



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. CASE NO. 42 OF 2009

POLYMARIS MBITHE MUTUA.....PLAINTIFF

VERSUS

PETER MWANZIA MWANIA.....1ST DEFENDANT

CHRISTOPHER KATISYA.....2ND DEFENDANT

MUTUA MAWEU.....3RD DEFENDANT

RULING

1. In the Application dated 23rd March, 2010, the Defendants are seeking for the striking out of the Plaintiff's suit.
2. The Application is premised on the grounds that the suit is an abuse of the court process having been filed after Miscellaneous Civil Case No. 567 of 2007 and Miscellaneous Application No. 82 of 2006 were heard and determined; that the principles of justice dictates that litigation must come to an end and that the orders being sought in the Plaint are unenforceable.
3. In his Affidavit, the 1st Defendant deponed that the dispute involving the suit land has been adjudicated upon in the Matungulu Land Dispute Tribunal Case No. 14/994A and 14/99B, Chief Magistrate's Miscellaneous Application No. 71 of 2006 and 80 of 2006 and High Court Miscellaneous Civil Case No. 547 of 2007.
4. According to the Defendants, in all those cases, they emerged triumphant in respect to the issue of ownership of parcel of land number Matungulu/Katine/2548.
5. In response, the Plaintiff's advocate deponed that the present suit has disclosed the existence of the Tribunal cases and that the suit is challenging the fraudulent manner in which the Applicant prosecuted the proceedings together with the subsequent Applications in the Magistrate's Court.
6. Counsel submitted that in the present suit, the Plaintiff contends that she was never given a chance to defend her interests in the suit land; that the Plaintiff was not involved at any stage in the hearing of the Tribunal cases and that this court is clothed with the requisite powers to issue the orders sought in the Plaint.
7. The Defendants' advocate submitted that the origin of the dispute herein is Matungulu Land Dispute

Tribunal claim number 14A and 14B of 1999 in which the 2nd Defendant was the claimant and the Plaintiff was the Objector; that the Tribunal adjudicated upon the matter and issued a decision in favour of the 2nd Defendant and that the Tribunal's decision was adopted by the Magistrate in Miscellaneous Civil Application No.71 of 2006 and number 80 of 2006.

8. Counsel submitted that when the Plaintiff challenged the decision of the Tribunal in High Court Miscellaneous Application No. 567 of 2007, she was unsuccessful.

9. Counsel submitted that this suit is not an appeal; that the orders of the Tribunal have never been set aside and that the Defendants have been dragged into a never-ending judicial tag of war by the Plaintiff.

10. In his submissions, the Plaintiff's advocate submitted that the Applicant's Supporting Affidavit is bad in law; that although the deponent of the Affidavit swears that he was in Nairobi; the jurat shows that the commissioning of the Affidavit was done in Machakos; that the Application should be struck out and that in any event, this court is the one which has jurisdiction to hear the matter.

11. Counsel submitted that the Plaintiff was never informed of the proceedings that were before the Tribunal and that in order to perfect her fraudulent acts, the Defendants secretly caused the suit land to be sub-divided and new registration numbers were issued.

12. According to counsel, there was no conclusive determination of the matters by a court of competent jurisdiction; that the Tribunal did not have the requisite jurisdiction to entertain the matters in the first instance because the land had a Title Deed and that the claim before the court is not *res judicata*.

13. The Plaintiff's counsel finally submitted that because this suit was consolidated with Machakos HCCC No. 434 of 1998, the present suit does not have a life of its own separate from the consolidated matter.

14. In the Plaint dated 25th February, 2009 and filed on 26th February, 2009, the Plaintiff averred that the Defendants fraudulently and by misrepresentation of facts filed claim Nos. 14A and 14B of 1999 before the Matungulu Disputes Land Tribunal and that the said cases proceeded for hearing and determination in the absence of the Plaintiff on 23rd September, 2005.

16. The Plaintiff is seeking for a declaration that all the proceedings and awards in the Matungulu District Land Tribunal be declared null and void.

