



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

ELC CASE NO. 99 OF 2009

CHRISTOPHER LESIRE MUTUNKEI.....APPLICANT/DEFENDANT

VERSUS

PAUL SANE NANAPU.....1ST RESPONDENT/PLAINTIFF

KAJIADO NORTH LAND DISPUTE TRIBUNAL.....2ND RESPONDENT

THE DISTRICT LAND SURVEYOR KAJIADO.....3RD RESPONDENT

R U L I N G

1. The Defendant/Applicant's Motion dated **20th June 2014** is seeking the principle prayers namely;

1. Temporary injunction to restrain the respondents by themselves, their servants, agents, servants, and employees from conducting or beaconing of boundaries between parcel numbers formally KAJIADO /KITENGELA/54.

2. That in alternative and without prejudice to the foregoing, that the District Surveyor, Kajiado place beacons strictly as exist in the RIM MAP.

and is based on the core grounds on the face of the Motion namely:

1) That the Applicant moved to this Honourable court by an application dated 21st February 2014 in Civil Case No. 99 of 2009 disputing the findings of the now Defunct District Land Dispute Tribunal.

2) That the application dated 21st February 2014 was certified urgent and came up for hearing on 6th March 2014 but the court was not sitting.

3) That the Applicant moved to the court by an application dated 4th May 2014 in Civil Case No. 99 of 2009 seeking the listing of the application dated 21st February 2014.

4) That the honourable court upon reading the application dated 4th May 2014, certified the application urgent and ordered the file be transferred to the Environments and Lands Court in Nairobi for hearing of the application dated 21st February 2014.

5) That the Applicant further moved the court by an application dated 4th June 2014 in ELC Case No. 579 of 2014 seeking the listing of the application dated 21st February 2014.

The Motion is premised on the provisions of Section 1A, 1B, 3A Civil Procedure Act Cap 21, Order 40 Rules 2 (2) ad (2), 4 Order 40 51 of the Civil Procedure Rules 2010 and all the enabling provisions of the law.

2. The application is supported by the Affidavit of **Christopher Lesire Mutunkei** sworn on the 2nd June 2014 and also his further Affidavit sworn on the 11th August 2014.

3. The application is opposed by the Plaintiff/Respondent via his Replying Affidavit sworn on the 16th July 2014.

4. The parties herein consented to have application herein to be disposed by way of written submissions.

5. The Applicant's case is to the fact that:

i. The Tribunal having failed to take into account the interests of the Applicant, the Applicant herein moved to court by an application dated 21st February 2014 in Civil Case No. 99 of 2009 disputing the findings of the Tribunal upon which the Respondents pursuant to which the Respondents intend to remove, destroy and/or defence the boundary features of the Applicant's property unless restrained by this court.

ii. In rendering the award, the Tribunal did not comply with the express provisions of the law relating to boundaries disputes. The award of the Tribunal stated that the beacons would be pointed out upon the adoption of the award and not the vice versa.

iii. The credibility of the Surveyor's report relied upon in the award is questionable, the Honourable Court ordered that the surveyor's report be prepared by a government surveyor who had been agreed upon by the concerned parties, however the surveyor's report was prepared by a private surveyor. The surveyor never visited the disputed parcels of land for purposes of pointing out the beacons.

iv. The said award was filed one year later at the Kajiado Resident Magistrate's Court. The consent dated 19th May 2010 provided *inter alia* that the Tribunal to file its award within ninety (90) days from 19th May 2010 at the Machakos High Court and not the Kajiado Resident Magistrate's Court. Further to this the award was filed secretly and without notice to the Applicant.

v. The Chairman of the Tribunal in filing the award failed to file the award together with the depositions or documents which were taken or proven by the Tribunal. It is notable that the minutes of the Tribunal do not disclose the number of members present, the date when the Tribunal sat or whatever negotiations that there were, when the beacons were pointed out or when the parties appeared before the tribunal. The Senior Resident Magistrate's Court on the 5th of July 2012 adopted the order of the Land Disputes Tribunal which was null and void for failing to comply with express provisions of the law.

