



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.94 OF 1999

ANERICO M. SIMIYU.....PPLICANT/APPELLANT

VERSUS

REDEMPTOR N. SIMATI.....RESPONDENT

RULING

Notwithstanding the voluminous proceeding herein and the acrimony that appears to govern the dispute between the parties, the issue for my determination is fairly straight forward and within a very narrow scope. That issue is whether this Court can grant orders in an application that is premised on a suit that does not exist.

The genesis of this dispute was laid parcel No. **EAST BUKUSU/SOUTH KANDUYI/7029** in which the Respondent (REDEMPTA SIMATI) as the legal representative of her late husband **LIBERIO MASINDE SIMATI** sought eviction orders against **ANERICO M. SIMIYU** the (Applicant herein). The suit, as was the practice then, was referred to the **KANDUYI LAND DISPUTES TRIBUNAL** by the SENIOR RESIDENT MAGISTRATE'S COURT BUNGOMA on 20th July 1995. That Tribunal made an award in favour of the Respondent. The Appellant was aggrieved and filed an appeal to the **KAKAMEGA PROVINCIAL LAND DISPUTES APPEAL COMMITTEE** which approved the award of the **KANDUYI LAND DISPUTES TRIBUNAL**. The Appellant then filed an appeal in the **HIGH COURT AT BUNGOMA** being **Civil Appeal No.94 of 1999**. That appeal was allowed by **MBITO J** who, by a judgement delivered on 8th August 2008, set aside the awards made by the **KAKAMEGA PROVINCIAL DISPUTES APPEAL COMMITTEE** and the **KANDUYI LAND DISPUTES TRIBUNAL**. Following the quashing of those awards by **MBITO J**, the Appellant, in what later transpired to have been suspicious proceedings conducted exparte, managed to obtain a vesting order excising from land parcel No. **EAST BUKUSU/SOUTH KANDUYI/15** (which was registered in the names of the Respondent's late husband and was not the subject in the **KANDUYI LAND DISPUTES TRIBUNAL**), a parcel measuring 0.97 Hectares which he then added to the land parcel No. **EAST BUKUSU/SOUTH KANDUYI/7029** thereby increasing its acreage. That prompted the Respondent to move to the High Court on review and **SERGON J** in a ruling dated 23rd July 2004 set aside that vesting Order having found that the Appellant herein had on "**various occasions**" extracted "**orders surreptitiously**". Aggrieved by the Orders of **SERGON J**, the Applicant then moved to the Court of Appeal and filed **CIVIL APPEAL NO.227 of 2004** which was however dismissed with costs on 24th September 2010. That judgement ought to have brought this dispute to an end.

However, eight(8) years later on 12th June 2018, the Applicant filed a Notice of Motion citing Sections 3, 3A and 63(1) of the Civil Procedure Act and Order 40 of the Civil Procedure Rules seeking the following orders:

(a) Spent

(b) Spent

(c) That it pleases the Honourable Court to order the County Surveyor, Land Registrar Bungoma South to visit and erect the boundaries between the Applicant's parcel namely E.BUKUSU/S.KANDUYI/7029 and the portion measuring 0.97Ha that was to be allocated to the Respondent pursuant to the Court of Appeal judgement in Appeal No.227 of 2004.

(d) The Respondent be permanently restrained by herself or her agents from trespassing or encroaching on the Applicant's portion of land.

(e) That costs of this application be provided for.

That application which is the subject of this ruling is premised on the grounds set out therein and also supported by the Applicant's affidavit.

The gravamen of the application is that following the decisions of the superior Courts which I have summarized above, the Respondent has now invaded the Applicant's land parcel No. **EAST BUKUSU/SOUTH KANDUYI/7029** and has demarcated it with a view to selling plots

to un-suspecting buyers.

In opposing the application, the Respondent filed a replying affidavit in which she has deponed, inter alia, that this application is an abuse of the Court process and that following the judgement of the Court of Appeal, the only other proceedings in this matter can only relate to the taxation of the bill of costs. That the land parcel No. **EAST BUKUSU/SOUTH KANDUYI/7029** ceased to exist a long time ago and the issues being raised herein were also raised in **BUNGOMA HIGH COURT CIVIL CASE NO.64 OF 2015** and therefore this application is res judicata.

In a further affidavit however, the Applicant averred that the land parcel No. **EAST BUKUSU/SOUTH KANDUYI/7029** exists and the title was never cancelled either by **SERGON J** or by the Court of Appeal.

The applicant has been canvassed by way of written submissions which have been filed both by **Mr. SICHANGI ADVOCATE** for the Applicant and **Mr. OCHARO ADVOCATE** for the Respondent.

I have considered the application, the rival affidavits and annexures thereto and the submissions by Counsel.

The view I take of this matter is that there is no pending suit herein upon which the Applicant's Notice of Motion dated 12th June 2018 can be founded nor the prayers sought therein be granted.

I therefore wholly agree with the Respondent when she avers in paragraph thirteen (13) of her replying affidavit dated 16th July 2018 as follows:

13: "That I am informed by my Counsel on record which information I verily believe (sic) to be true that in the circumstances of the application, the only further proceedings that would be undertaken in this appeal by the Appellant/Applicant would only relate to taxation of his bill of costs."

This dispute was commenced under the provisions of the now repealed **LAND DISPUTES TRIBUNALS ACT** (Chapter 303A Laws of Kenya). Under that Act, a dispute over land would go through the following processes:

- 1. The dispute would be instituted by presenting a claim to the Land Disputes Tribunal for the area in which the land is situated – Section 3(2).**
- 2. The Tribunal then hears the dispute and files its award in the Magistrate's Court – Section 7(1).**
- 3. Judgement is entered in terms of the award and a decree follows – Section 7(2).**
- 4. Any aggrieved party may file an appeal to the Appeals Committee within thirty(30) days of the decision of the Tribunal – Section 8(1).**
- 5. The decision of the Appeals Committee shall be final on any issue of fact – Section 8(8).**
- 6. Either party may appeal from the decision of the Appeals Committee to the High Court on a point of Law within sixty(60) day of the decision complained of – Section 8(9).**

It follows therefore that where a dispute has been determined and no appeal is filed as contemplated vide Section 8(1) of the repealed Act, the parties are to be governed by the Tribunal's award. If an appeal is filed and allowed or the Tribunal's decision is quashed, as happened in this case, then the parties revert to the position in which they were prior to the decision of the Tribunal. Either way, those proceedings will have come to an end save on the issue of costs. That, in my view, is what has happened in this case.

There is therefore no suit pending herein on which this Court can issue orders permanently restraining the Respondent or her agents from trespassing on the Applicant's portion of the land in dispute. Sections 3, 3A and 63(1) of the Civil Procedure Act and Order 40 Rules 1 and 2 of the Civil Procedure Rules which have been cited by the Applicant in his Notice of Motion presuppose that there is a suit pending determination by the Court. Indeed Order 40 Rule 1 of the Civil Procedure Rules as far as is relevant for purposes of this ruling reads:

"where in any suit it is proved by affidavit or otherwise-"

And Order 40 Rule 2 of the same Rules starts by stating that:

"In any suit for restraining the defendant from..."

Sections 3 and 3A of the Civil Procedure Act saves the inherent jurisdiction of the Court while Section 63 of the same Act provides the remedies that a Court may issue to prevent the ends of justice from being defeated. However, all these powers cannot be invoked in a vacuum. They can only be exercised where there is a suit already filed in Court. Having taken the view that there is no suit pending before this Court, it follows therefore that there can be no basis upon which the Applicant's Notice of Motion dated 12th June 2018 can be considered as it has no foundation.

The Applicant also seeks the additional prayer that this Honourable Court orders the County Surveyor and Land Registrar Bungoma to “**visit and erect the boundaries between the Applicant’s parcel No. EAST BUKUSU/SOUTH KANDUYI/7029 and the portion measuring 0.97 Ha that was to be allocated to the Respondent pursuant to the Court of Appeal judgement in Appeal No.227 of 2004**”. Again, and for the same reasons given above, there is no basis upon which this Court can purport to grant those prayers.

Secondly, I have perused the Court of Appeal judgement in **Civil Appeal No.227 of 2004**. I have not seen any directions issues by that Court to the effect that any such boundaries be erected. In any event, it is common that the fixing of boundaries is, by law, the prerogative of the Land Registrar and he does not require any orders from the Court to perform his responsibilities as stipulated vide Section 18 of the Land Registration Act.

Finally, Counsel for the Respondent has submitted, and rightly so in my view, that this application is res-judicata in view of the ruling by **MUKUNYA J** in **BUNGOMA ELC CASE NO.64 OF 2015** delivered on 30th September 2015. A copy of that ruling has been annexed to the Applicant’s further affidavit dated 18th July 2018. From that ruling, it is clear that a similar application was placed before **MUKUNYA J** who struck it out and said:

“The issue raised by the Applicant is res-judicata. The same having been settled by this Court and the Court of Appeal. The suit filed herein is already determined by the Court. This application is herein struck out. It has no merits at all and since it is predicated on a suit that is res judicata. This suit is also struck out with costs to the Respondent.”

It is now clear beyond peradventure that the Applicant is forum shopping. This Court must remain vigilant and stop him in his tracks by informing him that this litigation has now arrived at a **cul de sac**. There is no suit upon which any of the prayers sought by the Applicant can be granted.

The up-shot of the above is that the Applicant’s Notice of Motion dated 12th June 2018 is struck out with costs to the Respondent.

BOAZ N. OLAO

JUDGE

4TH OCTOBER 2018

Ruling dated, delivered and signed in open Court this 4th day of October 2018 at Bungoma.

Mr. Ocharo for Respondent present

Mr. Milimo for Mr. Sichangi for Appellant present

BOAZ N. OLAO

JUDGE

4TH OCTOBER 2018