



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIROMENT & LAND COURT CASE NO. 169 OF 2003

AGNES KEMUNTO AGWACHA..... PLAINTIFF

VERSUS

HENRY MOKAYA

TERESA MOMANYI.....DEFENDANTS

RULING

1. The plaintiff brought this suit against the defendants on 13th November, 2013 seeking an order for the eviction of the defendants from all that parcel of land known as **LR. No. Nyansiongo/Settlement Scheme/978**(hereinafter referred to only as (“**the suit property**”). The plaintiff’s suit was brought on the grounds that the plaintiff is the registered proprietor of the suit property and that the defendants without the plaintiff’s authority or permission trespassed on the said property, illegally took possession of portions thereof and proceeded to put up houses on the same thereby forcefully denying the plaintiff possession and use thereof. The defendants filed a joint statement of defence on 16th December, 2003 in which they denied the Plaintiff’s claim in its entirety. The defendants contended that they are in occupation of the suit property as of right and that the Plaintiff who had acquired title to the suit property fraudulently is not entitled to the reliefs sought in this suit.
2. This suit was listed for hearing on several occasions but for one reason or the other the same did not take off. On 28th February, 2011, the parties agreed by consent to refer the dispute the subject of this suit to Borabu Land Disputes Tribunal (hereinafter referred to as “**the tribunal**”) for determination under the Provisions of the Land Disputes Tribunals Act, 1990. The court file relating to this suit was deemed as closed pursuant to that consent order. It is not clear from the record whether the parties took steps to refer the dispute the subject of this suit to the said tribunal for determination. What is now before me is an application dated 15th December, 2012 that was brought by the plaintiff on 21st June, 2013 under Order 51 rule 1 and Order 45 rule 1, and 2 of the Civil Procedure Rules seeking a review of the said consent order made on 28th February, 2011. The application was brought on the grounds that, the consent aforesaid was entered into in error and that the plaintiff was not consulted before the said consent was entered into. In her affidavit in support of the application, the plaintiff contended that the dispute the subject of this suit could not be entertained by the tribunal as it concerns an eviction from land which was not within the jurisdiction of the tribunal and that in any event; the tribunal did not deliberate on the matter as the dispute was never referred to it. The Plaintiff contended further that the court while referring the matter to the tribunal failed to give directions as to the time frame within which the tribunal’s determination was to be returned to court and whether it was to be filed in the lower court or before this court. The Plaintiff contended further that there was an apparent error on the face of the record of this court in that the court deemed this matter as closed when the dispute between the

- parties that had been referred to court had not been resolved. Finally, the Plaintiff contended that she has been greatly prejudiced by the said consent order as the defendants have continued in occupation of the suit property. The Plaintiff urged the court to set aside the said consent order and to give directions on further proceedings on this matter.
3. The Plaintiff's application was opposed by the defendants. Through grounds of opposition dated 22nd July, 2013, the defendants contended that the dispute herein having been referred to arbitration by consent of the parties, it is not open to the Plaintiff to unilaterally seek the return of the dispute back to court. The defendants contended further that since the court file relating to this suit was marked as closed, the present application cannot be brought in the same file as the proceedings in this file came to an end when the file was closed.
 4. When the application came up for hearing before me on 23rd July, 2013, Mr. Onyando, advocate appeared for the Plaintiff while Mr. Sagwe, advocate appeared for the defendants. In his submission in support of the application, Mr. Onyando submitted that the dispute herein was never referred to the tribunal for arbitration as contended by the defendants. He submitted that the Land Disputes Tribunals that were created under the Land Dispute's Tribunals Act, 1990 were disbanded after the establishment of this court and matters that were hitherto dealt with by them referred to this court. He urged the court to re-open the proceedings herein and deal with the matter to final conclusion. In his submission in response, Mr. Sagwe advocate for the defendants submitted that the file relating to this suit was closed on 28th February, 2011 when the parties by consent referred the dispute herein to the tribunal for arbitration. He contended that once this file was closed, the Plaintiff had to follow the laid down procedure for re-opening the file. He submitted that an application for review does not suffice for that purpose. Mr. Sagwe submitted that if the arbitration to which the dispute herein was referred did not take place, the only avenue open to the Plaintiff was to file a fresh suit. He submitted that the Plaintiff's application has no merit.
 5. I have considered the Plaintiff's application and the opposition thereto by the defendants. I have also considered the submissions by the Plaintiff's and the defendants' advocates. As I have stated at the beginning of this ruling, the Plaintiff's claim against the defendants in this suit was based on trespass. The Plaintiff had claimed that the defendants had entered the suit property without her permission and occupied the same. The Plaintiff therefore sought the assistance of the court to evict the defendants from the suit property. The Plaintiff's claim being that of trespass, the tribunal had jurisdiction to determine the same under the provisions of section 3 (1) (c) of the Land Disputes Tribunals Act, 1990 (hereinafter referred to as "**the Act**") (now repealed). It was therefore permissible for the court under rule 8 of The Land Disputes Tribunals (Forms and Procedure) Rules 1993 either of its own motion or on an application by either party to refer the dispute herein to the tribunal for hearing and determination. In the present case, the reference was made by consent of the parties. Under rule 8 of The Land Disputes Tribunals (Forms and Procedure) Rules 1993 aforesaid, once a matter was referred to the tribunal, it was to be dealt with in accordance with the said rules which provided that a decision or determination of the tribunal was to be filed at the Magistrate's court for adoption as a judgment of the court and execution. Due to the foregoing, the contention by the Plaintiff that the court erred in failing to set a time frame within which the tribunal's decision was to be filed in court and to give directions as to which court the same was to be filed is misconceived. The court order of 28th February, 2011 was clear that the matter was referred to the tribunal to be dealt with in accordance with the Act which Act has rules which provides for how a matter referred should be dealt with. Once the reference order was made, the court did not need to direct the tribunal on how to deal with the matter. The matter also did not need to be brought back to this court since the Act and the rules aforesaid provide expressly that the decisions of the tribunal are executed at the Magistrate's court. Again, the court cannot be faulted for marking this file as closed. That order was made on the basis that the matter would be dealt with to its logical conclusion by the tribunal. There is therefore no error apparent of the face of the record of this court's order made by consent of the parties on 28th February, 2011 that can form a basis for review of the said order.
 6. The Plaintiff's application as I have stated above was brought under Order 45 of the Civil Procedure Rules. Under that order, the court has power to review a decree or order not only on account of error apparent on the face of the record but also on other grounds which include any other sufficient reason. A part from the grounds that had been put forward by the Plaintiff in

support of her application which I have held above to have no basis, the Plaintiff raised other grounds which I believe constitutes sufficient reason to warrant the review of the order of 28th February, 2011. As I have already held above, the order of reference was proper and the tribunal had jurisdiction to determine the dispute herein. The parties did not however take immediate steps to refer the dispute herein to the tribunal. In the meantime, all tribunals were disbanded following the establishment of this court pursuant to the enactment of The Environment and Land Court Act, 2011 which commenced on 30th August, 2011 just some six (6) months after the dispute herein was referred to the tribunal. The disputes that were being handled by the tribunals were referred to this court. The effect of this development is that the tribunal is no longer in existence and as such the dispute herein cannot be determined as had been envisaged by the order of 28th February, 2011. I am of the view that the repeal of the Act that led to the disbandment of the tribunals which was not anticipated when the consent order of 28th February, 2011 was made is a good ground to review the said consent order by setting it a side so that this court can hear and determine this suit once and for all. I am of the opinion that the foregoing is a sufficient reason that would justify the setting aside of the consent order of 28th February, 2011. I disagree with the submission of the advocate for the defendants that the closure of this file fetters this courts power to review the said order. Under Order 45 aforesaid, the court can review any order or decree provided no appeal has been preferred. This includes an order for the closure of a court file. I disagree further with the defendants' advocate that a party seeking a review of an order in a file which has been marked by the court as closed, must first make a special application for the file to be re-opened. I am not aware of that special procedure and no authority was cited by the defendants for the novel argument.

7. The upshot of the foregoing is that the Plaintiff's application has merit. To deny the Plaintiff the orders sought would leave her without a remedy and would infringe on her constitutional rights under Articles 48 and 50 (1) of the Constitution of Kenya. The defendants' advocate's suggestion that the Plaintiff files a fresh suit is against the letter and spirit of Article 159 (2) (b) and (d) of the Constitution of Kenya and Sections 1A and 1B of the Civil Procedure Rules. The Plaintiff's application dated 15th December, 2012 is hereby allowed. The order made herein on 28th February, 2011 is hereby reviewed and set aside. The parties should take steps to set down this matter for case conference. The costs of this application shall be in the cause.

Delivered, dated and signed at KISII this 24th day of January 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiff

Mr. Kerongo h/b for Nyariki for the Defendant

Mr. Mobisa Court Clerk.

S. OKONG'O,

JUDGE.