are awarded.

33. It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 23RD DAY OF NOVEMBER, 2016, IN THE PRESENCE OF :

C.A James

Nyauchi holding brief for Baithambu for the applicant.

P.M. NJOROGE

JUDGE