



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA

ELC NO 131 OF 2019

CORAVE AMRNATH (Suing on behalf of the late

AMARNATH GUPTA).....**PLAINTIFF**

VERSUS

1. PATRICIA KAZUNGU

2. LAND REGISTRAR KILIFI

3. ATTORNEY GENERAL.....**DEFENDANTS**

RULING

1. By a notice of motion dated 12th July 2019 and brought under Section 1A and 3A of the Civil Procedure Act, Order 40 Rule 1 and 2 and Order 51 of the Civil Procedure Rules, the plaintiff/applicant is seeking an order of injunction against the 1st and 2nd defendants restraining them by themselves, their agents, servants or any other person acting on their instructions from transferring, selling, registering or mortgaging of the property known as Plot No. 1222 Kawala “B” until the suit is heard and determined. The application is supported by the affidavit of Gorave Amarnath, the plaintiff sworn on 12th July, 2019. The application is premised on the grounds that the plaintiff’s late father Mr. Amarnath Gupta is the current owner of the suit property. That the Minister erred by awarding the said land to the 1st Defendant and failed to consider the evidence by the plaintiff’s witness who sold the land to the plaintiff’s late father. The plaintiff avers that the minister was wrong in awarding the property to the 1st defendant and yet she had her own land adjacent to the suit property. That the Minister’s action has occasioned injustice to the estate of the deceased and especially the plaintiff and if not addressed might lead to the plaintiff losing the land.

2. The plaintiff has annexed copies the Grant of Letters of Administration Intestate issued on 4th February, 2016 in Mombasa HC Succession Cause No. 346 of 2015. In the matter of the Estate of Amarnath Gupta (deceased). The plaintiff avers that the suit property was registered in the name of his late father during adjudication, having bought it as an unsurveyed land and the subsequent dispute was decided in their favour. The plaintiff has annexed a copy of the decision. That the 1st defendant appealed to the Minister who made a decision in favour of the 1st defendant. A copy of the Minister’s decision has also been annexed. The plaintiff states that the Minister’s decision became final to the extent that the procedure under the adjudication was exhausted. The plaintiff avers that he is aggrieved by the said decision and did write to the committee to furnish him with the proceedings but the same have not been supplied. A copy of the letter requesting for the said decision has been annexed.

3. The plaintiff states that the land is now Plot No. 35 and is currently in the name of the 1st defendant’s son and his brother-in-law and as such the properly has nothing to do with the land of the plaintiff’s late father which is Plot No. 1222 Kawala “B”. It is the plaintiff’s contention that the Minister’s decision is unmerited and made in bad faith and was arrived at in total disregard to the evidence produced, and especially from the plaintiff’ witnesses. The plaintiff avers that unless the orders for injunction are granted, the property will be quickly sold such that by the time the suit is heard and determined, the property might not even be there.

4. In opposing the application, the 1st defendant filed a replying affidavit sworn by herself on 30th December, 2019 and a preliminary objection dated 27th September, 2019. The 1st defendant avers that the Minister’s decision is final and unchallenged and that the plaintiff never filed an application for judicial review to quash the said decision. It is the 1st defendant’s contention that this court lacks jurisdiction to entertain the application and the suit, adding that the same is malicious, misconceived, lacking in merit, baseless and abuse of the court process. That the suit and application violates Order 53 of the Civil Procedure Rules and Sections 27 and 28 of the Land Adjudication Act, Cap 284 Laws of Kenya. That the land is privately owned and now registered in the name of the 1st Defendant and does not form part of the estate of the late Amarnath Gupta. The 1st Defendant therefore wants the application and the suit struck out with costs.

5. The application and the preliminary objection were heard concurrently by way of written submissions. The plaintiff filed submissions on

9th March, 2020 while the 1st defendant filed his on 13th March, 2020.

6. I have considered the plaintiff's Notice of Motion, supporting affidavit and annexures thereto, the 1st defendant's Replying Affidavit and Preliminary Objection and the written submissions filed by the advocates for the plaintiff and for the 1st defendant as well as the authorities cited. The first issue for determination by the court is whether the preliminary objection taken by the 1st defendant is sustainable or not. Secondly, if the preliminary objection fails, whether the plaintiff has satisfied the conditions for grant of orders of temporary injunction.

7. In the case of **Owners of the Motor Vessel "Lillian S" –v- Caltex Oil (Kenya) Ltd (1989) KLR 1**, Nyarangi JA stated:

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seizes of the matter is then obliged to decide on the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

8. Referring to the passage in Words and Phrase Legally Defined – Volume 3: 1-N page 113, Nyarangi, JA went on:

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, commission under which the court is constituted, and may be extended or restricted by the like means.....where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

9. In the case of **Samuel Kamau Macharia & Another –v- Kenya Commercial Bank Ltd & 2 Others (2012) eKLR**, the Supreme Court stated:

"A court's jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law....the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings."

10. The 1st defendant's preliminary objection is premised on the ground that the plaintiff's suit violates the provisions of Order 53 of the Civil Procedure Rules and Sections 27 and 28 of the Land Adjudication Act, Cap 284 Laws of Kenya. In the plaint the plaintiff has pleaded that the dispute herein was subject to an objection under the Land Adjudication Act. The plaintiff's case is that an objection (under Section 26 of the Said Act) was made in his favour. That the 1st defendant filed an appeal under Section 29 of the said Act and the Minister decided in favour of the 1st defendant, thus overturning the decision that was in favour of the plaintiff. The plaintiff is now challenging the Ministers' decision in this suit. Section 29 of the Land Adjudication Act provides as follows:

"29 (1) Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination by –

a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

b) Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final" (emphasis added).

11. From the pleadings and the material placed before me, it is not in dispute that the dispute before me emanates from the decision of the ministerial panel acting pursuant to the provisions of the Land Adjudication Act. The Land Adjudication Act has an inbuilt dispute resolution mechanism which starts at the lowest level which is the Adjudication committee up to the highest level which is an appeal to the Minister responsible for lands docket. From the material placed before me, that machinery has now been exhausted. Section 29 (1) (b) provides that the decision of the Minister is final. The Act has not provided for further appeal to this court from the decision of the Minister. It is clear from the pleadings herein that the plaintiff is challenging the Minister's decision which was made under the said Act. I am accordingly in agreement with the preliminary objection raised by the 1st defendant though;[not in very precise terms, that this court has no jurisdiction to sit on appeal against the decision of the Minister made under the Land Adjudication Act. It is clear to me that this court cannot entertain a dispute of this nature arising from the adjudication process, save in the exercise of its supervisory jurisdiction. That being the case, and the Ministers' decision being an administrative action, the plaintiff could only come to this court if there was sufficient reason therefor, by way of judicial review, which is not the case herein. Otherwise, in the circumstances before me, the suit is misconceived and without any foundation.

12. I accordingly find and hold that the 1st defendant's preliminary objection has merit and I uphold the same. The notice of motion dated 12th July 2019 and the suit are struck out with costs to the 1st defendant.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE