



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 318 OF 2016

MAE MWADENA WASHE.....PLAINTIFF

=VERSUS=

TSUI LEWA.....DEFENDANT

RULING

1. On or about 23rd November 2016, the plaintiff Mae Mwadena Washe filed this suit seeking:-

(i) A permanent injunction order restraining the Defendant from trespassing, constructing houses or dealing in any way with the Plaintiff's Plot No Mwele/Simakeni/25.

(ii) He also sought vacant possession by way of demolition of what he terms illegal structures on the Plot as well as eviction of the Defendant therefrom.

2. Simultaneous with the suit, the Plaintiff filed an application dated 23rd November 2016 seeking the grant of the injunction orders in the interim pending the hearing and determination of the application and the suit. On the same day the application was filed, the Honorable Justice Angote granted the following orders having heard the Motion ex-parte:-

(i) THAT the application dated 23rd November 2016 be and is hereby certified as urgent.

(ii) THAT a temporary injunction Order is hereby issued restraining the Defendant/Respondent by himself, servants, agents and anyone claiming interest from the defendant from trespassing and entering onto the Plaintiff's land being Plot No. Mwele/Simakeni/25 and from constructing structures thereon and or dealing with the land in any manner whatsoever until this application is heard on 6th February 2017 and finalized.

(iii) THAT the costs of this application be in the cause.

3. The said Orders and Summons were subsequently served upon the Defendant Tsui Lewa on 25th November 2016. Accordingly, on 3rd February 2017, the Defendant filed a Statement of Defence stating that he had lived in the suit plot from time immemorial and accusing the plaintiff of misleading the Court into issuing the Orders. At paragraph 13 of the Statement of Defence, the Defendant denied the jurisdiction of the Court and stated that he would raise a preliminary point of objection at an appropriate time as the Court's jurisdiction had been in his view, ousted by the provisions of Section 30 of the Land Adjudication Act, Cap 284 of the Laws of Kenya.

4. A similar averment was made in the Replying Affidavit also sworn and filed on the 3rd day of February 2017. At paragraph three thereof, the Defendant states that the area Mwele/Simakeni was in 2014 declared to be an adjudication area and that he has on-going disputes between the plaintiff and himself pending before the area Land Adjudication Committee.

5. Before the main application could be heard inter-partes, the plaintiff moved to court on 3rd February 2017 and filed a Notice of Motion dated 30th December 2016 seeking to have the defendant arrested and “committed to civil jail for a term not exceeding six(6) months for being in contempt of the Court Orders issued on 24th November 2016.

6. On 23rd February 2017 before the new application for contempt of Court could be heard inter-partes, the Defendant moved to Court and filed a Notice of Preliminary Objection. The Notice dated 6th February 2017 reads in short as follows:-

“TAKE NOTICE that the defendant shall raise a Preliminary Objection on a point of law to be determined *in limine* on the following grounds:-

1. That the Honourable Court’s jurisdiction to deal with the claim herein has been expressly ousted by the mandatory express clear provisions of Section 30 of the Land Adjudication Act, Cap 284.

2. That the claim herein is prohibited by the express clear provisions of Section 26 of the Land Adjudication Act, Cap 284, of the Laws of Kenya.”

7. On 4th May 2017 when the matter came before me, the parties agreed that both the Preliminary Objection and the application dated 30th December 2016 be disposed of together. I have considered the application, the Preliminary Objection and the submissions placed before me by the Learned Advocates representing the parties herein.

8. As Honourable Justice Nyarangi stated in the celebrated case of ***Owners of Motor Vessels “Lillian S” –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1;***

“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide on the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

9. By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means.

10. As was stated by the Supreme Court in ***Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Ltd & 2Others (2012) e KLR,***

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.....The issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.....where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the

Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within this authority to prescribe the jurisdiction of such a Court or tribunal by state law.”

