



REPUBLIC OF KENYA

High Court at Busia

Miscellaneous Application 123 of 2011

PIUS BEN OKOJO OMOIT

PETITIONER.

=VERSUS=

THE CHAIRMAN AMAGORO LAND DISPUTES

TRIBUNAL

FRANCIS EMEKEDE

MIKE ICHAUSI

NIXON IBULOI

SOLOMON ENYATI.....RESPONDENTS.

R U L I N G .

PIUS BEN OKOJO OMOIT hereafter referred to as the Applicant filed the application dated 07.07.2011 under certificate of urgency through his Advocate, M/S. A.B. Khakula Advocate on 08.07.2011 which is the same date he filed his petition. The application is by way of Chamber Summons and stated to be, “ Under Article 2 (1), 20, 21 (1) 23 (3) 40 (1), 47 (1) and 50 (1) of the constitution of Kenya (Supervisory), jurisdiction and protection of fundamental Rights and Freedom of the individual High Court practice and Procedure Rule 2006 and all enabling provisions of the law.” The application seeks for orders:

- “ 1. That this application be heard exparte at first instance.
- 2. That orders of prohibition do issue temporarily prohibiting the Respondent by themselves, servants, agents, or whomsoever from alienating the petitioners’ parcel of comprised in the title No. North Teso/Kocholia/733 or in any manner interfering with the petitioner’s possession of the said land pending interpartes hearing of this application.
- 3. That orders of prohibition do issue prohibiting the Respondent by themselves themselves, servants, agents or whomsoever, from alienating the petitioner’s parcel of comprised in the title possession of the said land pending hearing and determination of the petition filed herein
- 4. That costs of this application be provided for.”

The grounds on which the application is based are:

- a) "That the Respondent are in the process of subdividing the Applicant's land and exercise which contravenes his constitutional rights.
- b) That the petitioner stands to suffer irreparable loss and damage if conservatory orders are not issued herein.
- c) That the 1st Respondent acted in excess of its jurisdiction.
- d) The proceedings before the 1st Respondent in which the petitioner and the 2nd, 3rd, 4th and 5th Respondent were parties were a nullity and unconstitutional for all purposes."

The application is supported by the affidavit of Pius Ben Okojo Omoit sworn on 07.07.2011 and further affidavit sworn on 24.01.2013 which counsel indicated was erroneously headed "replying affidavit of Francis Emikede the 2nd Respondent sworn on 14.02.2012. He indicates at paragraph 1 of the said replying affidavit that he swore the affidavit with the authority of his co-respondents who I take to be 3rd, 4th and 5th Respondents'.

Having perused the court record, I find the matter has already been certified urgent and interim orders in terms of prayer 2 granted on 12.7.2011 and consequently extended on 05.06.2012 obviously to the next hearing date which was indicated as 13.11.2012. I take it that the order lapsed as there was no court appearance on 13.11.2012 and there has been no attempt since to reinstate the orders and extend the same by either party.

The prayers the court will make a determination on are prayers 3 and 4 of the application.

The applicant, in his supporting and further affidavits deponed on 07.07.2011 and 24.01.2013., swore on the following facts among others:

1. That he is the registered proprietor of Land parcel North Teso/Kocholia/753. However the certificate of official search annexed and marked PB 001 is for parcel North Teso/Kocholia/733.
2. That the 2nd to 5th Respondent filed land dispute No.17 of 2009 with the 1st Respondent which made an award which was adopted as courts judgment on 10.07.2009 in Busia PMCC. LDT No. 57 of 2009.
3. That he was never served with the Land Dispute Claim papers and only got to know of the case in the Land Tribunal through his relatives.
4. That the Land Disputes Tribunal had no jurisdiction to deal with the matter and its process of having the matter heard without his involvement offended the principles of natural justice, equity and fair play. His constitutional rights contravened.
5. That Land Parcel North Teso/Kocholia exists.
6. That it is not true to say the Respondents have been in possession of the Land in question.

The affidavit of Francis Emikede in reply restates the following facts:

1. That Land Parcel North Teso/Kocholia/733 is nonexistent the same having been subdivided through the court order of 13/04.2011 in Busia. PMCC 57 of 2009 resulting to parcels 3277 to 3281. I notice certificate of official searches availed are for parcels North Teso/Kocholia/3277, 3279, 3280 and 3281 registered in the names of Namaan Opo Enyatta, Francis Omekede Murunga, Mike Papa Ichasi and Nixon Ebuloi Etyang respectively. Namaan Opo Enyatta was registered with parcel 3277 on 26.07.2010 while Francis Omekede Murunga was registered with parcel 3279 on 11.10.2011. The parcel 3280 was registered in the names of Mike Papa Ichasi on 11.10.2011 and Nixon Ebuloi Etyang was registered with parcel 3281 on 8.8.2011.

2. That they have been in possession of the land since the 1970's and have enjoyed exclusive possession since then. The applicants' counsel Mr. Khakula Advocate made his submissions during the hearing. He submitted that they have established a prima facie case with his chances of success and hence entitle to the injunction. He said the Applicants rights under articles 40, 47 and 50 of the constitution would be infringed if their prayers were not granted. He submitted the Applicants would suffer irreparable loss if the prayers were not granted and the balance of convenience should be in their favour as the applicant is the registered owner of the suit property. He added that the Respondents have been disobeying the court orders and that the Applicant has come to court with clean hands and deserves the prayers sort.

