



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT 97 OF 2003

MDZOMBA MWAMLONGO NGALA PLAINTIFF

VERSUS

MGALLA CHIRIMA DEFENDANT

Coram: Before Hon. Justice Mwera

Gichana for the Plaintiff/Applicant

Chidzipha for the Defendant/Respondent

Court clerk – Sango

RULING

The Plaintiff brought this application dated 6-5-04 under O. 39 rr. 1, 2, 3, 9 Civil Procedure Rules and S. 3A Civil Procedure Act. The main prayer was:

1) That a temporary injunction do issue restraining the defendant from tilling or interfering with

“..... the parcel of land,”

pending hearing and determination of this application.

There was nothing specific said to describe the subject land but Mr. Gichana, not in-the-very-so-usual way drew the court’s attention to paragraph 4 of the plaint where it was pleaded that the plaintiff wants to recover:

“..... all that parcel of land and or portion taken by the defendant about four (4) acres situated at FULUGANI VILLAGE, MAZERAS SUB-LOCATION, KASEMENI LOCATION, KWALE DISTRICT.”

The grounds on which this application was based were to the effect that the defendant had gone on to plough/cultivate this subject land thereby damaging crops thereon. That if this application was not disposed off the suit may be rendered nugatory.” And so the court was called upon to “determine this matter conclusively and justiciably.”

Mr. Gichana told the court that the land in question was inherited down the line from the plaintiff’s grandfather, to his father and now to himself. That he had been occupying and tilling the land since

1974. That he planted crops which the defendant has damaged by trespassing on that land and destroying the same (valued at Sh.85,000/-. That in the meantime the defendant caused a land dispute to be registered with a local district officer where it was resolved (to give 3 acres to the defendant) all outside the provisions and stipulations of the Land Disputes Tribunals Act No. 18/90. As if that decision was under attack by way of judicial review, the court was told that the District Officer's decision was invalid and yet it gave away the plaintiff's land. That the plaintiff had therefore approached the local District Commissioner's office whereupon that office ordered maintenance of the status quo until a tribunal/court determined the dispute.

Mr. Chidzapha wondered whether this was an application for judicial review over the District Officer's decision or it was one for an injunction. His view was that without the plaintiff describing the land in question with clear specificity, this court would be giving orders in futility because nobody knew what part of the land in Fulungani village would be affected. And that the local District Officer had dealt with the dispute as best he could on instructions from the District Commissioner.

Having gone over the fluid state of pleadings and arguments above, this court's duty in doing justice even in the most awkward cases will not leave the plaintiff as he came. Accordingly this court adopts the contents of the District Commissioner's letter of 12-8-2002 to the District Officer of the area which said inter alia:

"Advice (sic) the village chairman to stop issuing notices to the above named until the dispute is fully determined by the Tribunal/Court - -----."

With the above the status quo be and is hereby ordered. Since this apparently unregistered land, being in dispute about Trespass and tilling or working the same, it falls under the ambit of the Land Disputes Tribunals Act No. 18/90. The plaintiff who ought to have proceeded under that Act should do so by filing an appropriate tribunal case. It is hoped that a tribunal exists there as per the Act. At least Mr. Gichana referred to the application this Act and it can thus be assumed that a tribunal therefore exists to handle such disputes.

However that the plaintiff was so advised on 12-8-02 to follow that course and he did not do so, and that he came here (in the wrong forum for the dispute in question) he will pay costs of this application to the defendant. After all orders were sought until this application was heard and determined – not otherwise. That has been done now.

Order: Status quo to hold. The plaintiff to move to the proper forum. Costs to the defendant.

Delivered on 1st December 2004.

J.W. MWERA

JUDGE