



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

CIVIL CASE 29 OF 2005

DAVID MBITHI MUSILA PLAINTIFF

VERSUS

JOSEPH MATHEKA KILULU

JOSEPH MUTUA MULI

JULIUS MUSILA KIMEU

HELLENA WANYUA AARON MBITHI

AIINI (AOINI) NTHENGEO – NGO – CLAN DEFENDANTS

J U D G M E N T

The application dated 24/5/05, is brought pursuant to Order 39 Rules 1 (a) 2, 2 A (1) and 3 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act. The applicant/plaintiff David Mbithi Musila, prays that an order of temporary injunction do issue against the defendants restraining them, their agents, or servants from moving into the plaintiff's land parcel No. MUPUTI/KIMUTWA/1087 and MBOONI/IIANI/300 or the plaintiff's home on plot 1087 and from wasting or subdividing or sharing out the said land or any other of plaintiff's property either to the 4th defendant/Respondent or to any other person until the suit is heard and finalized. He also prays for costs.

The application is premised on grounds found on the face of the application and a supporting and supplementary affidavit sworn by the applicant. The application was opposed and the 1st defendant Joseph Matheka, 2nd defendant Joseph Mutua Muli and 4th defendant Helena Wayua Aaron Mbithi swore affidavits in reply to the application. The plaintiff was represented by Mrs Nzei Advocate, while Mr Masika, is counsel for the defendants.

The 1st three defendants including the plaintiff are members and officials of the 5th defendant clan which is a registered society. The applicant is the registered proprietor of the suit land and his home is built on plot 1087 in which he lives with his family. He contends that on 12/3/05, the 1st to third defendants went to his home in company of the 4th defendant. He avers that the 4th defendant is a stranger to him and not a member of the clan. They informed him that the clan wanted to subdivide all his movable and immovable property to share them between the applicant and the 4th defendant/Respondent who was alleged to be his wife. They promised to return on 19/3/05 to subdivide the property. The plaintiff's advocate wrote to the defendants on 14/3/05 asking the defendants to keep off and on 15/3/05, the defendant wrote a letter addressed to plaintiff's counsel in which they insisted they would go to plaintiff's

home on 19/3/05 and subdivide the property. The defendants kept their promise to go to plaintiff's land on 19/3/05 and took an inventory of plaintiff's property and even demanded bank accounts and promised to return on 26/3/05 to do the subdivision. He denied ever marrying the 4th defendant or having children with her. He averred that the 4th defendant is a stranger to him and only met her in 1998 when she lived with his brother called Muli Masika, who is deceased. The 4th defendant sued him in 1987 in Maintenance Cause No. 2 of 1987 where she sought maintenance but the case was dismissed and she never appealed. He also denied that the 4th defendant has ever lived on the suit land.

According to 1st defendant/Respondent he is the Divisional Chairman of the 5th defendant and swore the affidavit on behalf of himself, 2nd and 3rd defendants. He recalled receiving a report of complaints from Musila Mbithi, Johnson Muendo, Josephine Nthenya and Christine Mutheu, who claimed to be the plaintiff/applicant's children and 4th defendant had a problem with which they wanted the clan to help them resolve. He deponed that Article 2 F of their Societies Constitution does allow the clan to settle disputes concerning clan members. It is on that basis that a meeting was called to investigate the allegations and that it had nothing to do with subdivision of land and properties of the plaintiff as they are aware that they have no power to do so. At the meetings the complainants were heard and the applicant asked for time to call witnesses and no decision was made about subdivision of land or property. The Respondent annexed copies of proceedings of the said meeting (JM K II). He contended that the said meeting took place in applicant's home with his consent and that at no time did 4th defendant refer any dispute between her and the applicant to them. He went ahead to explain why they had referred to plaintiff's property as clan property. It is because the plaintiff is a member of that clan. This is in reference to a letter dated 15/3/05 addressed to applicant's counsel by the defendants in which they referred to applicant's property as clan property and at paragraph 7 of the same letter it was stated that the issue could cause death in the family which 1st defendant explains to mean that if such disputes were left unresolved they could lead to death and it did not mean the clan would use violence or force.

2nd defendant Joseph Mutua Muli, in his affidavit also attempted to explain the contents of the letter dated 15/5/05 and explained as 1st defendant did, that the applicant's land fell within the 5th defendant's jurisdiction and denied having wanted to use any violence against the plaintiff/applicant.

