



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 224 OF 2018

KISINGU KINYILI.....PLAINTIFF

VERSUS

GERALD MUSANGI.....DEFENDANT

RULING

1. In the Notice of Motion dated 20th November, 2018, the Plaintiff has prayed for the following orders:

a. That a temporary injunction be issued restraining the Defendant/Respondent by themselves, agents, servants and or employees or whomsoever from transferring, encroaching, surveying, grazing, trespassing into and or otherwise interfering with the whole of that parcel of land known as Plot No. Machakos/Katangi/866.

b. That an order be issued to the Land Registrar Machakos Lands Registry stopping any further action towards Plot No. Machakos/Katangi/866 till final conclusion of this case.

c. That the costs of this Application be borne by the Defendant/Respondent.

d. Any other relief that this Honourable Court deems fit.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the legal owner of land known as Machakos/Katangi/866 (*the suit property*); that the suit land was acquired from his father in 1952 and that his father was buried on the land when he died in the year 1960.

3. According to the Plaintiff, in 1985, a dispute arose when Mr. Mailu Nzinzi lodged a dispute before the Land Adjudication Committee and that when the dispute was heard by the Minister, he unjustifiably allowed the Appeal. According to the Plaintiff, it is on the basis of the decision of the Minister that the Defendant started interfering with the suit land by trespassing on the land. The Plaintiff finally deponed that the Defendant is not a legal representative of his father's Estate and that an injunction should issue.

4. The Defendant filed a Notice of Preliminary Objection in which he averred that this court lacks the requisite jurisdiction to handle the matter. In the Replying Affidavit, the Defendant deponed that the Appeal before the Minister was rightfully lodged by his late father; that the decision of the Minister was final and that the Plaintiff filed Judicial Review Application Number 69 of 2017 challenging the decision of the Minister and that the said Judicial Review Application was dismissed by the court.

5. The Plaintiff's advocate submitted that whereas Machakos Judicial Review Application No. 69 of 2017 was challenging the decision making process in the Appeal to the Minister, this matter was premised on fraud; that the Minister's Appeal was not determined on merit and that this court has the requisite jurisdiction to hear the matter.

6. The Defendant's counsel submitted that the Minister's decision in Appeal Case No. 368 of 1996 is final; that the proceedings herein are a kin to an Appeal against the Minister's decision and that this court does not have jurisdiction to deal with the dispute.

7. This suit was commenced by way of a Plaint dated 20th November, 2018. In the Plaint, the Plaintiff alleged that he is the legal owner of the suit property. The Plaintiff admitted in the Plaint that the issue of ownership of the suit land was adjudicated over under the Land Adjudication Act, wherein the Minister of Lands, through his representative, allowed the Appeal that had been lodged by the Defendant's father.

8. In the Plaint, the Plaintiff has alleged that the Defendant masqueraded as the legal representative of his late father's Estate. Without saying

so, the Plaintiff is seeking for an order setting aside the Minister's decision.

9. The evidence before me shows that the Defendant's father was the Appellant in Appeal Case No. 368 of 1996, in which the then Deputy County Commissioner, Yatta, on behalf of the Minister, found that the Defendant's father was entitled to the suit property.

10. Upon the delivery of his decision, the Plaintiff herein filed a Judicial Review Application No. 69 of 2017 in which he sought for an order of certiorari to quash the decision of the Minister. That Application was dismissed by this court on 26th October, 2018.

11. The proceedings before the Minister in Appeal Case No. 368 of 1996 were filed pursuant to the provisions of the Land Adjudication Act. Section 29(1) of the Act provides as follows:

“(1) Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

12. The decision of the Minister in Appeal No. 368 of 1996 was final. When the Plaintiff challenged that decision by way of Judicial Review, this court dismissed the Application. The Minister having determined the issue of ownership of the suit land, the issue of ownership of the same land cannot be revisited by this court by way of a Plaintiff.

13. Considering the finality of the decision of the Minister, and this court having dismissed the Plaintiff's Application for Judicial Review, the Plaintiff cannot challenge the same decision by way of a Plaintiff on the ground that the Defendant did not have Letters of Administration for his father's Estate as at the time the Minister made his decision. That is an issue that he should have argued during the hearing of the Judicial Review Application.

14. In the circumstances, I find that the Plaintiff has not established a prima facie case with chances of success. Consequently, the Notice of Motion dated 20th November, 2018 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE