

REPUBLIC OF KENYA

AT MOMBASA

CIVIL SUIT NO. 95 OF 2003

ALII MARO HERO PLAINTIFF

VERSUS

DOYO GUYU DEFENDANT

R U L I N G

ALII MARO HERO (the plaintiff) instituted this case against DOYO GUYU (the defendant) through a plaint drawn and filed on the 12th May 2003 by M/s Mungatana & Co Advocates, praying for a declaration that a piece of land situated at Haraborogo within Masabubu location in Tana River District belongs to him, the plaintiff, and that an injunction do issue to restrain the defendant from encroaching, trespassing, interfering with his peaceful enjoyment, damaging, wasting, alienating, disposing off or in any way interfering with the same.

The plaintiff pleaded that he and the defendant have all along been coexisting peacefully as neighbours until the defendant interfered with his peaceful enjoyment of the same; that there was a dispute between them which was referred to a panel of elders in land case number 8 of 2002 and that the said panel passed a verdict that the defendant had indeed unlawfully encroached, trespassed and interfered with his land. For the above reasons he prays for the orders which I have referred to hereinabove.

Filed along the plaint is a Chamber Summons in which the plaintiff seeks interim orders of injunction to issue under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules based on the grounds that the piece of land in question belongs to him (plaintiff); that the defendant has willfully and unlawfully encroached and trespassed on the same; that the defendant has no right over the same and that the defendant has destroyed his (plaintiff's) home, property and crops and has caused irreparable damage and loss. In a supporting affidavit the plaintiff has explained that the land in dispute measures 15 acres, that he inherited it from his father, it is situated near River Tana and he has planted bananas, sugarcane and mango trees. More importantly the plaintiff has deponed that the defendant's land borders with this land and that there is a dispute between him and the defendant over a boundary issue between the two parcels.

The defendant, through Ms BEN OCHIENG & CO ADVOCATES, filed a defence in which he pleaded that this court has no jurisdiction to hear and determine this suit or to grant the reliefs sought by the plaintiff pursuant to the provisions of Section 3 of the Land Disputes Tribunals Act to the effect that all cases of a civil nature involving a dispute as to the division of or the determination of boundaries to land, a claim to occupy or work on land or trespass to land shall be determined by a Land Disputes Tribunal. Mr. Machukia Advocate in the firm of Ms Ben Ochieng & Co Advocates has taken up this matter in the Notice of Preliminary Objection filed and has asked that the suit filed by the Plaintiff amounts to an abuse of the court process and should be struck off.

On the other hand Mr. Kithi has submitted that the High Court, pursuant to the provisions of Section 60 of the Constitution, has unlimited civil jurisdiction and therefore that the suit is not incompetent.

I have given due consideration to these submissions. The jurisdiction of the High Court is not being challenged by the defendant. The issue here is that, all cases of a civil nature involving a dispute as to the division of or the determination of boundaries to land, and trespass to land shall be heard and determined

by a Land Disputes Tribunal. Any party who is aggrieved by the decision of that Tribunal may, within 30 days of the decision appeal to the Appeals Committee constituted for the province in which the land in dispute is situated, with a provision that either party to that appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within 60 days from the date of the decision complained of. These are the statutory provisions in the Land Disputes Tribunals Act, which are not inconsistent with the Constitutional Provisions.

Consequently the plaint filed in this court and Chamber Summons dated the 12th May 2003 amounts to abuse of the process of court and are hereby struck out under Order VI Rule 13(1) (d) of the Civil Procedure Rules. Interim orders of injunction issued are vacated.

I award costs of this application and costs of the suit to the Defendant. It is so ordered.

Dated and delivered at Mombasa this 30th June 2003.

A.G.A. ETYANG

JUDGE