REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 355 OF 2014

JOHN AYIENDA ……………………………………………….PLAINTIFF

VERSUS

JACQUES ORANGI AYIENDA …………………………….…DEFENDANT

RULING

1. The plaintiff is the father of the defendant. This dispute is over the sharing or distribution of family land. At all material times, the plaintiff was registered as the proprietor of all those parcels of land known as LR No. West Kitutu/Mwakibagendi/1395, West Kitutu/Mwakibagendi/876 and West Kitutu/Mwakibagendi/1611 (hereinafter referred to as "Plot No.1395, Plot No. 876 and Plot No.1611 respectively" where the context so admits). Sometimes in the year 2011, the defendant and one of his step-brothers, Donald Bosire Ayienda lodged a claim against the plaintiff at the Marani Land Disputes Tribunal (hereinafter referred to as "the tribunal") in which they accused the plaintiff of disposing of land without consulting his family members. The two sought the assistance of the tribunal to compel the plaintiff to divide Plot No. 1395, Plot No. 876 and Plot No. 1611 (hereinafter jointly referred to as "the suit properties") between his two wives. Each wife would in turn divide her share among her children.

2. The tribunal after hearing the parties made a decision on 21st June, 2011 in which it directed that Plot No. 1395 and Plot No. 876 be divided equally between the plaintiff's two wives and that, Plot No. 1611 be retained by the plaintiff. The tribunal ordered further that upon the adoption of its decision as a judgment of the court, a surveyor should carry out the sub-division of Plot No. 1395 and Plot No. 876 aforesaid and in the event that the plaintiff declines to execute the documents necessary to accomplish the said sub-division, the executive officer of the court should do so on his behalf. The tribunal's award was lodged at the Chief Magistrate's court at Kisii and was adopted as a judgment of the court on 25th November 2011 and a decree issued on 13th December 2011.

3. The plaintiff was aggrieved by the said award of the tribunal and its adoption as a judgment of the court and decided to challenge the same by way of judicial review. The plaintiff's application for judicial review was dismissed by this court in a judgment that was delivered on 31st May 2013. In the said judgment, I stated among others that:-

> **"I am not satisfied that the applicant has made out a case for the orders of certiorari and prohibition sought herein against the respondents and the interested parties. The application fails partly for having been brought without leave of the court contrary to the provisions of the order 53 Rule 1 (1) of the Civil Procedure Rules with respect to the prayer for prohibition, partly for having been directed against a non-existent decision and lastly for seeking to quash a decision that had already been adopted as a judgment of the court."**

4. I also made the following observations:

> **"I would like to make two (2) observations, first if the application before me was directed at the decision of the 1st respondent (Marani Land Dispute Tribunal) that was made on 21st June, 2011 and the applicant had obtained leave to seek an order of prohibition and had sought an order on certiorari against the decisions of both the 1st and 2nd respondents, I would have on the facts that I have set out hereinabove allowed the application. I am in full agreement with the submissions by the applicant that the 1st respondent had no jurisdiction to determine a dispute over title to land and the 2nd respondent similarly could not adopt as a judgment of the court a decision that was arrived at without jurisdiction. Secondly, I have considered without being prompted to do so by the applicant whether the application can be saved by the provisions of Article 159 (2) (d) of the Constitution of Kenya. I have concluded that this is not possible as the issues militating against the granting of the orders sought by the applicant are not mere technical issues of the procedure but substantive issues of law. As things stand therefore, the application must fail."**

5. All went quiet for over one year after the dismissal of the said application for judicial review on 31st May 2013 until the plaintiff brought this suit against the defendant on 26th September, 2014 seeking; a declaration that the decision of the tribunal and its subsequent adoption by the Chief Magistrate's Court as a judgment of the court is illegal, unlawful, ultra-vires, null and void and a permanent injunction to restrain the defendant by himself or through his servants or agents from causing any further sub-division or dealing any manner with all those parcels of land known as LR Nos. West Kitutu/ Mwakibagendi/ 1611,876,195, 3300, 3301,3302 and 3303 (hereinafter referred to as Plot Nos. 1611,876,195, 3300, 3301,3302 and 3303. In his plaint dated 17th September, 2014, the plaintiff averred that the decision of the tribunal was made without jurisdiction and that following its adoption as a judgment of the court, the defendant had proceeded to sub-divide the suit properties and have threatened him with eviction from his matrimonial home.

