



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT KITALE**

**CIVIL SUIT 144 OF 2006**

**MARY WAMBUI MURIITHI =====PLAINTIFF**

**VERSUS**

**MARGARET WANJIKU KARIUKI ===== DEFENDANT**

**RULING**

The suit herein was instituted by way of a Plaint dated 30/8/2006. Through that Plaint, the plaintiff asks the court for a declaration that by virtue of the decision in *Kitale HCCA NO.51 of 1997*, the defendant was finally dispossessed of the 17 acres of land which she had earlier been awarded by the magistrate's court on 26/6/1990.

The award by the learned magistrate was made in *Kitale SPMCC NO.24 of 1989*, when the court adapted the award of the panel of elders as the judgment of the court.

Following the adoption of the award as a judgment of the court, a decree was drawn up, giving to the defendant herein some 17 acres of land.

The defendant herein did execute the decree, culminating in the cancellation of the original title; and the issuance of two separate titles namely; *SINYERERE/SITATUNGA BLOCK 1/MUKUYU/400* and *SINYERERE/SITATUNGA BLOCK 1/MUKUYU/401*, respectively.

Notwithstanding the execution of the decree, the plaintiff's husband, Dominic Mathenge (now deceased), lodged an appeal against the decision in *Kitale SPMCC NO.24 of 1989*.

After a full hearing, the High Court allowed the appeal. In doing so, the Hon. Nambuye J. held that the proceedings before the panel of elders were in contravention of the court order. The reason for that holding is that whereas the court had directed the District Officer to constitute the same panel of elders as that which had previously adjudicated the issues, the order that was extracted indicated that the District Officer should constitute a panel of elders whose composition was different from the earlier panel.

Secondly, the learned judge also held that there was every possibility that the award had been filed late, as there was no proof that it had been filed within the 60 days, as ordered by the court.

Thirdly, the learned judge held that as Mukuyu Farmers Co. Limited was made a party to the proceedings before the elders, yet that company had been dissolved long before those proceedings, the said proceedings were rendered a nullity.

In the light of those three holdings, the learned judge allowed the appeal, quashed the decision of the magistrate's court and set aside the elders award.

It is consequent upon that decision that the plaintiff now seeks the declaration cited at the beginning of this ruling.

But even as the plaintiff awaits the trial of the suit, she has moved the court for an interim injunction to restrain the defendant from alienating, disposing of, entering, fencing, wasting or destroying the land on ***L.R. NO. SINYERERE/SITATUNGA BLOCK 1/MUKUYU/401***. She also prays that the defendant be restrained from interfering with her use of the said property until the suit is heard and determined.

The application is said to have been prompted by the defendant's forcible entry onto the land, where she then caused damage and destruction to the maize crop belonging to the plaintiff. It was the plaintiff's case that unless the defendant was restrained by injunction, she would continue to commit further acts of waste on the land, or even alienate that parcel of land.

In answer to that application, the defendant has not only put forward a replying affidavit, but she has also filed her own application, in which she is seeking an injunction to restrain the plaintiff from entering onto, wasting, destroying, ploughing or in any other way interfering ***with L.R. NO.SINYERERE/SITATUNGA BLOCK 1/MUKUYU/401***, (which property will henceforth be cited as "***the suit property***")'

The defendant's application is founded upon her assertion that she was the registered proprietor of the suit property. Therefore, as she holds the certificate of title, which she believes to be valid, the defendant submitted that she was entitled to the use and ownership thereof, to the exclusion of the plaintiff and all other persons.

To back her application, the defendant had lodged a counterclaim against the plaintiff for mesne profits, together with a permanent injunction to restrain the plaintiff from interfering with the defendant's quiet possession of the suit property.

In the Plaintiff, there is no doubt that the plaintiff acknowledges that the defendant was currently the registered proprietor of Plot No.401. But she insists that that proprietorship was acquired by virtue of a court order which was thereafter reversed by an appellate court.

The question that will need to be determined at the trial is whether or not, the fact that the decree had been executed before the appeal was heard and determined, could, in law, deprive the plaintiff the rights bestowed upon her by the appellate court.

That issue could be laid down differently, as follows;

***"Can the defendant be allowed, by law, to continue to derive benefit from the decree in Kitale SPMCC NO.24 of 1989, notwithstanding the fact that the High Court had, in Kitale HCCA NO.51 of 1997, quashed the decision of the lower court, and also set aside the elders award?"***

On a prima facie basis, I hold the view that the defendant is likely to face an uphill task in justifying her proprietorship which was founded upon a judgment that was set aside after she had been registered as the owner of the suit property.

From the evidence so far available to the court, it appears that whereas the defendant holds the title documents to the property, the plaintiff has been in possession of the property at all material times.

To my mind, that implies that the balance of convenience tilts in favour of the plaintiff, who has had the use of the property since 1994. As that has been the position on the ground, I find no justification to stop the plaintiff from entering onto the property whilst the suit is being heard. I also find no justification to stop the plaintiff from ploughing the said property.

And, as regards wastage and destruction of the property, the defendant did not demonstrate how the plaintiff was about to do so. In any event, the plaintiff is laying claim to same said property. I cannot therefore understand why she would either destroy or waste it.

Had the plaintiff been the registered proprietor of the suit property, it would have been conceivable that she might have been in a position to either offer it as security or alternatively, to sell it off or even give it away as a gift to a third party. In such a scenario, there would have been justification to restrain the plaintiff from taking actions which could prejudice the defendant or which could put the property beyond the reach of the court.

But as the defendant currently holds the title documents, I hold the considered view that the plaintiff is not in any position which could allow her to encumber or alienate the property.

In the event, an injunction shall issue to restrain the defendant from alienating, entering onto, fencing, wasting or destroying the suit property, or from interfering with the plaintiff's possession thereof, until the suit is heard and determined. In other words, prayer 2 of the application dated 3/8/06 is granted.

On the other hand, the application dated 20/2/07 is dismissed. However, the costs of both applications shall be in the cause. It is so ordered because it is only fair and just that the party who finally persuades the court, after a full trial, should also have the benefit of the costs of the two interlocutory applications herein.

Finally, the parties are directed to finalize all the pre-trial procedures within the next 60 days, so as to pave the way for the substantive hearing of the suit, without any further delay. Justice demands that this case be resolved soonest.

Dated and Delivered at Kitale, this 24th day of January, 2007

**FRED A. OCHIENG**

**JUDGE**