



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MISC APP NO. 4 OF 2020**

**MDIGO MBAJI CHIGULU.....APPLICANT**

**VERSUS**

**ISSAC CHIGWADO BAYA.....RESPONDENT**

**RULING**

1. By the Notice of Motion application dated 9<sup>th</sup> September 2020, Mdigo Mbaji Chigulu (the Plaintiff) prays for an order of injunction restraining the Defendant from trespassing, entering or in any manner interfering with the Plaintiff's peaceful use and enjoyment of the properties known as Plot No. 1040 and 1042 Kaling'ombe/Jimba Adjudication Scheme pending the hearing and determination of the suit.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds that: -

***i) The Plaintiff has been in occupation of the suit properties since the year 1987;***

***ii) An Appeal filed by the Defendant's father one Robert Baya Tumu regarding the same property was dismissed and the Defendant's father failed to pay the costs taxed at Kshs 62,709/-.***

***iii) The Plaintiff has ripe maize plants for harvesting, guava, cassava and coconut trees but is being threatened not to step on the suit property; and***

***iv) Owing to the Defendant's illegal acts or dealings with the property, the Plaintiff feels threatened and stands to suffer loss and damage.***

3. But in his Replying Affidavit sworn on 15<sup>th</sup> January 2021 and filed herein on 19<sup>th</sup> January 2021, Isaac Chigwado Baya (the Defendant) denies that the Plaintiff has been in occupation of the suit properties as stated in the application. On the contrary he asserts that he has been in occupation of the two parcels of land since 10<sup>th</sup> January 1965 when his father Robert Baya Tumu purchased the parcels of land from the Plaintiff.

4. The Defendant avers that the Plaintiff has in the past made two unsuccessful attempts to sell the suit properties to third parties. Sometime on 4<sup>th</sup> April 2014, the Plaintiff in the company of some rowdy youth forcefully evicted the Defendant from the land. The parties were thereafter summoned to the Rabai District Officer's Office where the Plaintiff was ordered to abandon the land and to remove his people who had taken occupation of the same.

5. The Defendant further avers that on 8<sup>th</sup> and 10<sup>th</sup> October 2018, the Plaintiff again forcefully evicted him from the land and despite reports made to the Police, the Plaintiff continued to cultivate the land taking advantage of the Defendant's absence as the Defendant works in Nairobi.

6. The Defendant further asserts that in June 1989, the Plaintiff took the matter to Court claiming he had not sold the land to the Defendant's father but had only mortgaged the same. The matter was later dismissed and the parties went before the land adjudication committee which again adjudicated the land in the Defendant's favour. The Plaintiff thereafter lodged an appeal to the Minister which remains pending for hearing.

7. In addition to the Replying Affidavit, the Defendant has by a Notice of Preliminary Objection dated 18<sup>th</sup> January 2021 objected to the suit herein on the ground that the same is an abuse of the Court process and bad in law pursuant to the provisions of Section 30 (1) of the Land Adjudication Act.

8. I have carefully considered both the Plaintiff's Motion and the Defendant's Preliminary Objection. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

9. Section 30 (1) of the Land Adjudication Act, Cap 284 of the Laws of Kenya provides as follows: -

***“Except with the consent in writing of the adjudication officer, no person shall institute and no Court shall entertain any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29 (3) of this Act.”***

10. From a perusal of the record before me, there was no doubt that the suit properties are situated within an adjudication section. That is the reason that the Plaintiff avers as follows at paragraphs 9 to 14 of his Supporting Affidavit: -

***9. That sometimes in November 2012, the Respondent herein without any colour of right went to the Ministry of Lands, District Lands Adjudication & Settlement Department and lodged a complaint. (Annexed and marked “MMC- 05” is a Copy of the Summons;***

***10. That the Committee mandated (by) the Land Adjudication & Settlement Department deliberated and decided to give back the land to the Respondent herein but I preferred an Appeal to the Ministry. Annexed hereto and marked MMC- 06 is a copy;***

***11. That sometimes in May 2019, I was summoned to the OCS Rabai Police Station, the Police took away my Summons letter and told me not to step in the Shamba.***

***12. That I visited the Land Adjudication and Settlement Department who issued me with a letter to deliver to the OCS Rabai Police Station. Annexed and marked “MMC-07” is a Copy;***

***13. That I have coconut trees ready to harvest, maize, young maize plants, cassava and guavas on the suit properties and unless the Respondent is restrained by orders of the Court, he is likely to cause destruction. Annexed and marked “MMC-08 are photographs of the suit properties; and  
14. That it is the interest of justice that I now seek orders of the Court to continue using the shamba i.e Plot No. 1040 and 1042 Kaling'ombe/Jimba Adjudication Scheme pending hearing and determination of my Appeal with the Ministry.”***

11. While the Plaintiff would as per paragraph 14 of his affidavit aforesaid want this Court to believe he merely craves an order of injunction pending the determination of the Minister, it is apparent from the orders sought herein that he would want the orders in place pending the hearing and determination of the suit he has instituted herein. A perusal of the prayers in his Plaint dated 9<sup>th</sup> September 2020 reveals that the Plaintiff indeed craves a declaration that he is the rightful occupant and owner of the suit properties.

12. Having subjected himself to the adjudication process as provided under Cap 284 aforesaid, I did not think it was open for the Plaintiff to pursue a determination of his rights over the suit properties in two different fora. And having acknowledged that the adjudication process was not yet concluded as his own appeal to the Minister was still pending, it was not open for the Plaintiff to institute these proceedings unless he was in compliance with the requirements of Section 30 (1) of Cap 284.

13. The reasoning behind the enactment of Section 30 of the Act was that the process of determining the rights of people in an adjudication area is to be left to the elaborate mechanisms set out in the Land Adjudication Act and not to the Courts. It is the people on the ground who best know who is entitled to which part of the land that is the subject of an adjudication process. The effect of Section 30 was to remove that determination from the jurisdiction of the Court so that the Court does not determine any conflict touching on interest over the land without the party aggrieved first seeking the permission of the Adjudication Officer.

14. In the circumstances herein, it is evident that no such permission was obtained prior to the institution of this suit. It follows therefore that I find merit in the Defendant's Preliminary Objection.

15. Accordingly, I hereby strike out the Motion and the Plaintiff's suit with costs to the Defendant.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 15<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**J.O. OLOLA**

**JUDGE**