



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

CIVIL APPEAL 3 OF 1997

MOSES MBUVI KITHI APPELLANT

VERSUS

KALIKANDA MWOLA RESPONDENT

JUDGMENT

1. The Appeal herein raises only two important issues viz:

- i. whether the learned magistrate in RMCC 85/1996 at Mwingi had jurisdiction to entertain the claim before him, and
- ii. whether the orders of injunction issued in that case were lawful or not.

2. I have gone through the record of the lower court and I note that in the Plaintiff dated 31/7/1996, the present Respondent was seeking orders that the present Appellant be ordered to vacate land parcel No.3792 Kanyaa Adjudication Section and that he be “ordered to stop all works on the said land completely.” Costs were also sought. In the Statement of Defence filed on 26/8/1996, the Defendant denied that he was in occupation of the Plaintiff’s land and stated that he was occupying land parcel No.3665 at Kinyaa Adjudication Section and that there was an appeal pending before the Minister over land parcel No.3792 aforesaid.

3. On 16/9/1996, A.K. Kaniaru, Esq, RM decided to visit the locus in quo and on 22/11/1996, he did so and observed as follows:-

“The court has gone round the disputed land. The lands office representative has shown the court the boundary that the disputants were shown. It is very clear that the respondent has cultivated the applicant’s land. The respondent is also putting up a permanent house on the applicant’s land.”

4. On 16/12/1996, an Application for injunction under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules was argued. In his submissions, the Plaintiff made reference to his land parcel No.3792 and stated further as follows:-

“I request the court to restrain him from doing any work until the Appeal is determined.”

5. The Appeal was apparently to the Minister in-charge of lands and in reply the Defendant stated as follows:-

“I am not opposed to both of us being restrained from using that land until the appeal is heard and determined.”

6. In his Ruling, the learned magistrate stated as follows:-

“This is a ruling on an application filed here on 31/7/96. It is brought under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules and S.3A of Civil Procedure Act. The application was supported by the annexed affidavit of KALIKANDA MWOLA NZERU (Applicant) and other reasons advanced in the course of hearing.

The application was opposed. The orders sought are. Interralia that the respondent be ordered to vacate the land parcel No. 3792 Kanyaa Adjudication section which is registered under the applicants name, and two, that the respondent be ordered to stop all works on the said land completely.

In the applicants affidavit annexed to the application, the applicant has deponed the land parcel in question in his and that in 1989 the respondent entered the said land and started felling down trees and cultivating thereon. Now, the respondent has gone further and started constructing a permanent house on the said land.

In the course of hearing this court was invited to visit the locus in quo. The court did do on 1/11/96 but nothing proceeded because the lands officer present had forgotten to carry PID (Photo identification Diagram). The matter was put-off to 22/11/96. The court again visited the site. The land’s officer was present. The court was shown the boundary by the said officer. It is not disputed that as matters stand now, the person with the best legal title to land parcel, No.3792 is the applicant-Kalikanda Mwola Nzelu. While touring the suit land, it became clear that it is true that the respondent has entered the land. He has cultivated on it and there is maize and other crops belonging to the respondent on that land. It is clear too that on that piece of land, there is a permanent house under construction and the said house belongs to the respondent. There was no visible work by the applicant on that land. In the course of hearing the position seemed evident that the applicant is not opposed to an order affecting both himself and the respondent. The court was also informed that as matters stand, an appeal lies with the Minister of Lands. The appeal is filed by the respondent. When all the pleadings relevant to this application are considered this court finds that the only prudent course of action open to it is to issue an order affecting both parties, their agents, relatives, servants and/or employees. Such an order will issue inspite of the fact that a prayer for its issuance has not been make in the application: The order is this: Both the applicant-Kalikanda Mwola Nzelu, and the respondent-Moses Mbuvi Kithi, their agents, servants, relatives, and/or employees be and are hereby restrained from working, cultivating, constructing, wasting and/or in any other manner interfering with land parcel No.3792-Kanyaa Adjudication section until the respondents, appeal to the land’s Minister is heard and determined or until further orders of this court. R.O.A 28 days.

A.K. KANIARU R.M”

7. If it was agreed as is clearly the case that there was indeed an appeal before the Minister as is clear, then Section 30 of the Land adjudication Act, Cap 284 can properly be invoked as it provides as follows:-

“30.(1) except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act.

(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.

(3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or subsection (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.

(4) The foregoing provisions of this section do not prevent a final order or decision of a court make or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time

this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.

(5) A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.

(6) Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown.”

8. It is the law therefore that while an appeal is pending, a suit can only be instituted with the written authority of the Adjudication Officer. I have perused the lower court record and such authority is missing and the Respondent has not said that in fact it exists. That being the case, the suit before the learned magistrate was improperly filed and there was no jurisdiction to determine it. That being my holding, I see no reason to go to the second question; whether an injunction should have been issued or not. Without jurisdiction, there is nothing.

9. The Appeal is merited and is allowed with the consequence that the suit in the subordinate court is instead dismissed with costs to the Appellant.

10. Orders accordingly.

Dated and delivered at Machakos this 28th day of November 2008.

ISAAC LENAOLA

JUDGE

In presence of: Mr Musyoka for Appellant

ISAAC LENAOLA

JUDGE