6. Together with the plaint, the plaintiff lodged an application by way of Notice of Motion dated 30th October 2014 under Order 40 Rule 1 and 2 of the Civil Procedure Rules seeking the following prayers:-

> **(1) Spent.**
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> **(2) THAT pending the hearing and determination of this application interpartes, a temporary order of injunction do issue restraining the defendant/respondent by himself and or through his agents/servants from entering LR No. West Kitutu/Mwakibagendi /1395 formally (sic)1611 now 3300 and 3301 formally (sic)876 now 3302 and 3303 and causing any/ further sub-division, by physically erecting boundary features, taking possession and/or do (sic)any dealing on such parcels of land.**
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> **(3) THAT pending the hearing and determination of this suit, a temporary order of injunction do issue restraining the defendant/respondent by himself and/or through his agents/servants from entering LR No. West Kitutu/Mwakibagendi /1395 formally (sic)1611, 3300 and 3301 formally (sic)876 now 3302 and 3303 and causing any further sub-division, by physically erecting boundary features, taking possession and/or do(sic) any dealing on such parcels of land.**
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> **(4) THAT the court be pleased to issue an inhibition order directing the Registrar of Lands Kisii County to place the same on LR No. West Kitutu/Mwakibagendi/1395 formally (sic)1611, now 3300 and 3301 formally (sic) 876 now 3302 and 3303 till further orders of this court.**
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> **(5) That the court be pleased to order the parties to maintain the status quo as**

previously held.

(6) That costs of this application be provided for.

7. The plaintiff's application was supported by the affidavit of the plaintiff sworn of 30th October, 2014. In the said affidavit, the plaintiff narrated the history of the dispute between the parties much of which I have set out at the beginning of this ruling. The plaintiff reiterated that the tribunal had no jurisdiction to determine the dispute that was taken before it by the defendant and his step-brother aforesaid as it revolved around the ownership or title of the suit properties. The plaintiff stated further that following the adoption of the tribunal's decision by the court, the defendant sub-divided the suit properties and caused one portion thereof to be transferred in his name. The plaintiff has contended that he was not consulted when the said sub-divisions were done and that the defendant did not have regard to the location of his matrimonial home and the trees that he had planted thereon. The plaintiff contended that his judicial review application was dismissed on procedural technicalities and that this court has power to grant the reliefs sought in this suit.

8. The application was opposed by the defendant through a replying affidavit sworn on 15th December 2014. In his affidavit, the defendant stated that the reliefs sought by the plaintiff in this suit are not available to him. The defendant has contended that the plaintiff having chosen to challenge the decision of the tribunal and the Chief Magistrate's Court by way of judicial review cannot turn round after the dismissal of the judicial review application to mount the same challenge through these proceedings. The defendant has contended that he is now the registered proprietor of Plot Nos. 3300 to Plot No. 3303 and as such it would be unjust to grant the orders sought in the present application as the same would infringe on his proprietary rights.

9. The defendant denied that he has threatened the plaintiff with eviction from his matrimonial home. He stated that he has lived peacefully with the plaintiff since he acquired titles to the properties mentioned above in the year 2013 and denied that the plaintiff would suffer any loss if the orders sought are not granted.

10. When the application came up for hearing on 18th December 2014, the parties agreed to argue the same by way of written submissions which were duly filed by the parties. I have considered the plaintiff's application and the affidavit in reply that was filed by the defendant in opposition thereto. I have also considered the parties respective submissions. The principles for granting interlocutory injunction are now settled. As was stated in the case of **Giella –vs- Cassman & Company Ltd [1975] E. A 358**, an applicant for interlocutory injunction must show that he has a prima facie case against the respondent with a probability of success and that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt, the application will be determined on a balance of convenience. The plaintiff has sought other prayers in addition to the interlocutory injunction. I believe that since the same are also intended to restrain the defendant from dealing with the suit properties temporarily, the foregoing principles shall equally apply to the same.

11. I am in agreement with the submission by the defendant that the plaintiff has not met the conditions for granting the orders sought in the present application. I am not persuaded on the material before me that the plaintiff has established a prima facie case against the defendant. This suit essentially is challenging the decision of the tribunal and the adoption thereof by the Chief Magistrates Court, Kisii as a judgment of the court. I am in agreement with the submission by the plaintiff that the said decisions can be challenged through a declaratory suit such as this one and that this court has jurisdiction to grant the reliefs sought herein. This position finds support in the decision of the Court of Appeal in the case of **Johana Nyakwoyo Rasugu Buti vs. Walter Rasugu Omariba & 2 others, Kisumu Civil Appeal No.182 of 2006 (unreported)** that I had mentioned in the case of **Walter Rasugu Omariba vs. Johana Nyakwoyo Buti & 2 others, Kisii ELCC No. 15 of 2006 (unreported)** that was cited herein by the defendant.

