



REPUBLIC OF KEN YA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 16 OF 2011

ASHWIN RAMJI GUDKA PLAINTIFF

VERSUS

ANCHELA KWAMBOKA MBOGA 1ST DEFENDANT
PETER OGWORA KIBOSA 2ND DEFENDANT
HON. ATTORNEY-GENERAL 3RD DEFENDANT

RULING

1. The application that is before me is the Notice of Motion dated 7th February, 2011 and filed in court on 8th February, 2011. The Plaintiff/Applicant, **Ashwin Ramji Gudka** seeks an order of injunction to restrain the 1st Respondent, Anchela Kwamboka Mboga by herself and/or through her agents and or any persons acting on her behalf from proceeding to implement the decree in Kisii CMCC Misc. Application No. 127 of 2010. The applicant also prays that costs of the application be provided for.

2. The application is supported by the grounds on the face thereof, namely:-

(a) That the Plaintiff/Applicant herein is the registered owner of land parcel No. WEST KITUTU/BOGEKA/529.

(b) That the said Plaintiff/Applicant was not a party to the proceedings before the Mosocho Land Disputes Tribunal Case No.20 of 2010 which culminated in decree that issued vide KISII CM MISC.APPL. NO. 127 OF 2010.

(c) That the claim before the Mosocho Land Disputes Tribunal was not within the claims that the said Tribunal had jurisdiction to hear under the Land Disputes Tribunal Act.

(d) That the Mosocho Land Disputes Tribunal also overstepped its powers in the manner of the orders it granted.

(e) That the Plaintiff/Applicant's rights and interests to suit land stand a grave danger of being interfered with and/or trampled upon unless this application is granted.

3. The application is also premised on the plaintiff's affidavit sworn on 7th February, 2011. The deponent avers that the 1st Defendant sued the 2nd Defendant herein before the Mosocho Land Disputes Tribunal vide case No. 2010 which culminated in Kisii CM Misc. Appl. No. 127 of 2010, whereby the decision

was, *inter alia*, that the plaintiff's title to L.R. No. WEST KITUTU/BOGEKA/529 be subdivided among family members of the 1st Defendant/Respondent which decision if implemented will seriously and/or greatly affect the plaintiff's rights and interests therein. The deponent also contends that the claim filed before the Mosocho Land Disputes Tribunal was void *ab initio* for the reason that the nature of the claim as filed before the Tribunal did not fall within the ambit of those claims for determination by a Land Disputes Tribunal. He contends further that if the order sought herein is not granted, he stands the risk of having his title deed cancelled.

4. The application was duly served upon the Respondents, but neither of them had filed any replying pleadings by the time of the hearing of the application on 1st March, 2011. The application thus proceeded *ex parte*. Mr. Soire who appeared for the Plaintiff/Applicant urged the court to grant the orders sought.

5. Before I go into the merits of the application, it is necessary to give some background to the application. This starts with the plaint dated 7th February, 2011 and filed in court on 8th February, 2011. The dispute between the plaintiff and the respondents revolves around L.R. NO. WEST KITUTU/BOGEKA/529 measuring 0.09 hectares and registered in the name of the plaintiff – see annexure marked “**ARG 1**” to the plaintiff's supporting affidavit. The plaintiff bought the same land (suit land) from the 2nd Defendant for Kshs.1,10,000/=. The plaintiff avers as follows at paragraph 8 of the plaint:-

“8. That reaching sometimes on diverse dates between 29th September, 2010 and 1st November, 2010 without knowledge and/or notice of the said plaintiff and plaintiff's participation the 1st defendant commenced proceedings before the Mosocho Land Disputes Tribunal against the 2nd Defendant claiming title and/or sub-division of the said land to the family vide Mosocho Land Tribunal case No. 20 of 2010 which suit culminated in Kisii Misc. Appl. No. 127 of 2010 wherein the said Tribunal wrongfully and acting beyond its mandate provided for in the Land Disputes Tribunal Act, Act No. 18 of 1990 decided *inter alia* that the plaintiff's title to land parcel NO. WEST KITUTU/BOGEKA/ 529 be revoked and that the same be sub-divided among the family members of the 1st and 2nd defendants.”

6. According to the plaint, the decision of the Mosocho Land Disputes Tribunal has already been adopted as a judgment of the court vide Kisii CM Misc. application No. 127 of 2010. The plaintiff seeks a declaration by this honourable court that the decision of the Mosocho Land Disputes Tribunal in case no. 20 of 2010 as adopted by the Court in Kisii CM Misc. Application No. 127 of 2010 revoking and/or cancelling the plaintiff's title to the suit land is unlawful and/or improper and/or unconstitutional and the same is a nullity. The plaintiff also seeks an order of a permanent injunction restraining the 1st and 2nd Defendants by themselves and/or any persons acting on their behalf from subdividing and/or in any way interfering with the plaintiff's title to the suit land.

7. Looking at the pleadings, it is clear that the plaintiff/applicant was not a party to the Tribunal case. It is also clear that the decision of the Tribunal has already been adopted as a judgment of the court pursuant to **section 7 of the Land Disputes Tribunals Act, No. 18 of 1990.**

8. The position as I see it is that the plaintiff/applicant should have come to this court by way of Judicial Review proceedings under **Order 53 of the Civil Procedure Rules.** It follows therefore that this court cannot intervene in this matter in the way envisaged by the plaintiff/applicant. For this reason, the applicant's application must fail.

9. Secondly, the court finds that the reliefs sought in the plaint are at variance with the reliefs sought in the application. Such variance is fatal to the plaintiff's application, so that even if the application was properly before this court, the same would have failed on account of such variance.

10. In the premises and for the reasons above stated, the plaintiff's Notice of Motion dated 7th February, 2011 is found to be without merit. The same is accordingly dismissed in its entirety with no order as to costs.

11. It is so ordered.

Dated and delivered at Kisii this 4th day of March, 2011.

RUTH NEKOYE SITATI
JUDGE.

In the presence of:-

Mr. Ombachi for Soire (present) for Applicant

N/A for 1st Respondent

N/A for 2nd Respondent

Mr. Bibu for 3rd Respondent