



No. 298

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 30 OF 2012**

YUVINALIS MAYAKA .....PLAINTIFF

VERSUS

JOSEPH ONTITA GWARO .....DEFENDANT

**RULING**

1. What is before me is the plaintiff's application that was brought by way of Notice of Motion dated 19<sup>th</sup> December, 2012 under Order 40 rule 1 and 2 of the Civil Procedure rules 2010 for the following orders:-
  - a. **Spent**
  - b. **That pending the hearing and final determination of this application, this court do issue an order of injunction restraining the defendant by his agents, servants and/or employees or anybody working under his instructions from implementing the orders dated 16<sup>th</sup> July 2012, trespassing, demolishing, evicting or interfering with the plaintiff's quiet possession on LR Nos. West Kitutu/Mwagichana/ 206, 664, 668, 177 and 3223 respectively.**
  - d. **That the honourable court be pleased to issue an order preserving the suit property LR Nos. West Kitutu/Mwagichana/206, 664, 668, 177 and 3223 (hereinafter referred to only as "the suit properties") respectively against any subdivision, alienation and/or disposition.**
  - e. **That the costs of this application be provided for.**

The plaintiff's application was supported by affidavit sworn by the plaintiff on 19<sup>th</sup> December, 2012. In the said affidavit, plaintiff contended that;the plaintiff had acquired titles to the suit properties through transmission pursuant to the grant of letters of administration that was issued to the plaintiff in Kisii HC. Succession Cause No. 271 of 2010, In the matter of the estate of the late Kwamboka Ontita (deceased). At the time of the confirmation of the said grant of letters of administration, the defendant was duly served with the application for confirmation and the defendant participated in the said proceedings without raising any objection to the said grant being confirmed in favour of the plaintiff.

2. After the confirmation of the said grant of letters of administration and the transfer of the suit properties into the name of the plaintiff through transmission, the defendant lodged a claim against plaintiff at Marani Land Disputes Tribunal (hereinafter referred to only as "**the Tribunal**") claiming portions of the suit properties. Without any notice to the plaintiff, the tribunal made an *ex parte* award in favour of the defendant in which it ordered that each of the suit properties be

sub-divided and half portions thereof be registered in the name of the defendant. The said award was adopted as a judgment of the court on 11<sup>th</sup> May, 2012 in Kisii Chief Magistrate's Court Civil Application No. 18 of 2012. The plaintiff contended that he is apprehensive that the said award if executed would disinherit him of the suit properties which he acquired procedurally and lawfully. The plaintiff contended that the said award is null and void for several reasons. The plaintiff contended that the defendant's claim at the tribunal was brought on behalf of one, Bokena Ontita (deceased) without obtaining letters of administration in respect of her estate as required under the law.

3. The plaintiff contended further that the said award was *ultra vires* the powers that were conferred upon the tribunal under section 3 (1) and (2) of the Land Disputes Tribunal Act No. 18 of 1990 (now repealed). The plaintiff contended that if the defendant had any claim against the estate of Kwamboka Ontita (deceased), the defendant should have lodged such claim through objection proceedings in the succession cause aforesaid. The plaintiff contended further that the defendant's claim before the tribunal was time barred under the Limitation of Actions Act Cap 22 Laws of Kenya. The plaintiff contended further that unless the orders sought herein are granted, the plaintiff stands to suffer irreparable loss and damage. The plaintiff contended that the defendant on the other hand will not suffer any prejudice or loss if the orders sought are granted.
4. The plaintiff's application was opposed by the defendant. The defendant filed grounds of opposition dated 18<sup>th</sup> June 2013 and a replying affidavit sworn on 14<sup>th</sup> November 2013 in opposition to the application. In his "strong" grounds of opposition, the defendant contended as follows:-
  - a. **That the suit properties initially belonged to one, Ontita Siro who died in 1935 before land registration in Kenya.**
  - b. **That the said Ontita Siro had two wives namely, Bokeno Ontita who was the 1<sup>st</sup> wife who died in 1932 and the 2<sup>nd</sup> wife Kwamboka Ontita who died on 16<sup>th</sup> day of December 1995.**
  - c. **That Bokeno Siro, Ontita Siro's 1<sup>st</sup> wife had only one son namely, Ogwaro Ontita who died in 1991 leaving 3 sons namely:-**