11. According to the Defendant, the area in which the suitland is located that is Mwele/Simakeni was declared an adjudication area pursuant to the Land Adjudication Act in the year 2014. While the particular gazette notice declaring the area an adjudication section, has not been annexed, both the plaintiff and the Defendant have annexed a number of correspondences from the area District Adjudication Committee which would appear to suggest that indeed the area is undergoing adjudication. In one such letter dated 5th December 2016, (Annexure TL -3 of the Defendant’s Replying Affidavit) the Area Demarcation Officer one Said A Barawa writes in regard to Plot No. 25 and as concerns this case as follows:-

“Reference to your letter, land case No 318 of 2016. I Said Ali Barawa being the demarcation officer of Mwele/Simakeni Adjudication Section do hereby inform you that the land said case is before Land Committee Case currently running in Mwele/Simakeni Adjudication as per Act Cap 284 Laws of Kenya. Attached is a notice of the establishment of the adjudication section. Mwele/Simakeni adjudication section for your reference (sic). Please read the below marked space which explains how the lands section handles the matter especially section 30 of Act Cap 284, Laws of Kenya.”

12. In an earlier letter dated 6th June 2016, (annexed to the Plaintiff’s Supporting Affidavit and marked MWW- 1’) the same Said Barawa writes as follows in regard to the same Plot No 25:-

“This is to confirm and certify to you that the above mentioned parcel of land.....is registered the name of Mae Mwadena Washe.....

The entire Section is at an advanced stage of registration whereby the title deeds will be issued bearing the name(s) of the registered owner unless legal challenges are affected (sic).

13. At Paragraph 2 and 3 of his Supporting Affidavit, the Plaintiff confirms that the area was undergoing adjudication when he states:-

2. That I am the owner of Plot No. Mwele/Simakeni/25 and have lived there since birth.

3. That title documents have not been issued to me but the Adjudication of the land have been finalized and I have been issued with the title number. See annexed copies from the Land Adjudication and Settlement Office confirming that I am the registered owner marked “MWW 1”

14. Section 30 of the Land Adjudication Act, Cap 284 provides as follows:-

“30 (1) Except with the consent of the Adjudication Officer, no person shall institute, and no Court shall entertain any civil proceedings concerning an interest in land in an adjudication Section until the adjudication register for that adjudication section has become final in all aspects under section 29(3) of this Act.

15. The said Section 29(3) referred to on the other hand states:-

“29(3) when all the appeals have been determined, the Director of Land Adjudication shall:-

(a) Alter the duplicate register to confirm with the determination; and

(b) Certify on the duplicate adjudication register that it has become final in all respects and send details of the alterations and copies of certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.”

16. The Plaintiff does not dispute the averments made by the Defendant that as at the time of filing this suit, there were disputes still pending unresolved before the Adjudication Committee. That being so, the Applicant ought to have obtained the consent of the Adjudication Officer prior to filing of this case.

17. The Plaintiff did not satisfy this Court that as at the time of filing this suit, the Adjudication process had been completed in the manner envisaged under Section 29(3) of the Land Adjudication Act. In ***Benjamin Okwaro Estika –vs- Christopher Anthony Ouko & Another (2013) e KLR***, the Court of Appeal dealing with a similar matter as the one before me observed as follows:-

“In the matter before us, there was no evidence as we have stated, that by the time the Minister determined the Appeal No 460 of 1996 from the Adjudication Section all the appeals had been determined. There is no evidence that the Director of Land Adjudication had altered the duplicate adjudication register to conform with the determinations and there was no evidence that the Director of Land Adjudication had certified on the duplicate Adjudication Register that it had become final in all respects and had sent the details of the alterations and a copy of the Certification to the Chief Land Registrar. In short, the adjudication was not complete. That being so, the mandatory requirements of Section 30(1) had to be complied with i.e. consent of the Land Adjudication Officer had to be obtained before filing a case in respect of a dispute on land in that adjudication section or before the Court could be clothed with jurisdiction to hear it.”

18. From the position discussed hereinabove, it must be clear that I am in full agreement with the Defendant/Respondent that this Court has no jurisdiction to entertain this matter as no consent was obtained prior to its being filed.

19. Accordingly, I hereby vacate the Orders issued by this Court on 23rd November 2016 and strike out the suit with costs to the Defendant.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J.O. OLOLA

JUDGE