It is established in our country Kenya, that there are three main factors to be considered in determining whether or not to grant a preliminary injunction. (*See Giella –vs- Casman Brown*). These factors are:

- a) The Applicant must show a high probability of succeeding on merit in the suit.
- b) That the applicant is likely to suffer irreparable harm if injunction is not granted.
- c) That on a balance of convenience the Applicant should get the order.

Hon. Justice J.M. Ngugi in *Symon Gatutu Kimamo and 587 others* versus East African Port Land cement company limited, Machakos H.CC. NO. 333 of 2011 in his ruling of 14.12.2012 and read for him by Justice G.M. Dulu stated:

“ 8. To these three factors one might add another factor which a court is at least, entitled to take into account after the first three: Public interest. A temporary I injunction will not normally issue if there will be harm to the public interest resulting from its issuance”

The honourable judge also referred to Justice Musinga take on the Giella case principle in the case of *Satrose Ayuma and 11 others –vs- The Registered Trustees of the Kenya Railways Staff Retirement Benefits scheme & 2 others (2011)* eKLR where the Honourable judge stated:

“In application for interlocution injunction to restrain breach of a fundamental right, the court may have to go beyond the ordinary tests as stated in *Giella -vs- Cassman Brown co. ltd*. While the applicants must demonstrate that there has been breach or threatened breach of their constitutional rights and thereby show that they have a prima facie case with a likelihood of success, the court has a duty to consider whether grant or denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the Bill of Rights. The court is enjoined to give interpretation that promotes the values of the democratic society based on human dignity, equality, equity and freedom. Dignity of the people out to be a core value in our constitutional interpretation.”

Returning to the application dated 07.07.2011 the provisions of the law under which it has been based are set out below with a summary of its contents.

- a) Article 2 (1) of the constitution 2010 Emphasizes the supremacy of the constitution and that it binds all persons and state organs in Kenya.
- b) Article 20 of the said Constitution contains he extent to which the Bill of rights applies.
- c) Article 22 (1) of the said constitution provides the enforcement of Bill of Rights giving every person a right to institute court proceedings.
- d) Article 23 (3) of the said constitution sets out the remedies available in proceedings brought under Article 22 of the Constitution.
- e) Article 40 (1) of the Constitution restates the right of every person to acquire and own property.

f) Article 47 (1) of the Constitution grants every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and:

g) Article 50 (1) of the Constitution restates the right of every person to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court, tribunal or body.

The Amagoro Land Disputes Tribunal was among the tribunals established under S.4 of the Land Disputes Tribunal Act now repealed on 30.08.2011 through the Environment and Land Court Act 2011. The Tribunal's award was adopted on 10.07.2009 which clearly shows it was made during the life time of the Tribunal. No appeal or judicial review application was preferred against the decision of the said tribunal as adopted by the lower court instead the Applicant filed the petition dated 07.01.2011 together with the application subject matter of this ruling. It is therefore important to consider whether the Applicant has availed sufficient material before the court that can at a glance show he has a case with high chances of success to warrant the issuance of the interlocutory injunction.

Prayers 1, 11, and 111 belong to the regime of judicial review orders. Order 53 Rule 2 of Civil Procedure Rules requires leave to apply for certiorari be made before the expiry of six months from the date of the order complained of. It is now over three years from 10.07.2009 when the Tribunal award was adopted by the lower court as judgment in Busia PM CC LDT No. 57 of 2009.

Section 79 G of Civil Procedure Act requires appeals to the High court to be filed within 30 days.

Even though at this stage of the proceedings the court is not at liberty to make final and conclusive findings of both fact and law as that will have to wait until after all the evidence has been recorded and submissions, if any, made, provisional conclusions so as to determine whether or not Applicant has established a prima facie case are necessary.

Prayers (11) (111) (1V) and (V) in the petition flows from prayers (1) and the execution that has taken place has been through the orders issued in Busia PMCC . LDT 57 of 2009 and has admitted under paragraph 11 of his supporting affidavit that he got to know of the case when it was in the Land Tribunal he never challenged those execution orders in accordance with the provisions of the law. If indeed he challenged those orders there has been no disclosure in this case about such a challenge. The Land Disputes Tribunal and the lower court that dealt with the matter were legally established and provisions of the law are clear on how to move them for redress where an order or decree one does not agree with has been issued by them. The Tribunal (1st Respondent) and the lower court who are not named as party in this petition cannot be said to have infringed on the Applicant rights when they were moved for the various orders by the 2nd to 5th Respondent. This is especially so when the orders have not been legally challenged for the last three years and move.

From the foregoing, I find the Applicant has failed to convince the court that he has a case with a high chance of success. On merit and the injunctive order prayer for cannot issue. The application dated 07.007.2011, under certificate of urgency, is without merit and is dismissed with costs. For avoidance of doubt the interim orders are also vacated.

Delivered in open court in presence of the Applicant/Petitioner and absence of the advocate and the Respondents.

**S. KIBUNJA,
JUDGE.
18.04.2013.**