



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Civil Case 8 of 2008**

**KOBIA M'MWIRABUA ..... PLAINTIFF**

**VERSUS**

**MWIRABUA M'IBERE ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT SURVEYOR IGEMBE DISTRICT ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

By a motion on notice filed in court on 29<sup>th</sup> January 2008 the applicant seeks that the respondents be restrained by an order of temporary injunction from entering, wasting, subdividing, surveying, alienating, damaging or dealing with parcel of land No. LR ITIMA/ANTUAMBUI/4629 pending the determination of the application. The application also seeks that the award in Maua LDT No. 10 of 2005 be stayed pending the determination of the suit.

The 1<sup>st</sup> respondent, M'Mwirabua M'Ibere filed an affidavit in reply which was objected to and which I find to be in clear contravention of sections 34 and 35 of the Advocates Act and is therefore, for that reason, struck out.

The 2<sup>nd</sup> respondent, the District Surveyor, Igembe District was duly served but failed to reply to the application or attend when it was argued. The 1<sup>st</sup> respondent being unrepresented stated in reply to the application that the matter was dealt with by the Land Disputes Tribunal, Meru South and award granted in his favour.

The applicant being dissatisfied filed an appeal to the Land Disputes Appeal Committee at Embu which appeal was also decided in his favour.

I have considered the foregoing arguments. It is a fact that the 1<sup>st</sup> respondent made a reference to the Land Disputes Tribunal being case No. 28 of 2004, the proceedings and award exhibited in the application. The dispute involved two adjacent parcels of land belonging to the applicant and the respondent respectively. The 1<sup>st</sup> respondent contended that the applicant had annexed, in collusion with the surveyors, part of his (respondent's) land.

The Tribunal found for the respondent. The applicant has now instituted the present suit seeking a declaration to the effect that he is the rightful owner of the suit land and that the award of the Tribunal is illegal, null and void.

It also seeks an order of permanent injunction against the respondents. The 1<sup>st</sup> respondent's contention that the applicant appealed against the decision of the Tribunal to the Appeals Committee has not been rebutted. The 1<sup>st</sup> respondent further stated that the appeal is No. 79 of 2005. The applicant has deliberately failed to disclose this fact to the court.

Secondly, if that be so, then the applicant ought to have come to this court by way of appeal to challenge the decision of the Appeals Committee. Thirdly, the applicant has sought, both in this application and in the suit, an order of injunction against the 2<sup>nd</sup> respondent, a Government official contrary to the

provisions of section 16 of the Government Proceedings Act, Cap 40.

For these reasons, I find that the applicant has failed to demonstrate that he has a *prima facie* case with a probability of success at the trial. It is not the entire land belonging to the applicant that has been awarded to the 1<sup>st</sup> respondent. Indeed, it would appear from the evidence on record that it was merely a question of adjusting the boundary between the two parcels.

The portion likely to be returned to the 1<sup>st</sup> respondent in this process, according to the award of the Tribunal will not interfere with the applicant's land. He therefore will not suffer any loss that cannot adequately be compensated with an award of damages. See **Giella V. Cassam Brown & Co. Ltd** (1973) EA 358. A stay will serve no purpose as the award was confirmed on 22.11.2007.

For the reasons stated, the application must fail and is dismissed with costs to the 1<sup>st</sup> respondent.

Dated and delivered at Meru this 28<sup>th</sup> day of April, 2008.

**W. OUKO**

**JUDGE**