



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.225 OF 2014

GILBERT SAFARI CHUYE.....PLAINTIFF/APPLICANT

=VERSUS=

1. NGUMBAO MWANZOYA GATSI

2. LAND REGISTRAR KILIFI.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction:

1. This Ruling is in respect to the Application by the Plaintiff dated 1st December 2014 seeking for the following orders:

(a) That upon interpartes hearing, the Honourable court do confirm the temporary injunction restraining the Defendant/Respondent by himself, his agents, his servants, his employees, personal representatives and or any other person claiming under him from interfering in any way with the property known as KILIFI/TAKAYE/MUSOLONI/563 within Malindi in Kilifi county or dealing with the same in any manner pending the hearing and determination of the Application and thereafter pending determination of this suit.

(b) That the Honorable court do issue prohibitory orders against the Defendant/Respondents jointly and severally to prohibit them from carrying out any transaction on by way of sale, transferring, leasing or disposing the suit property in any way pending hearing of this suit.

(c) That the honourable court do issue any other further orders and or directions as the honourable court may deem fit to grant.

(d) That costs be provided for.

The Plaintiff's/Applicant's case:

2. The Plaintiff has deponed that he has been living on land known as Kilifi/Takaye/Msoloni/563 (the suit property) since the year 1990 after he purchased it from Kalume Kaingu Chipa.

3. It is the Plaintiff's case that when the Defendant moved the Malindi Land Dispute Tribunal, the Tribunal declined to entertain his claim because it did not have jurisdiction; that the 1st Defendant then

moved the Magarini Land Dispute Tribunal and purported to obtain an award against him which he is now executing.

4. According to the Plaintiff, he is occupying 6.5 acres of the suit property; that he has complained about the illegality of the 1st Defendant's title at the Ministry of Lands and that he was not aware of the award of the Tribunal.

5. It is the deposition of the Plaintiff that the 1st Defendant has never lived on the suit property and that a warrant of arrest and an order for demolition of his house has been issued.

The 1st Defendant's case:

6. In his Replying Affidavit, the 1st Defendant deponed that the Plaintiff trespassed in the land in 1999; that the suit property was adjudicated and allocated to him in 1985 and that he settled on the suit property in 1978.

7. It is the 1st Defendant's deposition that when he filed a dispute in Malindi Land Disputes Tribunal case number 5 of 1999, the matter was heard but the file got lost before the award was made and that he had to file a new claim in the year 2004 by which time the Tribunal was sitting in Magarini.

8. It is the 1st Defendant's case that the Tribunal and the court had the requisite jurisdiction to entertain the matter before it; that the Plaintiff raised the issue he has raised herein before the magistrate and that the Plaintiff has not filed an appeal against the decision of the Magistrate, thus rendering the current application res judicata.

Submissions:

9. The Plaintiff's advocate submitted that the title in respect to the suit property was not properly obtained; that the 1st Defendant intends to evict the Plaintiff from 6 ½ acres and not the 3 ½ acres of land and that the Tribunal did not have jurisdiction to entertain the 1st Defendant's claim.

10. The Plaintiff's advocate submitted that the Tribunal, and in particular the term of the Chairman, Mr. Joshua Charo, expired on 19th June, 2009 when he purported to come up to file in the Resident Magistrate's court an award purported to have been made on 6th March, 2009 or 6th August 2009.

11. According to the Plaintiff's counsel, the Magistrate's court erred when it entertained the application, because its jurisdiction was limited to adoption and execution of the award from the Tribunal; that it is only the High Court that can declare as a nullity the illegalities committed by the Tribunal and that the orders which the 1st Defendant is seeking to execute are a nullity.

Analysis and findings:

12. In the Plaint dated 1st December 2014, the Plaintiff has averred that he occupies 6.5 acres while the Defendant occupies 3.5 acres of land known as Kilifi/Takaye/Musoloni 563.

13. The Plaintiff has further averred in the Plaint that the Defendant filed a suit in Land Disputes Tribunal Malindi, which he withdrew then filed it later at the Magarini Land Disputes Tribunal and proceeded to obtain judgment against him.

14. According to the Plaintiff's deposition, he has since discovered that the Tribunal that purported to sit and deal with the matter when it was not properly constituted, a new Tribunal having been gazetted by the then Minister.

15. The Plaintiff has averred in the Plaint and in his affidavit that due to the said anomalies, the Judgment

and proceedings from the Tribunal are nullities in law.

16. The orders that the Plaintiff is seeking in the Plaint are for a declaration that the Judgment or award by the Tribunal is a nullity ab initio, the cancellation of Title Deed in respect to the suit property and a declaration that the Title Deed held by the Defendant is a forgery.

17. It is not in dispute that on 14th August 1995, a title document for Kilifi/Takaye/Musoloni/563 measuring 1.4HA (approximately 3.5 acres) was issued to the Defendant.

18. The evidence on record shows that the Defendant herein sued the Plaintiff in the Magarini Land Disputes Tribunal in Land Dispute No. 5 of 1999.

19. On 6th March, 2009, the panel of elders found in favour of the Defendant herein and made the following orders;

“1. The claimant, NGUMBAO MWANZAYO GATSI, has proved his case beyond reasonable doubt and therefore has won the case against the one (1) objector named above that he (claimant) is the RIGHTFUL OWNER of parcel of land in dispute plot title number Kilifi/Takaye/Musoloni/563.

2. The one (1) objector named above is evicted and his DOCUMENTARY OWNERSHIP to the disputed plot number Kilifi/Takaye/Msoloni/563 RIGHTFULLY OWNED by the Cliamant, Ngumbao Mwanzoya Gatsi is REVOKED.”

20. The award of the Tribunal was adopted by the Magistrate in Land case no.18 of 2009 pursuant to the provisions of Section 7(1) and (2) of the Land Disputes Tribunal Act No. 18 of 1990 (now repealed).

21. The process of evicting the Plaintiff from the suit property is what the Plaintiff is seeking to stop in this action.

22. The Land Disputes Tribunal Act gave to the Land Disputes Tribunal jurisdiction to resolve disputes relating to trespass to land.

23. The record before me shows that the Tribunal found that it is the Defendant who is entitled to the suit property. If the Plaintiff was aggrieved by the said decision either on the ground that the Tribunal did not have jurisdiction or that he was not heard, he should have filed an appeal against the said decision.

24. It will be unprocedural, prima facie, for this court to deal with a dispute relating to ownership, use, occupation or title in respect of the suit property when the Tribunal has already dealt with the same dispute.

25. The circumstances of this case clearly shows that this court can only deal with the current dispute as an appeal, which is not the case.

26. The court cannot therefore stop the execution process by way of an injunction when the Plaintiff has not set aside or stayed the order of the court in Land case no.18 of 2009.

27. It is for those reasons that I make the following orders:

(a) I dismiss the Application dated 18th December 2014 on condition that the eviction of the Plaintiff should be in respect of parcel of land known as Kilifi/Takaye/Musoloni/563 measuring 1.4Ha (approximately 3.5 acres) and not for 6.5 acres.

(b) The national surveyor in charge of Kilifi County to determine the 3.5 acres of Kilifi Takaye Musoloni/563 which the Defendant is entitled to.

28. The Plaintiff to pay to the Defendant the costs of this Application.

Dated and delivered in Malindi this **12th** day of **June**, 2015.

O. A. Angote

Judge