



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 251 of 2009

BAKARI MOHAMED SARAI PLAINTIFF

V E R S U S

1. MAJAMBO KASSIM 1ST DEFENDANT

2. GABRIEL NDUNGU MACHARIA 2ND DEFENDANT

3. FRANCIS GITHAE KAGO 3RD DEFENDANT

RULING

The Plaintiff, in the main suit, seeks the revocation and/or cancellation of the Defendants registration as proprietors of Kwale/Majoreni/5 (the suitland). About 23 months after the commencement of the proceedings, the Plaintiff filed an application for injunction seeking the following prayer:-

“That the defendants, themselves, their agents be restrained by an order of injunction from digging a well, constructing, fencing, or doing anything at all on parcel of land No. KWALE/MAJORENI/5 until the suit herein is heard and determined.

This decision is in answer to that application.

It is the argument of the Plaintiff that he is the owner of the suitland. That the 2nd and 3rd Defendants fraudulently had themselves registered as the proprietors but he successful challenged this in Msambweni Land Disputes Tribunal Case No. 97 of 2006. It is for this reason that he seeks the cancellation and/or revocation of the 2nd and 3rd Defendants registration.

In response the 2nd and 3rd Defendants advocate Kiarie Kariuki filed a replying affidavit sworn on 8th April 2011. Before examining the contents therein, I need to say this. The practise of Advocates swearing

affidavits on their clients behalf in legal proceedings is frowned upon by Court. There will be instances where the Courts will strike out contents of such affidavits when they amount to hearsay evidence. But what is to be made of Counsels affidavit here?

The short affidavit substantially introduces formal information. Annexed to it is a copy of the Title Deed to the suit property and the order of the High Court in **Nrb Misc. Civil Application JR 943 of 2007** (the "Judicial Review"). The fact of registration of the suit property is admitted by the Plaintiff in paragraph 5 of the Plaint while the existence of the High Court proceedings is admitted in paragraph 7 thereof. The Court order would be a public document. For this reason the Court will consider Counsels affidavit only in so far as it touches on these two formal matters. This practise by Counsels must, however, be discouraged.

The affidavit establishes that the decision of the Tribunal and the order adopting it as a judgment of Court were quashed in the Judicial Review proceedings in the High Court. These are the orders of the High Court-

"1. That an order of CERTIORARI be and is hereby granted to remove forthwith into the High Court of Kenya for the purpose of quashing the entire proceedings, judgment dated 26th June 2006 and Ruling of the District Land Dispute – Msambweni Tribunal Case No. 97 of 2006.

2. That an order of CERTIORARI be and is hereby issued quashing the adoption order issued by the 2nd Respondent on the Judgment of Msambweni Land Dispute Tribunal in its Land Tribunal Case No. 97 of 2006 dated 2nd August 2007."

The Plaintiffs cause of action is based on an allegation of fraud whose particulars are found in paragraph 6 of the plaint. The application for injunction gave the Plaintiff an opportunity to prove this claim on a prima facie basis by way of affidavit. The Plaintiff does not appear to have discharged that onus at all and only makes reference to fraud in paragraph 5 of the affidavit in which he states:-

"The suit herein in based on the fact that the 2nd and 3rd Defendants registration of the suit property is based on fraud and I am seeking cancellation of the said Title."

There is no evidence led on when and how the fraud was committed.

Instead the Plaintiff pegged the strength of his claim on the victory he scored in the Tribunal proceedings. This, however, may be misplaced as the Tribunal award was quashed by the High Court in the Judicial Review.

I have to reach the decision that the Plaintiff has not established a prima facie case and the application for injunction must fail.

The application of 22nd March 2011 is dismissed with costs.

Dated and delivered at Mombasa this 5th day of July, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Kenzi for the Plaintiff

Mutangeli for Kiarie for the Defendants

Court clerk - Moriasi

F. TUIYOTT
JUDGE