vi. The Applicant being aggrieved with the decision filed the application dated 21st February 2014 in Machakos High Court Civil Case No. 99 of 2009 where the consent to refer the matter to the tribunal had earlier been filed and where the award was supposed to have been filed. The application dated 21st February 2014 was certified urgent and came up for hearing on 6th March 2014 but the court was not sitting on that day. Through an application dated 4th May 2014 in Civil Case No. 99 of 2009, the applicant sought the listing of the application dated 21st February 2014 and upon reading the application, the application was certified urgent and orders issued for the file be transferred to the Environments and Lands Court in Nairobi for hearing of the application dated

21st February 2014. The file was thereafter designated as ELC Case No. 579 of 2014.

vii. The Applicant further moved the court by an application dated 4th June 2014 in ELC Case No. 579 of 2014 seeking the listing of the application dated 21st February 2014. The application dated 4th June 2014 was certified urgent and was coming up for interparty hearing on 17th June 2014 but it was not listed. It is through the application dated 20th June 2014 that the application dated 21st February 2014 came up for interpartes hearing.

viii. The Applicant informed the Respondents of the applications and requested them to ensure that status quo prevailing was maintained pending the determination for the applications (Annexure 'PSN-9' of the Respondent's Replying affidavit dated 16th July 2014). However, on 8th May 2014, the Respondents commenced beaconing of the boundaries between the two parcels of land in the absence of the Applicant. The beaconing exercise conducted on 8th May 2014, was of no legal effects as the Order of the court issued on 4th of October 2013 required that the implementation of the decree of 5th July 2012 be conducted on a date to be agreed upon by the parties (see Annexure 'CLM-3' of the Applicant's Supporting affidavit dated 21st February 2014). The beaconing exercise was thus unlawful and irregular *ab initio*.

6. The Respondent's case is captured in the Replying Affidavit of Paul Sane Nanapu sworn on 16th July 2014. The respondent contends that,

a. The applications as drawn and filed are grossly misconceived, an order of injunction cannot issue after the event, beacons have already been placed, the order of the Land Disputes Tribunal has already been implemented, the decree of court has already been executed;

The application does not seek to set aside the beaconing exercise already done by the District Surveyor, carried in his report produced in the affidavit of Paul Nanapu as PSN-11.

The application only seeks an injunction to restrain beaconing that has already happened.

The respondent submits further that,

b. The RM map cannot be utilized as prayed in the application, the decision of the Tribunal reestablished the boundaries and since it stands, it is judicially forceful;

There is a decree of court issued in by the Resident Magistrate's Court in **Kajiado Land Dispute Case No.30 of 2011**, produced as Annexure PSN-5 in the Replying Affidavit of Paul Sane Nanapu.

The respondent further contends that,

c. The respondent is time bared from challenging the decision of the Kajiado North Land Dispute Tribunal and the adoption thereof done through Kajiado Resident Magistrate's Court Land Dispute Tribunal case No. 30 of 2011, under the Land Disputes Tribunal Act (Chapter 303A of the Laws of Kenya) now repealed, and judicial review;

The decision of Kajiado North Land Dispute Tribunal was made on 3rd March 2011, annexed as annexure PSN-3 in the affidavit of Paul Sane Nanapu, in presence of the parties.

Under Section 8 of the Land Disputes Tribunal Act in operation then, the Plaintiff was to appeal against the decision of the Land Disputes Tribunal within 30 days, which lapsed on or before the 4th April 2011.

The plaintiff was also at liberty to apply to the High Court for the order of Certiorari by way of

judicial review, which would limit him to a period of six (6) months under provisions of Sections 8 and 9 of the Law Reform Commission Act (Chapter 26 of the Laws of Kenya). The course would limit time to September 2011.

The application is wholly time barred and grossly an abuse of court process.

Further the respondent argues,

d. The High Court cannot by present application restrain the Resident Magistrate's Court Kajiado from enforcing the decision of the Land District Tribunal in Land Case No. 30 of 2011.

for 3 reasons:

- i. The decree of court has already been executed, there is nothing to restrain;
- ii. There are no proceedings before the High Court to set aside the decree of the Resident Magistrate's Court. Neither are there any proceedings for stay or execution of the decree.
- iii. The decree of the Resident Magistrate's Court could only be upset by judicial review proceedings or Petition. The present application is not an appeal. There are accordingly no competent proceedings before the court to upset the decree of the Resident Magistrate's Court.

