



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 30 of 2012

NO.571

JORAM GUTWI CHACHA.....1ST PLAINTIFF

GETAMAN CHACHA.....2ND PLAINTIFF

VERSUS

MARWA WANKORI.....DEFENDANT

RULING

The plaintiff/Applicant came to court through a notice of motion dated 1st February, 2012 and filed in court the same day seeking:-

- 1) *The Application herein be certified urgent and the same be heard Ex-parte in the first instance.*
- 2) *Pending the hearing and determination of the instant Application, the Honourable court be pleased to grant an Interim Order of Injunction restraining the defendant/*

Respondent either by himself, agents, servants, employees and/or anyone claiming under the defendant/respondent, from entering, re-entering, trespassing onto, cultivating, digging, building structures, interfering with add/or in any other manner, whatsoever, dealing with the suit land, that is, LR NO. NYABASI/BOMERANI/390 and/or any portion thereof.

- 3) *The Honourable Court be pleased to grant an Order of Temporary Injunction restraining the Defendant/ Respondent either by himself, agents, servants, employees and/or anyone claiming under the defendant/Respondent, from entering, re-entering, trespassing onto, cultivating, digging, building structures, interfering with and/or in any other manner, whatsoever, dealing with the suit land, that is, LR NO. NYABASI/BOMERANI/390 and/or any portion thereof, pending the hearing and determination of this suit.*
- 4) *Costs of this application be borne by the Defendant/ Respondent.*
- 5) *Such further and/or other orders be made as the court may deem fit and expedient.*

1. The application was supported by an affidavit sworn by the 1st plaintiff/Applicant on behalf of himself and the second applicant averring that the 2nd plaintiff/applicant together with 2 other persons now deceased are the registered proprietors in common of LR.NO. NYABASI/BOMERANI/390

(hereinafter referred to as suit land) which parcel of land was registered in their joint names on 5th April 1977; that the suit land has been in the possession and occupation of the 2nd plaintiff/Applicant and they have cultivated the suit land for purposes of earning a living and livelihood; that on 23rd October, 2006 the defendant/Respondent lodged a complaint with Kuria District and Disputes Tribunal (Kegonga Division) claiming ownership and title over a portion measuring 4 acres of the suit land; that upon lodgment of complaint, the Kuria District and Disputes Tribunal (Kegonga Division) entertained, deliberated upon and finally adjudicated on the same culminating into a decision being rendered on 29th October, 2006 whereby the said Land Dispute Tribunal decreed that a portion of the suitland measuring 4 acres be excised and registered in the name of the defendant/Respondent. The deponent further averred that the defendant/Respondent lodged the decision of the tribunal, for purposes of adoption and the same were adopted by the Resident Magistrate court at Kehancha on 14th June, 2007. The deponent avers that that the proceedings and decision of both Kuria District Land Disputes Tribunal (Kegonga Division) and the Resident Magistrate's Court at Kehancha were done without jurisdiction and without the participation of the plaintiffs herein contrary to the rules of natural justice; that though the defendant/Respondent has yet to be registered as proprietor in respect of the 4 acres. Plaintiff's/Applicant's are apprehensive that their title may be on the verge of cancellation on the basis of illegal and void orders; that the decisions of the tribunal and court at Kehancha, sought to be enforced were obtained without jurisdiction and in excess of the statutory mandate granted to the tribunal, and that as a result of the decisions by the Kuria District and Disputes Tribunal (Kegonga Division) the court at Kehancha, the defendant/respondent is now threatening to take possession and/or occupy a portion of the suit land measuring 4 acres, as the defendant/respondent has embarked on demarcating a new boundary, planting sisal and destroying the existing live fence over the 4 acres of the suit land.

2. The deponent further averred that that his Appeal to the Provincial Appeals Committee, Nyanza province, yet to be heard and or determined to date, and overtaken by events following the enactment of the new Land Act and the repeal of Act No. 18 of 1990. The deponent contends that the threatened actions of the defendant/respondent shall deprive the plaintiffs of a substantial portion of the suit land, which forms their only source of livelihood and they are thus bound to suffer irreparable loss and damage which cannot be compensated by payment of damages. He also avers that possession of a portion of the suit land may affect, alter and permanently alter the face of the suit land. The deponent therefore avers that in light of the above facts and the fact that they have the absolute and/or exclusive right to possess and/or occupy same, the balance of convenience tilts in their favour. He also says that the defendant/respondent shall not suffer any loss if the order sought is granted and further that the plaintiffs are ready and willing to give an undertaking as to damages, pursuant to granting of the order of injunction.