The 4th defendant in her affidavit denied ever visiting the applicant's home and denies the allegations that she claims any property from the applicant either through the clan or through her children. She contents that they separated over 40 years ago with plaintiff and that those with claims against the plaintiff are not sued. To the supplementary affidavit dated 5/5/05, the applicant annexed a letter from the 5th defendant disassociating themselves with the actions of 1st and 3rd defendants and written by the District Chairman of the 5th defendant. The said Chairman wants the defendants to be taken as if they acted in their personal capacities but not as representatives of the 5th defendant.

I have considered the application filed, affidavits by the applicants and the replies filed by the defendants, the annexures thereto and all the submissions by counsels. The applicant prays for an order of injunction and he therefore has to demonstrate that he has a prima facie case with high chances of success; that he will suffer irreparably if the order of injunction is not granted and he cannot be adequately compensated by damages and lastly, that if there is any doubt in the court's mind as to whether the injunction should issue or not, the court should decide the matter on a balance of convenience. (**GIELLA VERSUS CASSMAN BROWN**).

It is not in doubt that the 1st to 3rd defendant organized a meeting which was held at the applicant's home. The question is the purport of the said meeting. Was it to subdivide the applicant's property or try to resolve family issues?

I wish to point out that the applicant is not candid in claiming that the 4th defendant is a stranger to him. Contrary to that allegation is his own annexure DMM5, which are proceedings in Maintenance Cause 2/1987, before the lower court which had been filed by 4th defendant against the plaintiff claiming

maintenance and seeking dissolution of the marriage. The 4th defendant's prayers were dismissed; the court however made findings of fact which have not been dislodged by the plaintiff, that is, that the applicant was married to the 4th defendant at one time and that they had four children. The applicant did not appeal against these findings and he cannot claim otherwise. 4th defendant is not a stranger to him and he has children with her whom the defendant's claim they wanted to resolve their issues with their father the plaintiff. Similarly the plaintiff cannot deny the existence of the children who are said to have complained to the 1st to 3rd defendants.

The 5th defendant through the Chairman sought to disassociate themselves with the 1st to 3rd defendants and have their name struck off as 5th defendant. However, it is the applicant who preferred the claim against them and sued 1st to 3rd defendants in their capacity as officials of 5th defendant. If the 5th defendant is struck off then the whole suit would have to be struck off.

The 5th defendant's constitution at clause 2 F under which the defendants purport to have proceeded, provides that one of the clan's clans objectives is to settle disputes among clan members. It is not specific as to what kind of disputes. Subdivision of land and properties would not be within the mandate of this clan's constitution as it would be contrary to the Kenyan constitution relating to ownership of land and property and other statutes that provide for ownership of land. The defendants have no jurisdiction to subdivide land or one's property. Such interference would amount to commission to a criminal offence.

The defendants have annexed alleged proceedings of the meeting held at the plaintiff's home which is written in Kikamba and translated to English (JMK II). It bears names of those who attended and their signatures. Though the applicant claims that it is not authentic, the court cannot establish that fact at this stage. It can only be done at the hearing.

There is no doubt that the applicant owns land Nos. MBOON/IIANI/300 and MUPUTI/KIMUTWA/1087 as the registered proprietor. Even if the defendants would have attempted to subdivide the said land, yet they cannot have it registered in any other names unless the plaintiff consented. It would be an exercise in futility. It may only lead to some interference with applicant's quiet enjoyment of the land. It therefore means that the applicant would not suffer irreparably even if the defendants went ahead to carry out their threat.

From considering the evidence before court, it is apparent that the defendants did go to the applicant's home with a view to solving some problems whether to do with children or to subdivide the applicant's property. It is just not very clear what happened. It is also not clear whether the 1st to 3rd defendants had authority from the 5th defendant to do what they did. 4th defendant vehemently denies any interference. Since the court is in doubt and to ensure that there is no further interference the court on a balance of convenience orders that defendants be and are hereby restrained from moving into plaintiff's land and home, from wasting or sub diving or sharing out the applicant's movable and immovable property till this suit is heard and determined. Costs to be in the cause.

R.V. WENDOH

JUDGE

Dated at Machakos this 5th day of October 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE