



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 18 of 2005

SAMMY MASAKU KILONZO PLAINTIFF

VERSUS

SIMON KIMEU MWALYO DEFENDANT

R U L I N G

Before me is the Chamber Summons dated 22/2/05 brought under Section 3 and 3 A Civil Procedure Act, Order 39 Rule (a), b, 2 A (1) 2 A (2), 3 (1), 3 (3), 4 and 9 Civil Procedure Rules. The applicant seeks an order of injunction to restrain the defendant/Respondent by either himself or his employees or agents, from in any manner interfering with land parcel No. 118 Nziuni Adjudication Section, Kalama location, Machakos district and specifically, from grazing on the applicant's pastures, undoing soil conservation developments, reaping the applicant's crops or chasing away the applicant's agents or employees from the said land.

Secondly, he seeks an order that the Officer in Charge Machakos Police Station in whose jurisdiction the land is situate be allowed to supervise the observance of the order.

Lastly, the applicant prays for costs of the application.

The application is premised on grounds found in the body of the application, a supporting affidavit sworn by Sammy Masaku Kilonzo dated 22/2/05 and a further affidavit sworn by David Mwenza Kawa, Ngui Ngewa, Mutulili Muema, Mbatha Muema, Daniel Musilu, David Mukua and Ndileve Musilu who claim to be neighbours of plot 118 and 117 disputed plots and another further affidavit by the applicant.

The application was opposed and a replying affidavit was sworn by Simon Kimeu Mwalyo the defendant/Respondent.

The main grounds relied upon by the applicant are that the plaintiff/applicant and his ancestors have exclusively owned and physically occupied the disputed land for over 90 years; that on 8/2/05 the District Officer I, Machakos, awarded the land to the defendant/Respondent as he purportedly exercised powers delegated to him by the District Commissioner in Land Appeal No.103/1987; that the applicant intends to challenge the decision of the District Officer I, Machakos, by way of Judicial Review but cannot do so straight away as the certified proceedings and decision of the District Officer are not yet available; that acting on the decision of the District Officer I, Machakos, the defendant/Respondent has forcibly entered into the said land on 14/2/05 while armed with crude weapons and has begun grazing their livestock on

the land, reaping the applicant's crops and using threats and violence; has kept the plaintiff and employees from the land.

That if the Respondent is allowed to continue with the above mentioned acts, the applicant is bound to suffer loss and irreparable loss.

The dispute over this piece of land started way back in early 1970's and the parties have moved from one court to the other and also gone to quasi judicial tribunals. It is the applicant's case that the said suit land No.118 was purchased by his grandfather, Mwata Mwinza Nthenge who was party to the proceedings before the previous courts and tribunals. He purchased the land from Mwalyo Kamoni who was the defendant's grand father and one Mulinge Mutua Mithuku. He settled on the land and bore Kilonzo Mwata while on the said land. Kilonzo is the father of the applicant. They have lived on the said land for the past 90 years uninterrupted. The dispute herein began when in 1971 the defendant and one Ngumbi Kioko unlawfully subdivided the two parcels of land between themselves and marked a boundary ten years before the adjudication process which was in 1981. The applicants uprooted the sisal plants following which Mwata Mwinza sued the defendant and Joshua Ndambuki in the District Magistrate's Court, Kilungu in 1971. It seems the court decided in favour of the defendants. Mwata Mwinza appealed to the Resident Magistrate's Court, Machakos. Again it seems the decision was not in Mwata Mwinza's favour and he appealed in H.C.C.A 59/1979 but on 28/11/83 the said appeal was struck out as the process of adjudication had started. The grandfather of the applicant referred the matter to the Demarcation Committee who decided the matter in favour of the defendant and Joshua Ngumbi whereby land parcel 118 and 117 were awarded to the defendant and Ngumbi. Dissatisfied with the above decision the applicant's father Mwata appealed to the Land Adjudication Board which again made an award to the two. The grandfather again appealed against the decision of the Land Adjudication Officer and on 20/3/05 the parcels of land were awarded to his grandfather. That though this decision affected both parcels No.117 and 118, the defendant/Respondent filed an appeal No.103/87 and Joshua Ngumbi filed a separate appeal which is yet to be heard. The applicant is aggrieved by the decision of 8/2/05 which he intends to challenge by way of Judicial Review. One of the reasons for Judicial Review being that the District Officer acted in excess of jurisdiction and breached rules on sub delegation and considered extraneous matters in her decision. That it is in the interests of justice that the orders sought be granted as the defendant/Respondent will not suffer any prejudice since he does not occupy the land. In the further affidavit sworn by 6 neighbours of plots 117 and 118, it is deponed that the applicant's grandfather Mwata Mwinza has been in occupation of the land and that he never sold the land but that when he moved elsewhere he left the plaintiff in the said land.

In the replying affidavit sworn by Simon Kimeu, it is vehemently denied that Mwata Mwinza ever bought land parcel 118 Nziuni Adjudication Section from defendant's grandfather Mwasyo Kamami; it is contented that Mwata Mwinza sold his ancestral land at Nziuni to his brother Ngulo Mukanga and bought another parcel at Matuu in Kitui District where he lived till his death on 10/4/03 and that Kilonzo Mwata the plaintiff's father still lives on the said land at Matuu. He contends that the said land was his ancestral land that belonged to his grandfather, Kamami who then gave to his son Mwalyo Kamami, the defendant's father. He denied that the plaintiff's predecessors have ever lived or occupied the land parcel 118 Nziuni Adjudication Section. He denied that the plaintiff occupies Number 118 Nziuni but that he has been allowed to put up a temporary structure on parcel No. 117 which belongs to Joshua Ndambuki Ngumbi. The defendant acknowledged the various suits that have been filed by the applicant's grandfather and even appeal to Arbitration Board Case No.50/1985 which was allowed and the Arbitration case was set aside. The defendant was dissatisfied with that decision and he appealed to the Minister in Land Appeal No. 103/87 in respect of plot 118 which appeal was determined in his favour on 8/2/05 and which the applicant was dissatisfied with.

In response to the Respondent's affidavit, the applicant filed a further affidavit in which he demonstrated that he has been in occupation of the said land and that in the case before Machakos Court, an injunction was issued restraining the defendant from entering the land and that the demarcation officer confirmed that the applicant was in use of the land before adjudication. He annexed a letter SKM 10.

I have considered the fairly lengthy affidavits filed by both the plaintiff and defendant, the annexures

thereto and submissions by both counsel for the plaintiff and the defendant. From the material placed before the court, there is no doubt that there has been an ongoing battle over the land in dispute between Mwata Mwinza and Kimeu Mwalyo. The dispute has now landed before this court. It is high time it was put to rest.

The applicant seeks an order of injunction, yet claims that actually, his intention was to bring an application for Judicial Review were it not for the fact that he has not obtained certified copies of proceedings from the Director of Land Adjudication Department. The applicant has annexed a letter dated 14/2/05 addressed to the said director but there is no acknowledgement of the letter by the said director. It cannot be said with certainty that proceedings have been applied for. Besides, there is no bar under Order 53 Civil Procedure Rules in the applicant filing his application for Judicial Review and ask for leave to file further affidavits annexing the proceedings once they are obtained. Judicial Review can only be granted under provisions of Order 53 Civil Procedure Rules, Section 8 and 9 of the Law Reform Act, whereas injunctions are granted under Order 39 Civil Procedure Rules. The principles applied to the two are quite different. The applicant should have made up his mind how to proceed. Even if this court's duty is to do justice yet the defendant has to be properly notified as to what to expect in court and prepare his defence.

It is the applicant's case that though the land in question was the grandfather's – Mwata Mwinza yet he is the one living in the said land and has stepped in the grandfather's shoes. Indeed all the previous proceedings before the various forums were brought in the names of Mwata Mwinzi. The applicant has annexed a death certificate that indicates that Mwata Mwinza died on 10/4/93. The plaintiff/applicant does not feature anywhere. There is evidence that the applicant's father is alive living in Matuu in Kitui district. Though the appeals have proceeded, it seems they have done so in absence of Mwata Mwinza the one claiming the suit land. In my view, any proceedings that may have proceeded after Mwata Mwinza's death on 20/4/93 are null and void because there was no legal representative of the deceased's Estate. The applicant made no effort to try and show that he is the legal representative of the deceased's estate. He does not explain in what capacity he brings this suit. He cannot just claim to step in the deceased's shoes. He should do so in the manner provided by the law so that the other would be beneficiaries of Mwata Mwinza's estate are notified. The applicant lacks the legal capacity to bring this suit on his behalf or on behalf of the estate of Mwata Mwinza. Having capacity to bring this suit or locus standi is a prerequisite to this court granting any orders be they orders of Judicial Review or orders of injunction. The applicant does not fit in Mwata Mwinza's shoes.

The property in question is described as L.R 118 Nziuni Adjudication Section Kalama Location. It means that the land is situate in an adjudication section established under Section 5 of the Adjudication Act. Under Section 30 (1) of the Adjudication Act, no person is allowed and no court shall entertain any civil proceedings concerning the interest in land in an adjudication section until the register for that area is final. One can only institute such proceedings with the consent of the Adjudication Officer which consent has to be in writing. The Respondent never addressed this very important issue. Section 30 (1) of the Adjudication act is mandatory and the court has not seen any consent of the Adjudication Officer annexed to the application or pleaded in the plaint. This suit is prematurely before this court and therefore improperly before this court.

It is the Respondent's contention that the applicant has not complied with Section 29 of the Land Adjudication Act which provides that a person aggrieved by the determination of an objection will appeal to the Minister and the Minister's decision is final. Counsel for the applicant submitted that this court has unlimited powers under Section 60 of the constitution to deal with civil and criminal matters and that the court is supposed to ensure that justice is done. I do agree that Section 29 of Land Adjudication Act does not oust the jurisdiction of this court. However the applicant can only come to this court after following the laid down procedure in the Act. Since there is no provision for appeal to this court, the applicant can come to this court by way of Judicial Review. That is the avenue he should pursue but not jump the gun. He has not been shut out. The applicant has brought this application to enable him to protect the status quo awaiting the filing of an application for Judicial Review. There is no provision for bringing such a suit which the Respondent referred to as 'Holding Suit' and the same is totally misplaced.

From the reasons aforesaid, this application is improperly before this court. I find no merit in this application and it is hereby dismissed with costs to the Respondents.

R.V. WENDOH

JUDGE

Dated at Machakos this 21st day of September 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE