REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 196 of 2012

PETER GITHUA CHEGE……..……..APPLICANT/PLAINTIFF

VERSUS

PETER KAGUARA UIRU……...……RESPONDENT/DEFENDANT

RULING

The undisputed facts in this matter can be summarized as follows:

i) the applicant sold to the respondent BAHATI/BAHATI BLOCK 1/231 (the suit property);

ii) the suit property was at the time of the purported sale registered in the name of Beneditto Chege Muthee who was deceased;

iii) the applicant failed to transfer the suit property prompting the respondent to make a reference to the Bahati Land Disputes Tribunal;

iv) the Tribunal in determining the dispute found that the respondent was indeed entitled to 1 acre of the suit property; that the same ought to be excised and transferred to him;

v) the magistrate's court entered judgment in accordance with the above.

The applicant has brought this suit by way of a plaint seeking declaratory orders that the judgment entered by the magistrate court at Nakuru is null and void for want of jurisdiction and the decree should not be executed. The applicant further seeks a permanent order of injunction to restrain the respondent from entering, occupying or dealing in any way with the suit property.

In the meantime, the applicant has brought a motion on notice to stay the execution of the decree issued by the magistrate's court at Nakuru pending the hearing and determination of this suit.

The application is premised on the grounds that the respondent is moving to execute the decree yet the Tribunal lacked jurisdiction to determined the dispute; that the applicant was not heard; that the applicant stands to suffer irreparable loss if stay is not granted and further that he is willing to abide by any condition as to security as may be ordered by the court.

Responding to the application, the respondent has deposed that the Tribunal had jurisdiction to entertain the dispute and that the Chief Magistrate similarly acted lawfully in adopting the decision of the Tribunal

as a judgment. Finally it is submitted that the orders sought are not available except in a judicial review application.

Considering the pleadings, the submissions and the law, the question to be determined is whether the applicant is entitled to a stay.

The application is brought under the provisions of **Order 22 Rule 25** of the **Civil Procedure Rules**, which stipulates that:

"Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."

The suit seeks declaratory orders regarding a matter determined by the Tribunal. In terms of the repealed Land Disputes Tribunals Act, any party aggrieved by the determination of the Tribunal can challenge such determination by appealing to the Provincial Appeals Committee and if still dissatisfied can appeal, on points of law, to the High Court.

The dispute between the parties concerned an alleged breach of contract of sale of property and not any of the matters enumerated under **Section 3** of the repealed Act. The Tribunal clearly exceeded its jurisdiction in making a finding that, based on the contract, the respondent was entitled to one acre of the suit property. Having made that observation, it is equally clear that the applicant, in bringing this action is side-stepping the procedure for challenging that decision.

I have noted earlier that the applicant had the option of going to the Appeals Committee and then to this court on points of law. But he also could elect to seek to quash the decision by way of judicial review proceedings.

It is apparent that the applicant's counsel was aware of these options but because the time-lines set for challenging the decision had passed, he elected to bring this suit.

As was held in **Hadkinson** V. **Hadkinson,** (1952) 2 All ER:

"…… a court order is an order, whether null or valid, regular or irregular and every person has an obligation to respect it unless and until it is discharged. Again it is now settled that where a statutes specifically provides for procedure for the redress to a party aggrieved by an action, purportedly taken pursuant to a provision in the Constitution or an Act of Parliament, that procedure must be followed."

In **the Speaker of the National Assembly** V. **Njenga Karume**, (2008) 1 KLR (EP) 425, the Court of Appeal emphasized that point thus:

"In our view there is considerable merit in the submissions that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear Constitutional and statutory provisions."

I quote one more authority, an English authority if only to emphasis this point. Lord Denning, in **O'Reilly** V. **Mackman** (1983) 3 All ER 680 illustrated the issue as follows:

"Suppose a prisoner applied under Order 53 for judicial review of the decision of a Board of Visitors and the Judge refused leave. It would to my mind be an abuse of the process of the court for him to start afresh an action at law for a declaration thereby avoiding the need for leave. It is an abuse for him to try and avoid the safeguards of Order 53 so as to avoid the necessity of obtaining leave. Where a good and appropriate remedy is given by the procedure of the court, with safeguards against abuse, it is an abuse for a person to go by another procedure so as to avoid the

safeguard."

Likewise, although **Order 3 rule 9** of the **Civil Procedure Rules**, **2010** states that a court can make a binding declaration of rights, that can only be done where there is no specific provision of the law laying down a procedure to be followed.

The applicant having realized that she had been caught up by the statutory limitation of **Section 9(3)** of the **Law Reform Act** and **Order 53 rule 2** of the **Civil Procedure Rules** is,in bringing this action, circumventing the laid down procedure.

For these reasons, I find that both the plaint and the instant motion amount to an abuse of the process of the court and strike them out with costs.

Dated and Signed at Nakuru this 18th day of January, 2013.

W. OUKO
JUDGE

Dated, Signed and Delivered at Nakuru this 29th day of January, 2013 by Hon. Justice M. J. Anyara Emukule.

JUDGE