**Joseph Ontita Ogwaro(the defendant)**

**Nyangweso Francis Ogwaro and,**

**Frankline Maragi Ontita**

- d. **Kwamboka Ontita, Ontita Siro's 2<sup>nd</sup> wife also had only one son, namely, Yuvinalis Mayaka Ontita(the plaintiff herein).**
- e. **That during land registration, the mother of the plaintiff herein Kwamboka Ontita was registered as the proprietor of all parcels of land that were owned by Ontita Siro to hold on behalf of the entire family of Ontita Siro.**
- f. **That after the death of Kwamboka Ontita the plaintiff proceeded to file succession proceedings in Kisii High Court Succession Cause No. 271 of 2010 for a grant of letters of administration in respect of the estate of Kwamboka Ontita in which proceedings the plaintiff left out the family members of the 1<sup>st</sup> wife of Ontita Siro who included the defendant and his brothers.**
- g. **That since most of the family members of Ontita Siro's first wife were deceased, the plaintiff capitalized on that situation to acquire the suit properties unlawfully.**
- h. **The dispute between the plaintiff and the defendant was lawfully determined under the Land Disputes Tribunals Act No. 18 of 1990(now repealed) as the matter concerned Gusii Customary Law.**
- i. **The plaintiff has taken advantage of the fact that the plaintiff's deceased mother was the one who was registered as the proprietor of the suit properties to mete out injustice on the defendant.**

In his replying affidavit, the defendant reiterated the above averments in his grounds of opposition and

added that Kwamboka Ontita (the 2<sup>nd</sup> wife to Ontita Siro and mother to the plaintiff) died on 11<sup>th</sup> December 1995 and the plaintiff applied for grant of letters of administration in respect of her estate without acknowledging the fact that Kwamboka Ontita held the titles to the suit properties in trust for herself and the defendant and his brothers.

5. When the plaintiff's application came before me for hearing on 14<sup>th</sup> November 2013, the parties agreed to argue the same through written submissions. Both parties filed their written submissions and the same are on record. I have considered the plaintiff's application and the affidavit in reply filed in opposition thereto by the defendant. I have also considered the written submission filed by the advocates for both parties and the case law cited. This being an application for a temporary injunction, what I need to determine is whether the plaintiff has met the conditions for granting such injunction that were enunciated in the case of **Giella vs. Cassman Brown & Co. Ltd. [1973] E.A 358**. The decision of the tribunal that has given rise to this suit was adopted by the Chief Magistrate's Court at Kisii as a judgment of the court in Kisii CM. Civil Application No. 18 of 2012 on 11<sup>th</sup> May, 2012. The decree that was issued by the said court upon the adoption of the said decision of the tribunal provided as follows;

- a. **That the land parcels No. 204, 664, 668, 177 and 3233 registered in the name of Yuvinalis Mayaka of West Kitutu is for two wives (sic) of Ontita Siro, so this lands (sic) No. 204, 664, 668, 177 and 3223 sub-divided (sic) and new numbers be given to two wives (sic) of Ontita Siro but be registered in the names of the applicant and the respondent.**
  - b. **That the land title deeds to be cancelled and the new land title deeds to be issued in the names of the applicant Joseph Ogwaro Ontita and the respondent who is Yuvinalis Mayaka Ontita.**
  - c. **That the land surveyor be called and make sure (sic) that proper boundaries are well marked in (sic) the ground, the new numbers and land title deeds are issued to the applicant and the respondent.**
  - d. **That the applicant Joseph Ogwaro Ontita request (sic) executive officer to sign on behalf of the respondent, if he refuses to sign the transfer.**
  - e. **That all buildings which are in the disputed lands (sic) No. 204, 664, 668, 177 and 3223 be removed immediately.**
6. In the case of **Mary Biyaki Basweti –vs- Saulo Ondieki Ondieki & another [2013] eKLR**, this court rendered itself as follows on the powers of the now defunct Land Disputes Tribunals:

**“The tribunal was established under The Land Disputes Tribunals Act, No.18 of 1990 (now repealed) (hereinafter referred to as “the Act”). The powers of the tribunal were spelt out in the said Act. The tribunal could not therefore exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act sets out the disputes over which the tribunal had jurisdiction as follows; “.....all cases of civil nature involving a dispute as to;**

- a. **the division of, or the determination of boundaries to, land, including land held in common;**
- b. **a claim to occupy or work land; or**
- c. **trespass to land.”**

**It is clear from the foregoing that the tribunal did not have jurisdiction to determine disputes over ownership of or title to land. The tribunal also lacked jurisdiction to determine disputes over the estates of deceased persons. The respondents' claims against the appellant before the tribunal were over title and/or ownership of the suit property. It was not contested before the tribunal and before this court that the suit property is registered in the name of the appellant's deceased husband, Basweti Kengari. The tribunal did not therefore have the power to order the transfer of a portion of the suit property to the respondents. Due to the foregoing, I am persuaded by the appellants' submission that, the tribunal acted outside its statutory powers when it entertained the respondents claim and proceeded to make the decisions**

