



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 51 OF 2017

DR TEMI MUTEMI MUTIA.....APPLICANT

VERSUS

NGUNDI MUTUNGA.....RESPONDENT

RULING

The application before me is the chamber summons dated 17th July 2017 brought under Order 40 Rules 1,2 3 and Section 3A CPR and CPA respectively.

The application is supported by the applicant's affidavit and grounds shown on the face of the said application that application is seeking the following orders:

1. (Spent)
2. THAT pending the hearing and determination of this application, a temporary order of injunction be issued restraining the defendant/respondent, his agent, and/or servants from interfering with the plaintiff's land registration No. MIGWANI.KYAMBOO/561.
3. THAT pending the hearing and determination of this suit an order of injunction do issue restraining the defendant/respondent his agent and or servants from interfering with the plaintiff's land registration No. MIGWANI.KYAMBOO/561.
4. THAT the costs of this application be awarded to the plaintiff/applicant.

This suit was filed simultaneously with the said application under certificate of urgency.

In a replying affidavit sworn on 25th July, 2017 the respondent denied the applicant's averments saying that this plot is No. MIGWANI/KYAMBOO/1673 and 151 and that he has not encroached the applicants plot No. 561 as alleged.

He stated that he has developed this two plots which he acquired from a third party by way of transfer. He attached a sale agreement marked NM – IV. The respondent also filed grounds of opposition in addition to the replying affidavit dated 25/7/2017.

When the application came up for inter-parties hearing, the parties through their legal representatives agreed to dispose of the same by way of written submissions.

APPLICANT'S SUBMISSIONS

The applicant states that he is a beneficiary to the estate of the deceased who is the proprietor of MIGWANI.KYAMBOO/561 after it was bequeathed to him and his brothers during the lifetime of the deceased and that he is holding the property as a legal proprietor. The applicant cited order 37 Rule 1 CPR and Article 159 (1) (h) of the Constitution of Kenya in support of the application. The applicant also cited the celebrated case of Giella –vs- Cassman Brown Limited (1973) EA 358 and urged this court to allow the application.

RESPONDENT'S SUBMISSION

The respondent through the firm of Mulinga Mbaluka avers that the land registration No. MIGWANI.KYAMBOO/561 is registered in the applicant's late father Mutia Ngonyi and that the applicant has not shown letters of administration authorizing him to sue on behalf of the estate of the deceased person. The respondent states the land he owns is No. 151 Migwani market is registered under the County Government of Kitui and that he brought the same from one Alex Bosco. The respondent further contends that the plot No. MIGWANI.KYAMBOO/151 borders the plot No. MIGWANI.KYAMBOO/561 and that the two plots are separate and distinct.

I have carefully considered the pleadings and the submissions by counsels appearing both for the applicant and the respondent. In the grounds of opposition dated 25th July 2017, the respondent has raised issues of capacity by the applicant to institute this suit and indeed the application herein. At paragraph (b) of the said grounds of opposition, the respondent says that the applicant lacks locus standi. This court is alive to the fact that where a party raises a preliminary objection that is likely to determine the suit, the court must down its tools and investigate the issue before proceeding further.

Thus the supporting affidavit, the applicant has attached a copy of title deed indicating that the registered proprietor of the land parcel No. MIGWANI.KYAMBOO/561 is MUTIA NGONYI of ID No. 3659968 of P. O box 661 Mwingi. The applicant in this submissions admits that he is the legal proprietor of his father's estate. However, he did not attach any letters of administration giving him legal authority to institute this suit on behalf of the estate of his late father.

I agree with counsel for the respondent that without letters of administration, the applicant lacks the locus standi to institute these proceedings. The applicant has submitted that letters of administration is a mere technicality and that the court should seek to deliver substantive justice.

In my mind the issue of locus standi is not a mere technicality contemplated under Article 159(1) (h) of the Constitution of Kenya 2010. The absence of locus standi is so serious such that the same cannot be remedied by the courts inherent powers. In the upshot I find this suit as a nullify and the same is hereby struck with costs to the defendant. The application herein dated 17th July 2017 is equally struck out with costs to the respondent.

Read and Signed in the open court this 1st day of November, 2017.

E.C. Cheron(Mr.)

ELC Judge

In the presence of:

1. Mr. Mwalimu holding brief Mbaluka for plaintiff
2. Mr. mbalongo holding brief Omao for the defendant