



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 229 OF 2013

FRANCIS NGAMBI RUKOMIAPLAINTFF

VERSUS

GABRIEL GIKUMA MAINA1ST DEFENDANT

DISTRICT LAND REGISTRAR – NAKURU.....2ND DEFENDANT

SENIOR RESIDENT MAGISTRATE- NAKURU.....3RD DEFENDANT

DISTRICT SURVEYOR - NAKURU.....4TH DEFENDANT

RULING

(Plaint filed seeking orders that a decision by a Magistrate's Court in a criminal matter be declared illegal; whether this ought to be done through plaint; elaborate process for appeal or revision set out in the Criminal Procedure Code; Suit an abuse of the process of court and is struck out with costs)

1. The plaintiff in this suit was charged in the Chief Magistrate's Court at Nakuru, vide Criminal Case No. 1977 of 2010. I have discovered for myself on perusal of the file, for none of the parties herein annexed the charge sheet, that the plaintiff was charged with the offence of "Creating disturbance in a manner likely to cause a breach of peace contrary to Section 95 (1) (b) of the Penal Code." The particulars of the offence were that he caused a breach of peace by using insulting language to Gikuma Maina (1st defendant herein) by calling him "satan, dog." He pleaded not guilty, and in the course of trial before the Magistrate's Court, on 17 June 2010, the court made an order that the District Surveyor Nakuru, do proceed to assess and fix the boundaries between the land parcels Kabazi/Munanda Block 1/111 owned by the plaintiff, and the land parcel Kabazi/Munanda Block 1/112 owned by the defendant's deceased father. The court was apparently acting pursuant to the provisions of Section 176 of the Criminal Procedure Code.

2. Following the orders, the District Surveyor (4th defendant herein) and the District Land Registrar (2nd defendant herein), proceeded and assessed the boundaries and tabled a report which the plaintiff states was adopted by the court (3rd defendant) on 23 September 2010 (although a perusal of the record shows that it was read to the parties). It is the claim of the plaintiff, through this suit, that the decision of the Magistrate's Court was illegal, and the subsequent actions of the 2nd and 4th defendant were also illegal, null and void. In his particulars of illegality, the plaintiff has pleaded inter alia that the Magistrate was wrong in turning the criminal case into a boundary dispute and was wrong in dealing with land belonging to a deceased person. In the suit, the plaintiff has asked for the following orders :-

(a) A declaration that the decision of the Magistrate's Court ordering the 4th defendant to determine the boundaries between the parcel numbers Kabazi/Munanda Block 1/ 111 and Kabazi/Munanda Block 1/112 is null and void.

(b) A declaration that the determination by the 2nd and 4th defendants on 21st September 2010, in execution of the orders of the 3rd defendant of 17th June 2010, is subsequently null and void.

(c) A declaration that the adoption of the 2nd and 4th defendants' report on 23rd September, 2010, by the 3rd defendant is null and void.

(d) A perpetual injunction restraining the 1st defendant from entering, trespassing, or in any other manner interfering with the plaintiff's ownership of the land parcel Kabazi/Munanda Block 1/ 111.

(e) Costs and interest.

3. The 1st defendant filed defence and pointed out that Section 176 of the Criminal Procedure Code (CPC) (CAP 75) Laws of Kenya, allows the court to promote reconciliation. He has not seen any problem with the order and has pleaded that there is no cause of action demonstrated. He has also pleaded that the plaintiff had earlier filed Nakuru High Court Judicial Review Case No. 16 of 2011 which was struck out with costs. He has pleaded that the plaintiff's case is vexatious, frivolous and scandalous and averred that he would raise a preliminary objection.

4. The 2nd, 3rd and 4th defendants filed defence through the State Law Office. It is again pleaded that the order issued by the Magistrate was in line with the provisions of Section 176 of the CPC and that it was necessary for the boundary to be determined so that the matter is settled amicably.

5. When the matter first came before me, I was not too sure whether a person can seek declarations through a plaint, that certain criminal proceedings were improperly conducted. I asked counsels to submit on that point which is the subject of this ruling.

6. For the plaintiff, it was submitted that Article 23(3) of the Constitution, allows a court, in proceedings brought under Article 22, to grant appropriate relief, including a declaration of rights. He submitted that this should be read with Section 1 of the Civil Procedure Act, CAP 21, which provides for the overriding objectives. He submitted that a person can seek a declaration through a plaint and relied on the cases of **Matalinga & Others vs Attorney General (1972) EA 518** and **Abdul Rehman & Another vs R.H. Gudka (1957) EA 4**.

7. For the 2nd, 3rd and 4th defendants, it was submitted that the Magistrate's Court did not exceed its jurisdiction by invoking the provisions of Section 176 of the CPC. It was also submitted that this court has no jurisdiction to handle the matter or impugn criminal proceedings.

8. I did not see any submissions filed by the 1st defendant's counsel.

9. I have considered the pleadings and the submissions of counsel.

10. It will be noted that in this suit, the plaintiff wants several declarations arising out of a decision made by a Magistrate in a criminal matter. I have no problem with the seeking of declarations through a plaint. That is not in issue. What is troubling me is whether a party can, through a plaint, seek declarations that a decision made by a subordinate court in a criminal proceeding, be declared illegal. I have tried to look for authorities but I have not come across any which address the point.

11. My own assessment of the matter is that the avenue of a party aggrieved by a decision made by a subordinate court in a criminal matter is to appeal that decision or seek a revision of that decision. He can also probably seek remedy through judicial review. There are elaborate provisions in the CPC which address how one is to appeal a decision of a subordinate court or seek a revision of it. I am unable to see

why a party should refuse to pursue these elaborate procedures, but instead come before court through a plaint, seeking orders which are in effect, for all intents and purposes, an appeal of the criminal matter. 12. That to me is an abuse of the process of court, and I would not wish to make precedent, that where a party is aggrieved by a decision of a Magistrate in a criminal matter, then the accused ought to file a plaint for a declaration that the Magistrate was wrong. The avenue, as far as I am concerned, is to appeal that decision or seek revision, or probably, seek a judicial review subject to leave being granted.

13. I have looked at Article 23 of the Constitution, relied by counsel and Section 1A of the Civil Procedure Act, and I do not see how they assist the plaintiff. Article 23 gives the High Court jurisdiction to hear applications for redress of a breach of the rights provided in the Bill of Rights. What is before me is not a constitutional petition stating that any rights in the Bill of Rights have been infringed. Section 1A of the Civil Procedure Act, provides that the overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. That has nothing to do with the matter at hand.

14. The upshot of the above is that I am of the view that this suit is an abuse of the process of court. I proceed to strike it out with costs to the defendants. I have deliberately avoided going into the merits of whether or not the Magistrate was correct in pursuing the line that he thought was best for the circumstances of the case. That to me, would be going to interrogate the provisions of Section 176 of the CPC, and in effect, proceeding to determine this case.

15. Orders accordingly.

Dated, Signed and Delivered in Open Court at Nakuru this 7th day of October 2015

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of: -

Mr Morintat holding brief for Mr C K Cheruiyot for plaintiff

Mr. Karanja Mbugua present for 1st defendant

N/A for State Law Office for 2nd - 4th defendants

Court Assistant : Janet

MUNYAO SILA

JUDGE

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