



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 202 of 2012

STEPHEN MWACHOHA PLAINTIFF

V

MGANDI KAMBIJIDEFENDANT

RULING

[1] Mr. Stephen Mwachoha filed this application on 21st September 2012 under a certificate of urgency against Mr. Mgandi Kambiji Kandoro the respondent herein. The application came before the court ex parte on 20/12/2012. The application was certified as urgent and temporary orders were granted in terms of paragraph (b) of the notice of motion dated 21/9/2012. The application was fixed for inter partes hearing on 19/2/2013.

[2] On 19//2/2013 Mr. Gekonde Advocate appeared for the applicant,while Mr. Obaara Advocate appeared for the respondent. Mr. Gekonde learned counsel for the applicant sought orders for injunction against the respondent to restrain the respondent from cutting coconut trees on the plaintiffs plots. He also sought for orders to restrain the respondent from doing anything on the plaintiffs unregistered community land. He stated that the respondent has illegally trespassed on his land and was illegally cutting coconut tress on the said plaintiffs land at Rabai Ruruma Pantani. He said the Plot is about 10 acres. He avered that the plaintiff/applicant had inherited this land from his father. He annexed photographs of the suit land. Heargued that there had been many suitsbetween him and others. He said that he had Mombasa High Court Civil Appeal No. 100/2008 between himself and one Nzumbe. He annexed a copy of that appeal to this application. He said that the respondent has entered his land and was interfering with graves therein and causing mayhem and stealing areas reserved as graves.

[3] On his part Learned Counsel Obara for the respondent opposed the application and argued that the application does not pass the test of applications of this nature. He stated that his client was not a party to Mombasa High Court Civil Appeal No. 100/2008 aforesaid. He said that the issue of ownership of that land has not been settled. He said that the application must be clear as to what he wants since on the one hand says the land belongs to him while on the other hand he says the land is community land. He argued that if the land was community land then the applicant must show that he had consent from the community to file this suit. He said that he had filed many suits concerning that land and that, if the applicant was the owner he should have been a party to those suits. He annexed photographs to show that the coconut trees are intact. He said that his client have all along been in occupation of the suit land until the year 2009 when the applicant in an attempt to draw ownership to himself wrote a letter dated 20/5/2009 claiming ownership. The respondent argued that the letter was replied to on 4/6/2009, he argued that the application was not merited and it should be dismissed.

[4] I have carefully perused the application by the applicant. I listened to the spirited arguments by counsels for the parties herein. I have considered the necessary applicable law.

The applicant filed the present suit making various claims. It is upon that suit that this application is anchored.

Paragraph 3 of the plaint states as follows:

“ The plaintiff avers that he is the owner of a plot of land unregistered (Community Land) situated at RABAI RURUMA PANTANI which he inherited from his father.”

This paragraph to me is a contradiction in terms. The applicant says he is the owner of the suit land. On the same breath he says this is community land. The applicant can only be either owner of private land or a beneficiary in a community land. If the land is his he can file the suit. If it is community land, then he must have consent of the other co-owners to file suit. He had not annexed title to this land. He has also not annexed any consent from the community giving him the *locus standi* to bring a representative suit for ownership. The Constitution of Kenya, the Land Act and Registration of Land Act has recognized the various land tenures namely Government, Community and Private Lands. There are well stipulated procedures of bringing actions in Court in each of these land tenures. It is the duty of the applicant to chose as to which of the three land tenures he wishes to use while filing his suit. He cannot bring a suit as a private owner and as a community owner at the same time on the same piece of land.

[5] The applicant annexed appeal No. 100 of 2008. In this appeal, he is the appellant. He lost the suit that was before the elders in Award No. 23/1983. The land was found to belong to the respondent one Dzumbe Chere. The Respondent herein was not a party to that suit. This appeal gives a huge credit to the respondents assertion that the suit land does not belong to the applicant. If that were not so, what would be the purpose of that appeal against award No. 123/1983?

[6] Court orders must be specific. If the Court were to give the court order as prayed what piece of land would the respondent be restrained from trespassing and cutting coconut trees? What land is the plaintiff illegally cultivating? And what land would the respondent be declared not to own. The Court orders must not be granted in vain. Orders should issue that a party to which they are directed against, should be able to easily identify understand and comply. I unfortunately cannot with profound respect to the applicant, be able to give the orders sought. The application is indeed unmerited and is dismissed with costs to the respondent.

DATED and delivered in open court at Mombasa this 13th day of May, 2013

S.N. MUKUNYA

JUDGE

13.5.2013

In the presence of:

Gekonde for the plaintiff - present

Obara for the defendant - absent