



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL SUIT NO. 109 OF 2010**

**MARKO MOKAYA NYAGESOA ..... APPLICANT/PLAINTIFF**  
**VERSUS**

**JAMES MOGI ONKOBA ..... RESPONDENT/DEFENDANT**

**RULING**

By an application dated 11<sup>th</sup> May 2010 the plaintiff sought an interlocutory injunction to restrain the defendant, his agents and/or servants from trespassing and/or interfering with a parcel of land known as **West Kitutu/Bokingoina/2050**, hereinafter referred to as “**the suit land**”. The application was supported by an affidavit sworn by the plaintiff where he stated that he is the registered proprietor of the suit land and another parcel of land known as **West Kitutu/Bokingoina/2159**. The two parcels of land share a common boundary. He stated that since 2<sup>nd</sup> April 2009 the defendant and his/or servants and agents had been trespassing on to the suit land and had done various acts of destruction thereon including, destroying a live fence, demolishing three semi permanent houses, destroying two latrines, chased away tenants from their rental houses, destruction of the residential/rental houses and carrying away iron sheets and timber. Prior to that the Marani Land Disputes Tribunal had given an award in favour of the defendant in respect of the suit land. The tribunal directed that his title deed in respect of the suit land be nullified and the defendant be registered as the proprietor thereof.

The plaintiff further stated that although the decision of the tribunal was read and dated the 17<sup>th</sup> day of April 2008, he came to know of it when the defendant started trespassing unto the suit land in April 2009. Thereafter he instructed the firm of Kimanga & Company Advocates to present a claim against the tribunal’s decision. The said advocate filed **Miscellaneous Civil Application No. 51 of 2009** but the same was struck out for having been filed outside the statutory period of time. The plaintiff tried to employ various administrative measures to save his land but he did not succeed. He contended that the decision of the said Land Disputes Tribunal was a nullity in law as the tribunal exceeded its jurisdiction. He therefore urged the court to grant the orders as sought.

The defendant filed a replying affidavit and stated, *inter alia*, that his late father, **Christopher Wankoba**, had filed HCCC No. 134 of 1989 before this court claiming ownership of the suit land. He however passed away in 2006 before the suit was finalized. The suit was eventually dismissed for want of prosecution. There was a parcel of land known as **West Kitutu/Bokingoina/1517** which belonged to his late father but had been registered in the name of the plaintiff’s late uncle known as **Ondieki Mogi** who was to hold the same in trust for the plaintiff’s father. As at 1987 when the said Ondieki Mogi passed away the title deed in respect of that parcel of land was intact. But in 2008 the plaintiff discovered that the said land had been subdivided into two portions, **West Kitutu/Bokingoina/2158** and **West Kitutu/Bokingoina/2159** and the first one was registered in the name of the plaintiff and the second one in the name of the defendant’s late uncle. That promoted the defendant to file the claim before Marani Divisional Land Disputes Tribunal vide case **No. 4 of 2008**. The said tribunal gave an award in his favour and the same was subsequently adopted as a judgment by the Kisii Chief Magistrate’s court vide **Miscellaneous Civil Application No. 133 of 2008 on 2<sup>nd</sup> November 2008**. Thereafter the plaintiff filed **HCCC Misc. Civil Application No. 51 of 2009** seeking leave to commence judicial review proceedings for purposes of obtaining an order of certiorari to quash the tribunal’s decision. The plaintiff withdrew the said application shortly after filing the same and then filed the present suit. The defendant denied having trespassed unto the suit land and/or destroying the plaintiff’s property as alleged. He added that together with his mother and brothers had been living on the suit land since 1986. Having lived there for more than 12 years the plaintiff had no right to interfere with their peaceful occupation of the land. He urged the

court to dismiss the plaintiff's application.

There is no dispute that the Marani Divisional Land Disputes Tribunal gave its decision on 17<sup>th</sup> April 2008. There is no evidence that the plaintiff was not present when the said decision was delivered. Thereafter the decision was filed in the Chief Magistrate's Court for adoption. On 17<sup>th</sup> October 2008 the defendant herein filed an application seeking an adoption of the said decision. The application was argued in the presence of both parties on 2<sup>nd</sup> December 2008 and although the plaintiff herein raised the issue of the tribunal's jurisdiction, Shinyada, R.M. rightly held that she had no power to vary the tribunal's decision. She pointed out that any party who was aggrieved by the tribunal's decision had the option of filing an appeal to the Provincial Land Disputes Appeal Committee or filing an application for judicial review before the High Court. She therefore proceeded to adopt the decision of the tribunal as a judgment of the court.

On 15<sup>th</sup> May 2009 the plaintiff filed misc. Application No. 51 of 2009 before this court seeking leave to commence judicial review proceedings. However, the plaintiff's advocate withdrew the said application upon realizing that the same had been made outside the six months' statutory period. That was on 20<sup>th</sup> May 2009. The plaintiff took no other action until 21<sup>st</sup> April 2010 when he filed the present suit seeking *inter alia*, a declaration that the decision of the Marani Divisional Land Tribunal aforesaid was null and void.

It is apparent that the plaintiff did not file any appeal against the tribunal's decision and neither did he obtain judicial review order of *certiorari* to remove into this court for purposes of quashing the aforesaid decision. The **Land Disputes Tribunal Act** has set out clear provisions as to how a party aggrieved by a decision of such a tribunal ought to do.

Although the plaintiff stated that the defendant moved into the suit land in April 2009 the defendant stated that he has been in occupation of the same since 1986. The defendant has also denied that he has destroyed any property belonging to the plaintiff. The plaintiff did not adduce any evidence in support of his claim to that effect. It is also evident that the parties herein have been in court over the suit land since 1989 when the defendant's father filed **HCCC No. 134 of 1989**. It is therefore most likely that the defendant and his family members have been living on that land since 1986 as alleged.

In view of the foregoing, I am not satisfied that the plaintiff has shown a *prima facie* case with a likelihood of success. The balance of convenience also tilts in favour of the defendant who is in occupation of the suit land. Consequently, I dismiss the plaintiff's application with costs to the defendant.

**DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2010.**

**D. MUSINGA  
JUDGE.**

**28/9/2010**

Before D. Musinga, J.

Mobisa – cc

Mr. Minda for the Applicant

N/A for the Respondent

**Court:** Ruling delivered in open court on 28<sup>th</sup> September 2010.

**D. MUSINGA  
JUDGE.**