**appealed herein. The dispute between the respondents and the appellant concerned the issue of the ownership and distribution of the suit property which is part of the estate of a deceased person. Section 47 of the Succession Act, Cap.160, Laws of Kenya, divested the tribunal of jurisdiction to deal with disputes relating to the estates of deceased persons. The suit property was registered under the Registered Land Act, Cap. 300 Laws of Kenya (now repealed) and as at the time when the respondents lodged their claims with the tribunal against the appellant, the jurisdiction to determine disputes concerning title to or possession of land registered under the Registered Land Act, (supra) was conferred exclusively upon the High Court and the Magistrates Court's in limited cases by section 159 of the said Act. The tribunal had no jurisdiction to determine issues to do with the ownership or title to land registered under the said Act. See, the Court of Appeal Cases of, Jotham Amunavi -vs- The Chairman Sabatia Division Land Disputes Tribunal & another, Court of Appeal at Kisumu, Civil Appeal No. 256 of 2002 (unreported) and Dominica Wamuyu Kihu -vs- Johana Ndura Wakaritu, Court of Appeal at Nyeri, Civil Appeal No. 269 of 2007 (unreported). Due to the foregoing, I am in full agreement with the submission by the appellant that the tribunal acted outside its jurisdiction in making the decisions the subject of this appeal. The two grounds of appeal therefore succeed."**

7. The issues that were raised in the case that I have cited above are similar to the issues raised in this case. Like in that case, the defendant herein lodged a claim against the plaintiff herein at the tribunal seeking title to portions of the suit properties. The suit properties were hitherto registered in the name of Kwamboka Ontita, deceased. The defendant herein claimed before the tribunal that Kwamboka Ontita held half undivided share in the suit properties in trust for him and his brothers. The tribunal upheld the defendant's claim and ordered for the sub-division of the suit properties and transfer of half portion of each of the suit properties to the defendant. The defendant's contention before the tribunal was that the plaintiff who had obtained a grant of letters of administration in respect of the estate of Kwamboka Ontita was not entitled to own or acquire title to the whole of the suit properties. The dispute before the tribunal was therefore a mixture of title and/or ownership of land claim and succession claim. As held in the case I have cited above, the tribunal had no jurisdiction to determine any of these disputes. The defendant should have lodged his claim over the estate of Kwamboka Ontita with the Succession Court or through a normal civil suit for a declaration that the late Kwamboka Ontita held half share in each of the suit properties in trust for him and his brothers. I am of the opinion that the defendant chose the wrong forum to ventilate his otherwise genuine grievances.
8. The tribunal having entertained a dispute in respect of which it had no jurisdiction, its decision that was adopted as a judgment of the court is null and void. I am satisfied therefore that the plaintiff has established a prima facie case against the defendant with a probability of success. The tribunal had ordered for the sub-division of the suit properties and the transfer of half portion thereof to the defendant. Once portions of these properties are transferred to the defendant, the defendant would be at liberty to deal with the same in any manner deemed fit. The said portions of the suit properties may therefore be disposed of by the defendant an act that would put the same beyond the reach of the plaintiff should the plaintiff be successful at the trial of this case. Due to the foregoing I am equally satisfied that the plaintiff stands to suffer irreparable harm if the orders sought herein are not granted.
9. In conclusion, I am satisfied that the plaintiff has satisfied the conditions for granting a temporary injunction. In the circumstances, I hereby allow the plaintiff's application dated 19<sup>th</sup> December, 2012 and make the following orders pursuant to the provisions of section 13(7) of the Environment and Land Act, 2011;
  - a. Pending the hearing and determination of this suit the execution of the decree issued on 16<sup>th</sup> July, 2012 in Kisii CM. Civil Application No. 18 of 2012, Joseph Ontita Ogwaro vs. Yuvinalis Mayaka be and is hereby stayed.
  - b. Pending the hearing and determination of this suit, the defendant by himself or through his agents, servants or employees be and are hereby restrained from trespassing on, evicting the plaintiff from or interfering with the plaintiff's possession of LR. Nos. West Kitutu/ Mwangichana/ 206, 664,

668, 177 and 3223 save that this order shall not apply to any portion of the said properties which was in the possession or occupation of the defendant prior to the date of the decree referred to in (a) above.

- c. Pending the hearing and determination of this suit, there shall be a restriction on the titles of LR. Nos. West Kitutu/Mwagichana/206, 664, 668, 177 and 3223 restricting the registration of any further dealing with of the said properties or any one of them.
- d. The plaintiff shall have the cost of this application.

**Delivered, signed and dated at KISII this 31<sup>st</sup> day of July, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

**N/A for the plaintiff**

**N/A for the defendant**

**Mr. Mobisa Court Clerk.**

**S. OKONG'O**

**JUDGE**