



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 13 of 2015

ISAACK BEN MULWA..... PLAINTIFF/APPLICANT

VERSUS

JONATHAN MUTUNGA MWEKE.....DEFENDANT/RESPONDENT

RULING

1. The applicant filed his application dated 28th January, 2015 together with his plaint against the defendant/respondent. The application is premised on article 40 of the Constitution Section 3A of the Civil Procedure Act and Order 50 of the Civil Procedure Rules. It seeks temporary orders of injunction to issue against the respondent stopping him from trespassing on, cultivating, constructing, dealing or threatening to evict the applicant pending determination of this suit.
2. The application is premised on 11 grounds on the face of the application and the affidavit deposed by applicant. The grounds inter alia states that the applicant is the legal owner of all that parcel of land which is his ancestral land where his parents are buried. Further that the respondent and his associates have been making in roads, cultivating and or trespassing on this land and has threatened to evict the applicant using violence. In the supporting affidavit, the applicant deposed that the land is undemarcated and was owned by his late father Mr.Balozi. Upon demise of his father, he deposed that his mother was embroiled in a legal tussle with the respondent's father.
3. In paragraph 9, the applicant deposed that the matter was taken to the tribunal in Land case No. LND/KAL/92 of 1985 which tribunal declared his mother as the rightful owner and he annexed the proceedings before the Tribunal as `IBM2. He believes information given to him that the district officer erred in drawing the sketch of the area by limiting ``our land to a portion of it'' and annexed a copy of the sketch. He gave elaborate reasons in his 32 paragraph affidavit on why the orders should be granted.
4. The application is opposed by the defendant/respondent. He filed both a replying affidavit and notice of preliminary objection on a point of law. He admitted they are neighbours. He deposed that at one time the plaintiff's mother wanted to sell this land given to them but his father objected to that transaction. Subsequently the elders came in, who then advised them to live the land given to the plaintiff and his family. The elders according to the respondent proceeded to mark out the boundaries on request of the applicant's mother and he annexed copies of the proceedings and sketch map. The respondent deposes that it is the applicant trying to take his land.

5. Besides the replying affidavit, the respondent contends this suit is res judicata as contained his abjection filed. The advocates filed written submissions to argue the objection and the application. The respondent's submission was limited to the principle of re judicata. In support of his objection he quoted section 7 of the Civil Procedure Act and referred this court to the case of **Nicholas Njeru Vs Attorney General & 8 others[2013] e KLR**. It is his averment that the subject in dispute herein was the one in dispute in **LND/KAL/92 of 1985** whose award was adopted in **SRMCC No. 11 of 1985** as a judgment and decision of the court . He submitted that the parties herein are claiming under parties in the earlier suit. He urged the court to dismiss the present suit and all proceedings for breaching section 7 of the Civil Procedure Act.
6. The applicant in opposition to the preliminary objection submitted that the respondent's objection is a vague statement that has no flesh upon which this court can be guided. He has cited the provisions of Section 7 and the case of **Benard Mugo Ndegwa Vs James Nderitu and 2 others [2010]e KRL**. The applicant submits that the issue in dispute is not about ownership but a boundary dispute which issue has not been adjudicated upon. Further that the plaintiff and the defendant have never been engaged in any legal proceedings before a court of law as the plaintiff is suing the defendant in his own capacity. On this submission, he relied on the case of **Elphas Otinde Andara Vs Akwera Hezron & Another [2015] e KLR**. Lastly the applicant avers that there is no decision this court has been referred to. He distinguished Nicholas Njeru case supra and urged the court to disallow the objection. The rest of the submission is on the merit of the application.
7. I will begin with the merits of the preliminary objection for if it is allowed, it determines the application and the entire suit. The respondent in support of his preliminary objection cited and produced proceedings of the Tribunal in Land Case No. 92 of 1985 which case was between Mueke Mumo Ganda and Esther Kasyoka Balozi. In this case, the elders made a finding thus; **“The defendant has permanent trees on the disputed land. Now that she had abandoned the idea of selling a portion of the land in dispute, what remains is establishment of their common boundary”** The elders made a site visit on the 17.4.1985 and marked the boundary which were shown by red broken lines on the map. Which formed part of the panel of elders award.
8. This award was adopted as judgment of the court on 16.9.1986 and the court declared that **“ the boundary between the plaintiff and the defendant will now remain as was fixed by the panel of elders as shown in the sketch plan.”** The applicant also annexed those proceedings in his affidavit as annexed `IBM2` and sketch map as `IBM3` meaning he is aware of them and their import. The applicant submits that no proceedings or judgment/decision was placed before this court to consider whether this suit is res judicata. I find this submission as not true as indeed the decision in the previous suit is made available by both parties in the current suit. The jurisdiction of those courts have not been questioned.
9. The applicant also contests this suit is not res judicata because not ownership

1. **He brings this suit in his own capacity and they have**

not litigated with the defendant

2. **The issue in dispute is boundary and which was not dispute in the previous suit.**

First, the applicant annexed as `IBM1` letters of administration of the estate of Esther Balozi (his mother). He also said the land was owned by his late father and Esther was embroiled in legal tussle with defendant (paragraph 3, 4, 5 and 6 of the plaint). In paragraph 8, he pleaded the matter was taken before the tribunal in LAND /KAL/92 of 1985 which decided in his mother's favour. Can the applicant state he is litigating in his own capacity while referring to the decision of the tribunal in his mother's favour and also having taken out letters of administration? I hold otherwise because this is the nature of a case where the applicant could have joined the mother in the suit or litigated through and indeed this suit is trying to re-establish the finding of the panel of elders as

regards ownership.

10. The decision in Elphas Otinde Andara Supra is made per in curium by a court of concurrent jurisdiction and therefore not binding on me. In any event is the issue in dispute similar to what was in dispute in a former suit? The applicant submits the issue in dispute is not about ownership but rather boundary dispute. In prayer (b) in the plaint, he asked ``**the honourable court to issue an order for proper adjudication and determination of the boundary herein**``. The final award of the tribunal which was adopted in court did establish the common boundary between the land belonging to the plaintiff's family and the defendant's family. The panel of elders drafted a sketch plan which the court adopted. The parties were given leave to appeal but none seems to have been preferred. In my interpretation of the decision of the tribunal, it settled both the issue of ownership and boundary.
11. The boundary dispute that the applicant say is his cause of action was indeed determined in the earlier suit. This court is satisfied that both issues of ownership and boundary was dealt with in Land/KAL/92 of 1985 and subsequently adopted in Mombasa RMC land case No. 11 of 1986. The dispute was determined by a tribunal competent (at the time) to hear it and whose award was turned into a decree of a court by virtue of its adoption. Consequently I find that this application and the entire suit is res judicata. Having found so, I need not determine the merits or otherwise of the application as it fails for breaching the provisions of section 7 of the Civil Procedure Act. The result is I strike out the application dated 28th January 2015 together with the suit and all pleadings filed for being res judicata with costs to the defendant.

Dated and delivered in open court at Mombasa this 18th day of June, 2015.

A OMOLLO

JUDGE