12. In the said Court of Appeal case, the court stated that when a suit challenging the decision of the Land Disputes Tribunal ("the tribunal") and its adoption by the magistrate's court such as the present one

has been brought, it up to the trial court to determine on the evidence placed before it whether or not it would be appropriate to grant the reliefs sought. In the case that was the subject of the appeal **(Walter Rasugu Omariba –vs- Johana Nyakwoyo Buti & 2 Others (Supra))** that this court dealt with after the disposal of the said appeal, the plaintiff had filed a suit challenging the decision of the tribunal and its adoption by the magistrate's court as a judgment of the court. He sought a declaration that the said decision and its adoption was null and void for want of jurisdiction and for breach of the rules of natural justice. The defendants in that case raised a preliminary objection in the High Court that the only recourse that was open to the plaintiff to challenge the tribunal's decision was through appeal or judicial review application. The defendants' objection was upheld by the High Court. When the matter went to the Court of Appeal, the Court of Appeal overturned the decision of the High Court and held that the High Court had jurisdiction to determine the suit and that whether or not the orders sought could be granted could only be determined upon consideration of the evidence. This court thereafter heard the suit and granted the reliefs that had been sought by the plaintiff.

13. In view of the foregoing, the plaintiff's suit herein is properly before the court. What I need to determine is whether the plaintiff has established on a prima facie basis that the reliefs sought herein are likely to be granted at the trial. In the case of **Walter Rasugu Omariba vs. Johana Nyakwoyo Buti & 2 others, Kisii ELCC No. 15 of 2006** (supra), the plaintiff was not a party to the claim was been lodged by the defendant in that suit at the tribunal although the order of the tribunal had the effect of cancelling his title. In the circumstances, he had no notice of the said decision and as such could not challenge the same through the appeal process that was provided for under the Land Disputes Tribunal's Act No.18 of 1990 or through judicial review. In the circumstances, the plaintiff in that case had no other alternative of seeking redress against the said decision of the tribunal other than through a declaratory suit.

14. On the facts of that case, this court declared the tribunal's decision and its adoption as a judgment of the court null and void. In the present case, the plaintiff was a party to the claim that was lodged at the tribunal and participated fully in the proceedings. The plaintiff had an opportunity to appeal against the decision of the tribunal to the Provincial Appeals Committee under the provisions of the Land Disputes Tribunals Act, No.18 of 1990. The plaintiff did not take this route. The plaintiff also had a right to challenge the said decision and its adoption as a judgment of the court by way of judicial review which right the plaintiff did exercise. The plaintiff however lost the judicial review application on technical grounds. The court found that the application was not properly brought before it. Following the dismissal of the plaintiff's judicial review application as aforesaid, the plaintiff did not take any other action to stay the execution of the decree that was issued by the Chief Magistrates Court following the adoption of the decision of the tribunal.

15. The said decree was accordingly executed and the suit properties dealt with in accordance with the terms thereof. The plaintiff brought this suit one year after the execution of the said decree. The plaintiff has not joined in this suit the parties who were involved in the tribunal case. It is not clear why the plaintiff left out the defendant's co-claimant in the tribunal, Donald Bosire Ayienda. It is also not clear why the plaintiff failed to join the Attorney General in this suit to represent the tribunal and the Chief Magistrate's Court whose decisions are sought to be overturned. I am not persuaded that this court would be able to overturn the decision of the tribunal and the decree of the Chief Magistrate that have already been executed. I do not also think that this court would overturn a decree that was made in favour of the defendant and Donald Bosire Ayienda in this suit where Donald Ayienda is not a party. In view of the foregoing, I am not satisfied that the plaintiff has established a prima facie case against the defendant.

16. Having reached that finding, I am not obliged to consider whether or not the plaintiff would suffer irreparable harm if the orders sought are not granted. The plaintiff has therefore failed to satisfy the conditions for granting a temporary injunction. Even if the plaintiff had met the said conditions, I would still not have granted the plaintiff's application for another reason. Injunction is an equitable remedy. It is a principle of equity that equity does not come to the aid of the indolent. As I have stated herein above, the plaintiff brought this suit and the present application one year after the execution of the decision of the tribunal and the transfer the disputed properties to the defendant. The plaintiff is guilty of laches and as such is not deserving of the equitable remedy of injunction.

17. The upshot of the foregoing is that the application dated 30th October, 2014 is not for granting. The same is dismissed with costs to the defendant.

Delivered, Dated and Signed at **Kisii** this **27th day** of **August, 2015.**

S.OKONG'O

JUDGE

In the presence of:

Mr. Abobo for Ogari for the plaintiff

Miss Okwoyo for the defendant

Mr. Omwoyo court clerk

S.OKONG'O

JUDGE