



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO.88 OF 2010

GILBERT WESONGA OKWALO ::::::::::::::::::::::::::::::::::: PLAINTIFF

V E R S U S

CALEB OKWALO ::::::::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

1. The parties herein are brothers and from the Plaint dated 29.6.2010, the Plaintiff/Applicant avers that he is the registered proprietor of title no. **South Wanga/Indangalasia/675** while the Defendant/Respondent is the registered owner of land parcel no. **South Wanga/Indangalasia/310**. That in 2002, a boundary dispute developed between them and in a decision by the Matungu Land Disputes Tribunal the Government Surveyor was ordered to rectify the boundaries between the two parcels of land; and that title no. 675 be amalgamated with title no. 310 and to be registered in the Defendant's name and that title no. 675 be cancelled.

2. The above background is important because where as in the Plaint, an injunction is sought to restrain the Defendant from evicting the Plaintiff from land parcel no. 675 aforesaid in a Chamber Summons dated 29.6.2010, the Plaintiff seeks the same orders in an interlocutory basis pending the hearing of the suit and that the status quo prevailing in respect of occupation of the land be preserved until the suit is heard and determined.

3. In the Supporting Affidavit sworn on 29.6.2010, the Plaintiff/Applicant has stated that he was not notified of the Ruling of the Tribunal and so he never appealed against it. Further, that since the Tribunal made no order of eviction, the Defendant's alleged attempts at evicting him from the suit land on 27.5.2010 were unlawful and that he stood to suffer loss as he had lived on the land for over 50 years and he suffer irreparably together with his family as they will all be rendered destitute.

4. In his Replying Affidavit sworn on 19.7.2010, the Defendant/Respondent denies that the Applicant is the registered proprietor of land parcel no. 675 aforesaid. That upon the decision of the Tribunal being made, he decided to pursue its adoption which was made by the Chief Magistrate's Court in Kakamega and that to-date, he has taken no action to evict the Applicant. Significantly the

Respondent at paragraphs 17 of his Affidavit has stated that;

“17. THAT if nay status quo should be maintained the same should be between parcels NORTH WANGA/INDANGALASIA/675 and 310 as at 13.8.2003 when the Matungu Land Disputes Tribunal award was adopted as judgment of the Honourable Court (see annexure marked CO-2 attached hereto.

18. THAT despite the fact that the applicant excised a portion of my land in view of the foregoing I have been in actual possession, utilization and occupation hitherto and that status quo be maintained.”

5. Is the Applicant, in view of the above matters, entitled to the orders as set out in his Chamber Summons aforesaid"

6. Firstly, in Omar & 8 Others vs Murania & Another KLR [E & L] 1 at page 206, Waki J. (as he then was reiterated the duty of an Applicant who seeks such an interlocutory injunction. The learned judge rendered himself as follows;

“It is clearly the law that the onus is on the applicants to satisfy the court that they have a prima facie case with a probability of success and that they would suffer irreparable loss which is incapable of compensation by damages if the order for injunction is not granted. If the court is doubtful then it will decided the matter on a balance of convenience which the applicants must show is in their favour.”

7. I wholly agree with the learned judge because that was the law as enunciated in Giella vs Cassman Brown & Co. Ltd. [1973] E.A. 358. In this case, the Applicant has accepted the fact that there was a dispute between himself and the Defendant which was resolved by the Matungu Land Disputes Tribunal. Further, that he has never challenged that decision including crucially the order that title no. 675 should be cancelled. Whatever the legality of that order, I cannot see how in separate proceedings, I can determine how and in what circumstances that decision was given. I can also not determine whether that decision is incapable of being enforced as the Applicant claims. What however cannot be contested is that he has a lawful order against him and without challenging that order in proper proceedings, he cannot benefit from the exercise of discretion in this court. I am clearly therefore of the view that an injunction cannot be issued to defeat orders obtained at the Tribunal and through a process known to the Land Disputes Tribunals Act, no.18 of 1990.

8. The Applicant has argued that he stands to suffer because he has lived on the land for over 50 years. That issue is contested by the Respondent and without any evidence of occupation, user and benefit from the land, the Applicant’s claim is nothing more than just that, a claim.

9. In the end therefore and not convinced that the Applicant has made out a prima facie case and seeing no evidence of irreparable damage, on a balance of convenience, equity cannot favour him.

10. The Application before me is devoid of merit and is dismissed with costs to the Respondents.

11. Orders accordingly.

Delivered, dated and signed at Kakamega this 16th day of November, 2010

ISAAC LENAOLA

JUDGE



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