



**REPUBLIC OF KENYA
HIGH COURT AT KISII
CIVIL CASE 139 OF 2009**

NAFTAL MACHANI AMOSI PLAINTIFF

VERSUS

MOGERE AMOS OMBUI DEFENDANT

RULING

This is an application by the plaintiff seeking the following orders:

“1...

2...

3. That this honourable court be pleased to issue a

temporary injunction restraining the

defendant/respondent by himself, his agents,

servants and/or workmen or any other person

claiming through him from wasting, damaging,

destroying, using, alienating, entering in,

disposing of or otherwise howsoever manner

from interfering with the suit land parcel No.

ISOGE/KINENI/311 pending the hearing and

determination of this suit.

4. Or in the alternative this court do make an order

inhibiting the dealing of land parcel No.

Isoge/Kineni/311 pending the hearing and

determination of this suit.

5. That the costs of this application be provided

for.”

In his affidavit in support of the application, the plaintiff deposed that he had all along been the registered owner of land parcel **No. Isoge/Kineni/Block I/70** measuring approximately 40.06 hectares. The title deed thereof was issued to him on 14th January 2004. That parcel of land was allocated to the plaintiff by Kineni Farmers Co-operative Society Limited where he was a member after the said society subdivided its land among its members. The land was subdivided in 1967 and each member was allocated a parcel of land measuring 100 acres. In 1974 the plaintiff allowed the defendant, who is his brother, to stay on his parcel of land. The plaintiff gave to the defendant a portion of his land measuring about 8 acres.

Sometimes in 2007 the defendant filed a case against the plaintiff before the **Borabu Land Disputes Tribunal**, to wit, **Tribunal case No. 05 of 2007**. He was claiming an additional acreage of the land from the plaintiff. The hearing went on before the Tribunal but no specific date was set for delivery of the verdict. Without his notice, the said Tribunal awarded the defendant 40 acres. The Tribunal's award was thereafter adopted as a judgment of the court vide **SRM Misc. Suit No. 18 of 2007 at Keroka**.

The defendant proceeded to execute the aforesaid judgment by having land parcel No. Isoge/Kineni Block I/70 subdivided and on 19th August 2009, he was issued with a title deed in respect of the suit land (Isoge/Kineni/311). The defendant is now cutting down trees on the suit land and the plaintiff is afraid that he may dispose of a portion of the same.

In this suit, the plaintiff contends, *inter alia*, that the Borabu Land Disputes Tribunal had no jurisdiction to interfere with his title by ordering that the defendant be given a portion of his land. He seeks a declaration to that effect. He is also seeking cancellation of the defendant's title deed.

The defendant filed a replying affidavit and stated that he obtained a title deed for the suit land in a lawful manner. He said that the plaintiff did not challenge the judgment by the Borabu District Land Disputes Tribunal. He further stated that he has been on the suit land for over 30 years and he has built his homestead thereon with permission of the plaintiff. He denied that he was in unlawful occupation of the suit land and urged the court to dismiss the plaintiff's application.

In his submissions, Mr. Bosire for the plaintiff said that his client had a *prima facie* case with high chances of success in that the said Tribunal exceeded its jurisdiction in awarding a portion of the plaintiff's land to the defendant.

Mr. Masese for the defendant submitted, *inter alia*, that equity does not aid the indolent, saying that the decision of the Tribunal that is sought to be challenged was made and adopted on 21st August 2007. Since then the plaintiff had not successfully challenged the same and the defendant went ahead to execute the said judgment and obtained a title deed for the land that was awarded to him. In his view, the plaintiff's case has no chances of success. It had not been demonstrated that the defendant was trying to dispose of the suit land or any portion thereof.

The principles applicable in an application for interlocutory injunctive orders are now well settled and I need not restate the same. See **GIELLA –VS- CASMAN BROWN & COMPANY LIMITED** [1973] EA 358. The plaintiff has filed a suit seeking, *inter alia*, a declaration that the decision of the Borabu Land Disputes Tribunal case No. 05 of 2007 is null and void. He also seeks a declaration that the suit land belongs to him exclusively. On the other hand, the defendant claims that the said Tribunal lawfully awarded him the suit land and the said decision, having been adopted vide Keroka Misc. Civil Application No. 18 of 2007, he had lawfully acquired a title deed over the suit land. He filed a counter-claim seeking a declaration that he is the lawful sole proprietor of the suit land.

The plaintiff's suit and the defendant's counter-claim relate to the jurisdiction of the Land Disputes Tribunals Act. That jurisdiction is clearly set out in **section 3** of the **Land Disputes Tribunals Act, 1990**. **Section 3(1)** thereof states as hereunder:

“Subject to this Act, all cases of a civil nature involving a dispute as to –

(a) the division of, or the determination of

boundaries to land including land held

in common;

(b) a claim to occupy or work land; or

(c) trespass to land,

shall be heard and determined by a tribunal established under section 4.”

In view of the aforesaid provisions of the law, it is doubtful whether the Borabu Land Disputes Tribunal had jurisdiction to make orders which had the effect of nullifying the title deed in respect of Isoge/Kineni/Block I/70 which was in the name of the plaintiff. This is an issue that would be fully canvassed during the hearing of this case. But at this stage it appears to me that the plaintiff has established a *prima facie* case with a likelihood of success.

The defendant is now the registered proprietor of the suit land. He can therefore dispose of the land or any portion thereof or deal with it in any other manner including charging the same. While I appreciate that he has been occupying 8 acres of the suit land for over 30 years, it will be improper if he proceeds to deal with the rest of the land in a manner that may be prejudicial to the plaintiff's claim. There is nothing to prevent him from so doing unless he is restrained by an order of this court. The defendant should be allowed to continue using the 8 acres of land but not the remaining portion of the suit land. In that regard, the order that commends itself to me and which I hereby issue is a temporary injunction restraining the defendant, his servants and/or agents from disposing of, damaging, destroying or using the remaining portion of the suit land other than the 8 acres, pending hearing and determination of this suit. The costs of this application shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF SEPTEMBER, 2009.

D. MUSINGA

JUDGE.

24/9/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Leteipa for the Plaintiff

Mr. Masese for the Defendant

Court: Ruling delivered in open court on 24th September, 2009.

D. MUSINGA

JUDGE.