3. The Defendant/Respondent on their part filed a replying affidavit to the Notice of Motion dated 1st February, 2012 and averred that both parties involved in these proceedings were party to the tribunal proceedings whose decision was in accordance with the law as it then applied. He also averred that the tribunal did not act in excess of its jurisdiction in their award and that the issues for determination were within mandate of the tribunal which properly reached a reasoned verdict about the ownership of land. The Defendant/ Respondent also contended in his affidavit that the Resident magistrate acted properly and within the law in adopting the award by the tribunal. The deponent denied that the tribunal acted contrary to the provisions of **Section 45** of the **Law of Succession Act** as the said parcel of land belonged to him; that the Resident Magistrate had the jurisdiction to adopt and enter judgment in terms of the decision of the tribunal. He further averred that Applicants/Plaintiffs would have in the first instance objected to the matter being referred to the tribunal if they had doubts of the court's jurisdiction and that the issues which were deliberated upon by the tribunal were the very issues which the court had referred to the tribunal for determination. He prayed that the court dismisses the applicant's application as the same has no merit and is made in bad faith.

4. By a notice of preliminary objection dated 9th March 2012 the defendant raised an objection to the plaintiff's application dated 1st February, 2012 on the ground that the suit as filed was bad in law in view of the fact that the only two options for challenging land disputes tribunals award are through an appeal to the Provincial Appeals Committee within 30 days and before the award was registered in the magistrate

court, or by way of filing proceedings for Judicial Review in the High Court under **Order 53** of the **Civil Procedure Rules**. It was contended that after the decision of the tribunal was registered in the magistrate court, the decision of the Land Disputes Tribunal cannot be challenged through a suit. The Defendant further contended that the plaintiffs/applicants filed this action on 1st February, 2012 seeking injunctive orders about 6 years after the tribunals award was adopted as a judgment of the court and that plaintiffs/applicants must not be allowed to circumvent the appellate procedure provided under the **Land Disputes Tribunals Act 1990** which required him to lodge his appeal against the tribunal award within 30 days.

5. I have now carefully considered the pleadings, the submissions and the law. Concerning the Preliminary Objection, I am of the considered view that since this case involves land, it would be imprudent for this court to dismiss the suit by way of summary procedure. It is not in doubt that a new land Act as required by **Article 64** of the **Constitution** is now in place. The new land law has repealed all other land laws including the **Land Dispute Tribunals Act, No.18 of 1990** and the **Registered Land Act, Cap 300** of the **Laws of Kenya**. The **Land Act, 2012** must be taken into account in determining this matter. The **Land Act, 2012** is:-

“An Act of Parliament to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land based resources and for connected purposes.”

Article 68 as read with **Article 60** of the **Constitution** establishes principles of land policy in Kenya. One of the principles to be applied is found under **Article 60 (1) (a)** and **(b)** relating to equitable access to land and security of land rights.

6. In light of the above provisions authorities such as **Eldoret HCCC No.266 of 2001 – Emily Ngeyoni & another –vs- Nicholas Kipchumba Kogo and another** must be looked at with a different set of lens. The case of **Rally –vs- Mackman [1983] 3 All ER 68** is distinguishable in the sense that the plaintiffs herein have come to court before expiry of the 6 years statutory period from the time the cause of action arose.

7. Applying the above principles, to the instant case, I am persuaded that the plaintiffs/applicants have satisfied the first two conditions set out in the **Giella case**. In case I am wrong in this regard, I am satisfied that the balance of convenience tilts in favour of the plaintiffs/applicants since they are title holders to the suit land. Further, since the parties herein are warring over a portion of the suit land, it is in the best interests of justice to stop any dealings therein until this suit is heard and determined or until further orders of the court.

8. In the premises, the Notice of Motion dated 1st February 2012 is allowed in terms of prayer 4 thereof, that is to say that the Defendant/Respondent either by himself, agents, servants, employees and/or anyone claiming under the Defendant/respondent be and is hereby restrained from entering, re-entering, trespassing onto, cultivating, digging, building structures, interfering with and/or in any other manner whatsoever, dealing with the suit land, that is LR no. NYABASI/BOMERANI/390 and/or any portion thereof pending the hearing and determination of this suit or until further orders of the court. The plaintiffs/applicants shall have the costs of this application.

9. It is so ordered.

Dated and delivered at Kisii this 22ND day of November, 2012

RUTH NEKOYE SITATI,

JUDGE.

In the presence of:-

Mr. Nyagwencha for Oguttu Mboya for plaintiff

Mr. Ondari for Nyangosi for defendant

Mr. Bibu - Court Clerk.

RUTH NEKOYE SITATI,

JUDGE.