



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

E.L.C CIVIL SUIT NO. 572 OF 2013

SAMUEL CHEMARINGO CHUMO APPLICANT

VERSUS

CLEOPHAS K. CHEPKWONY.....RESPONDENT

RULING

1. By a plaint dated **24th October, 2013** the plaintiff **Samuel Chemaringo Chumo**, instituted this suit against the respondent **Cleophas K. Chepkwony** seeking among other orders the nullification of the award of **Olenguruone Land Dispute Tribunal case No. 227 of 2006** dated **29th March, 2007** and decree by **Molo Land Dispute** case No. **46 of 2007** dated **24th September, 2013**.

2. Simultaneously with the suit, the plaintiff brought a notice of motion of even date seeking among other orders, that the honourable Court be pleased to restrain the respondent by himself, his servants, employees, authorized agents and hired help from using the award and decree obtained in Olenguruone Land Dispute Tribunal case No. 227 of 2006 and Molo Land Dispute case No.46 of 2007 to defraud the applicant or evict him from L.R No. **Nakuru/Baraget settlement Scheme/304** (hereinafter called “the suit property”) and or interfering with the applicant's peaceful and quiet possession, occupation and use of the same pending the hearing and determination of this suit.

3. On **13th November, 2013** counsels for the respective parties entered into a consent to maintain status quo on the suit property pending the hearing and determination of the application.

4. The application is supported by the affidavit of the plaintiff sworn on **24th October , 2013** and is premised on the grounds that the plaintiff is the owner of the suit property, has developed the same and has lived there with his family since 2005; that the respondent takes care of the neighbouring plot No. **Nakuru/Baraget settlement Scheme/1612** and has never raised any issue with the applicant concerning the applicant's plot; that the respondent has secretly, wrongfully and fraudulently obtained an award and decree from Olenguruone Land Dispute Tribunal case No. 227 of 2006 and Molo Land Dispute case No. 46 of 2007 without serving the applicant; that the applicant is extremely prejudiced by the respondent's actions and stands to suffer undue and irreparable loss of his land as the respondent intends to use the said award and decree to defraud him of his land and evict him unless the honourable court intervenes.

5. In opposition to the application, the respondent has sworn an affidavit where he has deponed that he is the rightful owner of the suit property; that he was allocated the same by the government as a squatter in the year 2000, has been in possession ever since and has settled therein with his family; that the applicant was fraudulently registered as the owner of the suit property as is evidenced by the date on the title deed which reads **12th October, 2005** whereas the receipts of issuance are said to have been issued after the

title deed on **11th November, 2005**; that the applicant was aware of the dispute before the tribunal and did not oppose the adoption of the award and he was served with the application; that the exhibits presented by the applicant are forgeries and the court should request the applicant to produce the originals.

6. I have considered the pleadings and the affidavit evidence presented in support thereof.

7. It is not in dispute that the parties had initially presented their dispute before the Olenguruone Land Dispute Tribunal as case No. 227 of 2006 and their award was adopted as judgement of the court by Molo Principal Magistrate's court in Land Dispute case No. 46 of 2000. The orders granted remain undisturbed to date and this court cannot attempt to vacate these orders in the manner proposed in the current application.

8. Section 7 of the Civil Procedure Act provides-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

This is replicated in section 28 of the Environment and Land Court Act thus:- **“The court shall not adjudicate over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction prior to the commencement of this act”**

9. The current suit is not an appeal. The decree issued by the Principal Magistrate Molo has not been reviewed/ set aside or appealed against. In the current application, there is no prayer for stay of the award by the tribunal and decree awarded by the lower court. What the applicant seeks from this court is a nullification of the award of Olenguruone Land Dispute Tribunal case No. 227 of 2006 dated **29th March, 2007** and decree in Molo Land Dispute case No.46 of 2007 dated **24th September, 2013**. In the interim the applicant seeks to restrain the respondent by himself, his servants, employees, authorized agents and hired help from using the award and decree obtained in Olenguruone Land Dispute Tribunal case No. 227 of 2006 and Molo Land Dispute case No.46 of 2007 to defraud the applicant or evict him off the suit property and or interfering with the applicant's peaceful and quiet possession, occupation and use of the same pending the hearing and determination of this suit.

10. The orders sought cannot be granted as the judgement by the lower court has not been set aside vacated/ or quashed. These are valid orders of the court and must be respected. In view of the foregoing the notice of motion dated **24th October, 2013** must fail.

11. Costs of the application are awarded to the applicant.

Dated, signed and delivered on this 9th day of May 2014.

L N WAITHAKA

JUDGE.

PRESENT

Mr Kavita holding brief for Mr Murindi for the Defendant

-Ms Ndeda holding brief for Ochieng Gai for the plaintiff.

CC: Emmanuel Maelo

L N WAITHAKA

JUDGE