



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 225 OF 2013

MUNGA MBODI MWENDA.....PLAINTIFF

=VERSUS=

1. MUGUZA JANGWATA JINDWA

2. MTWANA DUNE.....DEFENDANTS

R U L I N G

1. The Application before the court is the one dated 6th December 2013 seeking for the following orders:

a) That this Honourable court be pleased to issue a temporary injunction restraining the defendants by themselves, their relatives, servants, agents employees and/or any other person acting under their authority from cultivating, cutting down trees, harvesting the applicant's produce, disposing off and/or in any other way wasting or damaging the applicant's parcel of land pending hearing and determination of this suit.

b) That the costs of this suit be provided for.

2. The Application is premised on the grounds that the Applicant and his family are the beneficial owners of a parcel of land situated within Mlenji sub-location in Kilifi District having inherited it from their grandfather, namely, Mwende Msitu; that the Defendants have trespassed on the said land and that the Defendants and their families are aware of the boundaries bordering the Applicant's land.

3. According to the Plaintiff's Supporting Affidavit, the Applicant and the Respondents have litigated on the suit property for a long time; that the Defendants have trespassed on his land and that the balance of convenience tilts heavily in allowing the Application.

4. The 1st Defendant filed a Replying Affidavit and deponed that the Plaintiff's grandfather, Mwenda Msitu, did not leave any land when he died and that the Plaintiff's grandfather had been allowed to build a home within an area of 1 ½ acres by the Defendant's uncle but he later started trespassing onto their land.

5. It is the 1st Defendant's case that the suit property belonged to his uncle Choga Ngao and his late father Jangwata Jindwa; that they have the right to cut the trees thereon and that it is not true that the Chief, the D.O. and the D.C. of Rabai declared the Plaintiff as the owner of the suit property.

6. The Plaintiff filed a detailed Supplementary Affidavit and deponed that all the disputes involving the suit property were decided in favour of his late grandfather, Mwenda Msitu.

7. In response to the issue of the previous suits, the 1st Defendant deponed that in the Kaloleni Court, the court simply endorsed an award from the Lands Disputes Tribunal which awarded the land to Fondo Virugu Mwenda, the Plaintiff's father and that he appealed to the provincial Lands Appeals Committee which appeal was not heard.

8. The Plaintiff's advocate submitted that the Plaintiff's father, one Fondo Vurungu Mwende, sued the Defendant's father, one Jangwata Jindwa in RMCC No. 20 of 1997 seeking to enforce an award of the Land Disputes Tribunal delivered on 8th June, 1997 which was in favour of the Plaintiff.

9. According to counsel, the Environment and Land Court sitting in Mombasa set aside the appeal that had been filed by the Defendant's father in the defunct Provincial Appeals Committee. Consequently, it was submitted, the Plaintiff has shown that it has a *prima facie case* with chances of success in view of the decision of the Tribunal.

10. The Defendant's advocate submitted that indeed, the Plaintiff's father was awarded the suit property by the Tribunal, which award was adopted by the court in Kaloleni Resident Magistrate's Land Award No. 30 of 1997.

11. However, it was submitted, Mukunya J. in Mombasa Elc. No. 13 of 2013 set aside the Tribunal's Judgment and directed that parties should file fresh suits.

12. The Defendant's counsel submitted that by the time of filing this suit, there was no judgment or record in the subordinate court at Kaloleni and that the Plaintiff cannot rely on that judgment; that the land in question belongs to Choga Ngao who was a brother to the 1st Defendant and that both the 1st Defendant's father and Choga Ngao have been staying on the land.

Analysis

13. It is not in dispute that the Plaintiff's father and the Defendants' father took the dispute over the suit property to then Kaloleni Land Disputes Tribunal pursuant to the provisions of the Land Disputes Tribunal Act (repealed). The said dispute was decided in favour of the Plaintiff's father on 18th June 1997 and the same was adopted as an order of the court by the Kaloleni Resident Magistrate on 23rd July 1997.

14. An Appeal was then lodged to the Provincial Land Appeals Committee. However, the said Committee was abolished by operation of the law when the Land Disputes Tribunal Act was repealed.

15. It would appear that the Appeal that was pending before the Appeals Committee was transferred to the Environment and Land Court, Mombasa and allocated file reference number Misc. ELC No. 13 of 2013.

16. However, when the matter was placed before Mukunya J, he made the following order:

“This matter was pending for appeal before the Provincial Appeals Tribunal. The process under which it was filed and appeal mechanisms has been abolished by the relevant law. The parties herein shall be at liberty to file a fresh suit before the subordinate court. In the mean time the Judgment entered herein is set aside.”

17. The Plaintiff has now filed the present suit, in view of the sentiments of Mukunya J. Indeed, the Defendant's advocate has submitted that because the decision of the Resident Magistrate, and by extension the Tribunal was set aside by Mukunya J, the Plaintiff cannot use the same judgment to argue that he has a *prima facie case* with chances of success.

18. Before I determine whether the Plaintiff has established a prima facie case with chances of success, I would like my views to be known on the issues that were raised by Mukunya J in his Ruling of 28th October 2013.

19. I do not agree with my brother, Mukunya J, that with the repeal of the Land Disputes Tribunal Act, all the judgments of the Tribunal and subordinate court, and in particular those appealed against, were rendered void and should be set aside.

20. I hold the view that in instances where the Land Disputes Tribunal had already delivered its award, and the award was duly adopted by the subordinate court, such an award remains valid even where an appeal was pending before the Appeals Committee.

21. Upon the repeal of the Act, all the appeals which were pending before the Appeals Committee should be transferred to the Environment and Land Court and dealt with in that court in its appellate jurisdiction. In situations where fresh matters are filed in this court, if a party shows that the same issues had been dealt with and decided by the Land Disputes Tribunal and the subordinate court, then this court can only deal with those issues as an appellate court and not otherwise.

22. Having said so, and in view of the fact that the judgment of the lower court was set aside by Mukunya J, with clear directions that any subsequent suit in respect to the suit property should be filed in the subordinate, I can only refer this matter to the subordinate court without deciding on the merits or demerits of the Plaintiff's Application for injunction. Doing otherwise will be tantamount to sitting on an appeal of a court with concurrent jurisdiction and contrary to the orders of Mukunya J.

23. For the above reasons, I refer this file to the subordinate court for hearing and determination.

Dated and delivered in Malindi this 20th day of June, 2014

O. A. Angote

Judge