REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 113 of 2009

JERIAH KWAMBOKA KARORI……PLAINTIFF/APPLICANT

-VERSUS-

KEMUNTO KARORI……DEFENDANT/RESPONDENT

RULING

It is clear from the facts of the case that the Plaintiff/applicant is the registered owner of parcel of land Nyaribari Masaba/Bonyamasicho/616 which measures 0.8 Hectares. The defendant/respondent took the applicant to the Masaba Divisional Land Disputes Tribunal over the land. The applicant has not annexed the proceedings or the decision of the Tribunal, but it is clear from either side that the land was ordered to be subdivided to benefit the respondent and two deceased persons. From the Defence filed, the parties to this suit and the deceased persons were all the widows of the late Ondora Karori Onsoti. The decision of the Tribunal was adopted by the Kisii Chief Magistrate's Court. Following that, surveyors came to the land and subdivided it and put the respondent into occupation of one parcel. The applicant filed this suit seeking a declaration that the land belongs to her. She also sought a permanent injunction to restrain the respondent by herself, her servants and or agents from occupying any part of the land or in any way interfering with it. With the Plaint was filed the present application for a temporary injunction under *Order 39 rules 1,2 and 2A of the Civil Procedure Rules and section 3A of the Civil Procedure Act*. From the Supporting Affidavit, the respondent has entered the land and has begun plucking the applicant's tea.

The applicant's case is that she was not a party to the Tribunal's case or the adoption of the award. She is saying that her right to the land has been taken away without her being heard. The respondent is saying that the dispute has been properly determined by the Tribunal and an award given and adopted. Her case is that if the applicant was aggrieved by the decision of the Tribunal she ought to have appealed to the Appeals Committee or challenged the decision by way of judicial review.

This is an injunction application. The applicant has to show that she was a *prima facie* case with a probability of success; that she will suffer irreparable loss that cannot be compensated in damages; and that the balance of convenience's is in her favour. (*Giella –Vs- Casman Brown and Company Ltd [1973]E.A 358).*

I carefully listened to Mr. Nyachae for the applicant and Mr. Okenye for the respondent.

At this stage the Court should not judge the applicant's case. That will be done after full hearing. But is there a*prima facie* case? The land is in the name of the applicant. She's the *prima facie* owner of the land. However part of that land has been taken away following proceedings sanctioned by the *Land Disputes Tribunal Act No. 18 of 1990*. If the applicant was not invited to the proceedings or was aggrieved by the decision, the *Act* provides a remedy. There is an appellate machinery under *section 8(1).* If the applicant thinks that the Tribunal lacked jurisdiction to interfere with her ownership of the land she would have to resort to judicial review process. She has come by way of Plaint and not invoking the court's powers of judicial review.

The applicant is complaining that the respondent has caused the surveyors to subdivide her land into four portions and that the respondent has begun plucking her tea. In the application, she seeks that the respondent be restrained from the trespass or any other manner of interference. She is seeking a prohibitory injunction, quite unfortunately. Such an injunction is meant to prevent the future continuance or the repetition of the conduct of which the applicant complains and it does not attempt to deal with what has happened; that is left for the trial, to be dealt with by damages or otherwise. (See *East African Fine Spinners Ltd And Others –V- Bedi Investment Ltd, CivilApplication No. 72 of 1994atNairobi*). If the applicant wanted what has been done to be undone she should have requested for a mandatory injunction.

I do find that the applicant has not demonstrated a *prima facie* case.

It is clear that the value of any tea plucked can be ascertained. Similarly, damages for trespass can be

assessed. One cannot therefore say that whatever damage that has been occasioned cannot be compensated in damages.

The balance of convenience would, at this stage, tilt in favour of the parties who have valid decree which they are executing.

The application is consequently dismissed with costs.

Dated, signed and delivered at Kisii this 27th day of November, 2009

A.O. MUCHELULE
JUDGE
27/11/2009

A.O.Muchelule –J
Court clerk-Mongare
Mr. Bigogo for Mr. Nyachae for the plaintiff
COURT: Ruling in open court.

A.O.MUCHELULE
JUDGE
27/11/2009