



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 40 of 2005

CATHERINE C. KITONY PLAINTIFF

VERSUS

JONATHAN MUINDI DOME 1ST DEFENDANT

KAPSARET DIVISIONAL LAND DISPUTES TRIBUNAL 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

R U L I N G

Catherine Kitony who is the plaintiff herein claims to have acquired an 11.6 hectares property known as KARUNA/SOSIANI/BLOCK 2 (PROGRESSIVE)/157, at a Public Auction on 6/5/1998, and that she was subsequently registered as the owner of the said land, which I shall now refer to as 'the subject property' on 14/1/1999, after which she obtained the relevant Title Deed, but that when she visited the property, thereafter, she found Jonathan Muindi Dome, in occupation of a 5 acres portion thereof, which he had fenced off. Dome later moved the Kapsaret Land Disputes Tribunal in 2005 (sic) and obtained an award for the portion of 5 acres, which award was adopted as a decree by the Chief Magistrate at Eldoret on 7/1/2003.

Kitony whose contention it is that the Tribunal had no jurisdiction to arbitrate over the land or even to make the aforesaid award as the subject land was registered, has instituted this suit against Dome, the said Tribunal and the Attorney General, in which she claims inter alia that not only did the Tribunal lack the relevant jurisdiction as aforesaid, and she seeks apart from seeking restraining and eviction orders, she seeks a declaratory order to the effect that she is the absolute registered owner of the subject property, and further that the award of the Tribunal was null and void.

Catherine Kitony who is the applicant herein seeks a temporary injunction to restrain Dome and/or his servants or agents from transferring, registering into his own name, selling, transferring, leasing, encumbering and or otherwise parting with possession of the whole or any part of the subject property pending the hearing and determination of this suit.

She bases her claim on the grounds that though she is the registered owner of the subject property, Dome has laid claim to a portion of 5 acres, which he currently occupies and for which he has already obtained an award from the Kapsaret Division Land Disputes Tribunal, which she alleges had no jurisdiction and that the award is thus null and void, despite which fact, Dome may move to execute the award to her detriment.

Though served with the application, the Tribunal and the Attorney General have not filed any pleadings in opposition. Dome, who I shall now refer to as the respondent has filed a replying affidavit in which he concedes that he has been in occupation of a 5 acre portion of the subject land, which formed a part of a share which was originally owned by John Thogo Mwai in Progressive Farmers Co-operative Society Limited, and which share he bought from the said Mwai on 5/10/1983, but that though they had obtained all the relevant consents, the transfer was not effected as Mwai fled the area during the 1997 clashes, he disputes that the land was ever charged to National Bank or that the sale was ever conducted as alleged by the applicant.

At this stage of the suit, this Court's role is to establish whether the applicant has a prima facie case with a probability of success, and whether damages would not be an adequate remedy.

I have taken the pleadings into account and I have borne in mind the fact that parties are bound by their pleadings. I have also taken the submissions of both the applicant's counsel and the respondent who appears in person, and it would appear to me that several pertinent issues which the respondent raises in his replying affidavit where he raises doubts about the existence of a charge in favour of National Bank of Kenya, which bank ordered the sale of the subject property by Public Auction. He also doubts the validity of the auction at which this applicant claims to have acquired title. These issues have not been controverted by the applicant. In my view it would also be important to establish the nexus between Mwai and Lowland Investments Limited who are referred to as the 'clients' of National Bank of Kenya Limited and who it would safely be assumed offered the property as security for a facility.

Though it is trite that the Land Disputes Tribunals have no jurisdiction to deliberate over registered land, and Mr. Shivaji has very ably provided case law in support of the contention, the applicant has not been able to controvert the aforementioned pertinent issues, which omission can only benefit the respondent.

I would in the circumstances find that the applicant has failed to establish that she has a prima facie case with a probability of success at this stage.

But even if I was wrong in the above finding, the balance of convenience tilts in favour of the respondent who has been and still remains in occupation of the said five acre portion.

I do therefore find that this application lacks in merit and it is dismissed. Costs shall however be in the cause.

Dated and delivered at Eldoret this 4th day of May 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Koko holding brief for the firm of Kalya for the applicant

1st respondent in person