The respondent contends that,

e. The suit before the Court is wholly settled, by consent dated 19th May 2010 and filed in Court on 24th May 2010. The award was made and has been filed in court;

&

f. The Consent dated 19th May 2010 has not been set aside. The matter cannot therefore again be alive for litigation herein:

The dispute, being a boundary dispute was forwarded to the Land Disputes Tribunal by consent of the parties recorded in this Court. Annexure **PSN-1** in the affidavit of Paul Sane Nanapu. The dispute was then forwarded by the Plaintiff vide letter dated 19th August 2010, annexure **PSN-2** to the affidavit of Paul Sane Nanapu.

The Respondent proceeds to submit and contend; that, the consent recorded was as follows:

- i. That the dispute being a boundary dispute between L.R. No. Kajiado/Kitengela/53 and Kajiado/Kitengela/54 be referred to the Land Disputes Tribunal Kajiado, for determination;
- ii. The said Tribunal do file its award within 90 days from the day it is served upon the Complainant;
- iii. **Upon filing the award in the High Court, this matter is and be marked as settled:**
- iv. Each party to bear own costs.

It was indeed consent that upon filing the award in the High Court, this matter is and be marked as settled.

The Plaintiff forwarded the dispute to the Land Dispute Tribunal by his letter (**PSN-2**) in the following terms:

“I do wish to forward my request to your Committee to assist me as per attached letter from the Deputy Registrar High Court of Kenya to determine the above long standing dispute.

It’s my hope that your honourable court shall give a solution.

Thanks.....”

This consent has never been amended nor set aside.

The finding of the Land Disputes Tribunal has been filed in this court; it is further produced herein as annexure **PSN-3** in the affidavit of Paul Sane Nanapu.

As per consent, respondent, submit that the matter is completely settled, it is not available for any further litigation.

Further, the Plaintiff is wholly estopped from disputing the jurisdiction of the Land Disputes Tribunal and its findings. If the Plaintiff has any grievance with findings of the Tribunal in merit, then the course would be judicial review or appeal under Section 8 of the Land Disputes Tribunal Act (Cap 303 A Laws of Kenya).

The Respond further contends that,

g. The Land Disputes Tribunal had jurisdiction;

The Land Disputes Tribunal had jurisdiction.

The matter herein was a boundary dispute between L.R. No. Kajiado/Kitengela/53 and Kajiado/Kitengela/54.

Section 3(1) of the Land Disputes Tribunal Act (Cap 303A Laws of Kenya) proceeded as follows:

Subject to this Act, all cases of a civil nature involving a dispute as to-

a. The division of, or the determination of boundaries to land, including land held in common.....

Shall be heard and determined by a Tribunal established under Section 4.

The dispute was forwarded on 19th August 2010 and the decision was made on 3rd March 2011.

The Environment and Land Court Act (Chapter 12 A of the Laws of Kenya) commenced operation on 30th August 2011. Section 30 of this Act carries the transitional provisions.

Further Section 162 of the Land Act carries the transitional clauses as follows:

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act, shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

The award of the Land Disputes Tribunal and the decree of the court were completed before commencement of the Land Act and the Land Court Act. Those proceedings and the rights accrued therefrom are accordingly preserved per transitional clauses of Section 162 of the Land Act and Section 30 of the Land Court Act.

The pleading on jurisdiction by the Plaintiff is for the reasons above, completely untenable.

The Respondent argues that,

h. The Defendant has suppressed material facts and is grossly undeserving of the orders of equity:

The Replying Affidavit sets out the chronology of facts that the Plaintiff has suppressed.

i. There is no interference with the Plaintiff' parcel of land, the Defendant is only enforcing the boundary strictly as determined by the Tribunal.

j. The Defendant has committed breaches and is even criminally culpable, the Defendant is undeserving of the order of equity:

7. The applicant in a rejoinder submits that :

From the material presented to this court, and based on the facts herein, the applicant's indefensible right to parcel formerly **LR No. KAJIADO/KITENGELA/54** has been breached by the Respondents who unlawfully and irregularly commenced beaconing of the boundaries in the absence of the Applicant though they were requested to halt the exercise pending the determination of this application.

