



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.53 OF 2011

KIGOCHI MWAURA.....PLAINTIFF

VERSUS

JOSPHAT NDUNGU MWAURA.....DEFENDANT

R U L I N G

1. Kigochi Mwaura (hereinafter referred to as the applicant) has moved this court by way of notice of motion under Order 40 Rule 1, 2 and 4 and Order 51 Rule 1 of the Civil Procedure Rules 2010. The applicant is seeking an order of a temporary injunction restraining Josphat Ndungu Mwaura (the defendant), his servants or agents from interfering with the applicant's possession and quiet enjoyment of half share of Githunguri/Kanjai/646 pending the hearing and determination of the applicant's suit. The application is anchored on the following grounds:

- (i) That the plaintiff and the respondent are registered proprietors in common and in equal shares of all that parcel of Land No.Githunguri/Kanjai/646 since 1964.
- (ii) That sometimes in the year 2005 the defendant filed Tribunal Case No.16/20/9 of 2005 before the Githunguri Land Disputes Tribunal which instead of dealing with the alleged boundary issue went ahead and purportedly gave the land disproportionately giving the defendant 3.905 Acres and the plaintiff 3.095 Acres thereby cancelling the existing title which clearly stated ownership at half.
- (iii) That it is the plaintiff's case that order was, is a nullity as the Tribunal did not have jurisdiction to cancel the title.
- (iv) That the plaintiff filed Misc. Application No.358 of 2006 Kigochi Mwaura vs Githunguri Land Disputes Tribunal and 2 others but the same was dismissed for having been filed out of time.
- (v) That it is the plaintiff's case that the High Court has original and unlimited jurisdiction to hear and determine civil matters of this nature especially where it is manifestly clear that allowing the decision of Tribunal to stay would be tantamount to sanctioning an illegality.
- (vi) That it is unconstitutional to be deprived of one's property through a process that is in its self questionable.

2. The applicant has also sworn a supporting affidavit in which he reiterates that the suit property is jointly owned by plaintiff and defendant as proprietors in common, in equal shares, and that the Githunguri Land Disputes Tribunal acted in excess of its jurisdiction by challenging a valid title, and therefore its order was a nullity.

3. In his plaint filed on 11th February, 2011, the applicant seeks inter alia a declarations that the applicant has at all times since 1964 held one half of the suit property and that the Githunguri Land Disputes Tribunal did not have jurisdiction to cancel the title to the suit property. The applicant urges the court to issue the interlocutory orders to avert the execution of the Tribunal orders.

4. Mr. Ogwe who argued the application on behalf of the applicant argued that the matter before the court was not previously dealt with on merit. He pointed out that the applicant is now raising a new issue, which is altering the title and sub-divisions issues which had not been previously dealt with in the previous suits.

5. The application was opposed through grounds of opposition filed on 25th February, 2011. The grounds raised were as follows:

(i) The suit filed herein is *res judicata* in view of the High Court decision in the miscellaneous Application No.358 of 2006 as read with the decision of Githunguri Land Disputes Tribunal No.9 of 2005 adopted by Githunguri Senior Resident Magistrate Court.

(ii) The whole suit and the application is an abuse of the court process.

(iii) Application dated 10th February, 2011 is devoid of merit and no prima facie case is disclosed in the pleadings filed and the affidavits to warrant issuing an injunction against the defendant.

6. Mr. Kamiro who argued the application on behalf of the defendant submitted that the Githunguri Land Disputes Tribunal had already dealt with the issue of sub-division and that the order of the Tribunal cannot be challenged by way of a plaint but ought to be addressed by way of Judicial Review. It was pointed out that the applicant had filed Judicial Review application No.358 of 2006, and that he cannot purport to challenge the judgment of the court in Judicial Review 358 of 2006 by way of a plaint.

7. Having given careful consideration to this application, I find that the applicant is being economical with the truth. The applicant has attempted to mislead the court that Misc. Application No.358 of 2006 was not considered on merit but was dismissed for having been filed out of time. A look at the Judgment which fortunately was attached to the applicant's affidavit, shows that the court noted:

“Firstly, it is evident that the applicant has come to this court more than 6 months after the actions complained of. This is contrary to Order LIII Rule 2 of the Civil Procedure Rules. Nonetheless, if the applicant can demonstrate that the actions of the respondents were void ab initio, then this court would be entitled to issue the orders sought notwithstanding the delay because the court cannot ignore an illegality.”

8. The court then proceeded to consider whether the Tribunal had jurisdiction to deal with the matter and concluded thus;

“In this case, the dispute does not relate to ownership or title to the suit property, but the dispute relates to the division of the suit property which is admitted to be jointly owned by the applicant and 3rd respondent. In my view, this was a matter within the jurisdiction of the Tribunal as stated under Section 3(1) of the Land Disputes Tribunal Act as it concerned division of the land subject of the dispute. In the circumstances I find that the Tribunal acted within its powers. The applicant has not satisfied this court that the Tribunal acted in any way that was inconsistent with the Land Disputes Tribunal Act or vitiated the proceedings before it. In the circumstances, I find no merit in this application and do therefore dismiss it with costs.”

9. I find that the applicant has failed to establish a *prima facie* case as the issues he is raising are issues which have already been determined in Misc. Application No.358 of 2006. Accordingly, there is no basis upon which this court can issue the order of interlocutory injunction which is being sought. I find that this application lacks merit. It is accordingly dismissed with costs.

Dated and delivered this 18th day of May, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Ms Oburu H/B for Ogwe for the plaintiff
Advocate for the defendant absent
Kosgei - Court clerk