16. The Plaintiff is also seeking for an order of injunction stopping the Defendants from sub-dividing, registering or in any other way interfering with parcels of land number Matungulu/2772, 2773 and 2774.

17. The other order that the Plaintiff is seeking in his Plaint is for the cancellation of the entries that were made in the register in respect of parcel of land number Matungulu/Katine/2548.

18. It is not in dispute that the Matungulu District Land Disputes Tribunal made an award in respect of parcel of land number Matungulu/Katine/2548 (*the suit property*).

19. In its award, the Tribunal found that a new Title Deed for the suit land should be issued in the name of the son of the late Maweu Kavuu and all the concerned parties including the claimant (*the 3rd Defendant*) be given Title Deeds.

20. In effect, the Tribunal cancelled the Plaintiff's Title Deed and ordered that the land should be sub-divided and the portions thereof be allocated to the Defendants.

21. The Plaintiff's complaint is that he was not notified about the proceedings that were before the Tribunal and that the Tribunal did not have jurisdiction to determine the issues that were before it.

22. On the other hand, the Defendants have taken the position that having failed to file an appeal or to set aside the decision of the Tribunal, the Plaintiff cannot file a fresh suit in the manner that he has done.

23. Although the Defendants have raised an objection in the manner in which the Plaintiff's Supporting Affidavit was commissioned, I find that the mere fact that the stamp of the Commissioner of Oaths shows a Machakos address does not in itself prove that the commissioning of the Affidavit was not done in Nairobi. The said objection is disallowed.

24. The suit before this court is challenging the decision of the Tribunal, not by way of an Appeal or Judicial Review, but by way of an ordinary suit. In the case of ***Florence Nyaboke Machavi vs Mogere Amosi Ombui & 2 others (2014) eKLR***, the Court of Appeal was confronted with an objection similar to the present one. The court, while determining the Application, agreed with the decision that had been rendered by the High Court. The court held as follows:

“It will therefore be seen that the said Act (Land Disputes Tribunal Act) provided an elaborate procedure for resolution of disputes relating to the division of, or determination of boundaries to land or trespass to land where jurisdiction was donated to a Tribunal... The Appellant in this Appeal did not challenge the decision of the Tribunal in accordance with the said procedure set out in the Act. Neither were Judicial Review proceedings taken to quash the award. The Appellant instead chose to file the suit for declaratory orders and compensation. As the learned judge found in the Judgment appealed from, the 1st Defendant had the right to appeal against the award of Borabu Land Disputes Tribunal to the Appeals Committee”

25. The Court of Appeal in the above matter agreed with the Respondent that the Appellant could not file a fresh suit to challenge the order of the Tribunal, other than appealing against the said decision or filing Judicial Review proceedings.

26. If the Plaintiff's claim is that he was never served with the pleadings by the Tribunal, the Plaintiff should have challenged the verdict of the Tribunal by way of an appeal or Judicial Review when he became aware of the decision.

27. Indeed, by the time this suit was filed, the Land Disputes Tribunal Act had not been repealed, neither had the Environment and Land Court been established. Consequently, it was incumbent upon the Plaintiff to follow the law as provided for under the Land Disputes Tribunal Act or the Law Reform Act to challenge the decision of the Tribunal.

28. The danger of allowing parties to challenge the decisions of the Tribunal in a manner that does not conform to the law is that matters which have been finalized will be litigated upon over and over, with the result that those people who had acted on those Judgments will suffer great injustice.

29. Having failed to file an Appeal or Judicial Review proceedings the moment he learnt about the decision of the Tribunal, I find that the filing of the present suit by the Plaintiff challenging the decision of the Tribunal five (5) years after the decision was made is an abuse of the Court process.

30. In the circumstances, I find merit in the Defendants' Application dated 23rd March, 2010.

31. Consequently, the Plaintiff's suit is struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JUNE, 2017.

O.A. ANGOTE

JUDGE