The applicant contends that he has established that there is a *prima facie* case with probability of success. It is manifestly clear that if injunction is not issued by this Honourable Court, the Applicant will lose his proprietary interest in **LR No. KAJIADO/KITENGELA/54** hence suffering irreparable loss. The balance of convenience tilts in favour of the Applicant. The applicant concludes that, from the facts and circumstances of the Applicant's case, the court should exercise its discretion in the applicant's favour and award a temporary injunction.

He has cited the following Authorities:

1. Giella versus Cassman Brown & Co. Ltd. 1973 EA P.358.
2. MRAO versus First American Bank of Kenya Ltd. & 2 Others (2003) eKLR.
3. Charter House Investment Ltd. Versus Simon K. Sang & 3 Others.

8. ISSUES FOR DETERMINATION:

1. Whether the conditions for the grant of interlocutory injunction have been demonstrated herein?
2. What is the order as to costs?

FINDINGS:

The undisputed facts are that the matter herein is hinged on the boundary dispute between parcels **Kajiado/Kitengela/53 and 54**. By consent dated 19th May 2010 and filed in court on 19th May 2010 the parties agreed to refer the dispute herein to Land Dispute Tribunal Kajiado for determination inter alia. The aforesaid determination by the tribunal spawned a decree passed on 4th June 2011 by Kajiado resident Court in terms of the award of the tribunal.

9. The aforesaid decree has not been reviewed or set aside to date. The aforesaid determination was implemented on 8th May 2014.

10. The Applicant's contentions are principally that the award aforesaid was filed a year rather than within 90 days as per the consent. That it was filed in the Resident Magistrate's Court Kajiado rather

than the High Court at Machakos where the consent was entered. The applicant further questions the legality of the beaconing of 8th May 2010.

11. The Respondent rejoinder is to the effect that the applicant is seeking to undo what has been done in execution of a decree via an interlocutory injunction.

The implemented decree has never been set aside or reviewed thus, the Tribunal award which produced aforesaid decree still stands unimpugned and the time to impeach it is long gone.

12. The principles of grant of interlocutory injunction are now settled vide;

GIELLA VERSUS CASSMAN BROWN & CO. LTD. (1973) EA.

The applicant has to demonstrate and prove with material before court:

1. A prima facie case with probability of success.
2. That unless orders are granted, he might suffer irreparable injury, which would not adequately be compensated by award of damages.
3. **AND** if the court is in doubt, it will decide an application on the balance of convenience.

13. Prima facie case is defined as one material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call an explanation or rebuttal from the latter. Refer to, **MRAO LTD. VERSUS FIRST AMERICAN BANK OF KENYA LTD. & 2 OTHERS (2003) eKLR.**

14. An injunction is an equitable and discretionary remedy given when the subject matter of the case before the court requires protection and maintenance of the status Quo. Refer to **CHARTER HOUSE INVESTMENT LTD. VERSUS SIMON K. SANG & 3 OTHERS CIVIL APPEAL (2010) eKLR.**

In this Authority, the court goes ahead to hold that the award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties.

15. The circumstances of the matter herein, are on the face of it a challenge to what was done pursuant to a decree which stands unchallenged. Therefore to seek to stop beaconing which has already been done defeats logic. That would amount to issuing an order in vain. Thus prayer No.4 of the motion dated 4th June 2014 cannot be granted.

16. The alternating prayer No. 5 in the same motion seeks to force the District Surveyor Kajiado to place beacons as they exist in the RM map.

The same is couched in mandatory form. The same would amount to supplanting what was implemented pursuant to a decree produced by an award which still stands unreviewed.

That would amount to reviewing or setting aside the decree arising by the award which stands to date unchallenged.

17. Since implementation of the award arising from a consent by parties herein, has taken place, the court finds that the motion herein has no merit and makes the following orders:

1. The Motion dated 4th June 2014 is dismissed.

2. The costs of the Motion are awarded to the Respondents.

DATED, SIGNED and DELIVERED at MACHAKOS this 17TH day of OCTOBER, 2014.

CHARLES KARIUKI

JUDGE