REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case 127 of 2012

JOSEPH MUIGAI NG'ANG'A.....……..APPLICANT/PLAINTIFF

VERSUS

PAUL NG'ANG'A MUIGAI……1ST RESPONDENT/DEFENDANT

TABITHA WAIRIMU MUIGAI……...2ND RESPONDENT/DEFENDANT

RULING

The applicant who is the husband of the 2nd respondent and the father of the 1st respondent is the registered owner of parcel of land No.NYANDARUA/MAWINGO/1764 measuring 12.91 hectares.

In the 2005 the 1st respondent on behalf of his siblings made a reference to Kipipiri Land Disputes Tribunal (the Tribunal), claim No.8 of 2005 where he alleged that the applicant had excluded them from the suit property for over twenty (20) years.

The applicant who participated in the case before the Tribunal confirmed that out the 44.5 acres of the suit land, he had sold 14 acres. He offered to the respondents three (3) acres of arable land and three (3) of a rocky portion subject to certain conditions. The Tribunal on 31st May, 2005 rendered a decision that gave the respondents nine (9) acres comprising 6 acres arable and 3 acres rocky land. The decision was adopted in Nyahururu Principal Magistrate Land Dispute Case No.37 of 2006 and a decree drawn. The respondents began the process of subdividing the suit property as decreed, the transfer documents having been executed by the Executive Officer of the court after the applicant declined to execute them.

The applicant has now instituted this action against the respondents for a declaration that the award by the Tribunal and the subsequent decree are null and void and an order for the removal of the caution registered against the title to the suit property.

In the meantime, he has brought the application to which this ruling relates for a temporary order of stay of execution of the decree to bar the registration of the mutation instrument or transfer of the suit property pending determination of the main suit. The application is premised on the ground that the Tribunal acted without jurisdiction in awarding the nine (9) acres to the respondents as there was no basis for doing so.

In opposing the application, the respondents have contended that the applicant has participated in the process throughout and that this suit is an afterthought; that this suit has been brought after inordinate

delay; that the land has been subdivided and nine (9) acres hived off the main suit land; that the application has been overtaken by events in that after sub-division and erection of beacons, the respondents are only waiting for the issuance of the title deed.

I have considered those averments and the five (5) authorities relied on by learned counsel for the applicant.

The present suit arises from the decision of the Tribunal that awarded the respondents nine (9) acres from the applicant's parcel of land. The respondents are part of the applicant's family, wife and son.

Under **Order 22 rule 25** of the **Civil Procedure Rules**, the court may stay execution of a decree on such terms as to security or as it thinks fit until a suit against the decree holder is determined. The discretion donated to court by the above provision must be exercised judicially and in accordance with the law. The main argument in this application and indeed in the suit is whether the procedure adopted is tenable.

There was a whole process that started with the Tribunal through to the magistrate's court culminating with a decree. It has been submitted by learned counsel for the respondents that the applicant ought to have proceeded by way of appeal to the Appeals Committee or judicial review to this court. The repealed Land Disputes Tribunal Act was a special legislation complete with an appellate procedure laid out and which was intended to limit the role of court in matters falling under that Act.

The applicant therefore had the option to challenge the decision of the Tribunal to the Appeals Committee. If still not satisfied, they were at liberty to appeal on matters of law to the High Court. Further the applicant could even challenge the decision by a judicial review application. This last option was clearly unavailable due to the time that has lapsed since the decision of the Tribunal was made.

The applicant did not appeal to the Appeals Committee and instead has filed a suit, seven years after the decision of the tribunal, which suit is in fact in the form of an appeal challenging the basis of the decision of the Tribunal. The applicant has relied on the case of **Muriuki Marigi** V. **Richard Marigi & 2 others,** Civil Appeal No.189 of 1996 which is distinguishable. In the case before me the reference was made to the Tribunal which made a decision and a decree drawn. In the **Muriuki** case, the High Court that was seized of the matter referred it to arbitration under the chairmanship of the District Officer Mathira.

It is instructive to note that it has been held in a long line of decisions that where there is a special procedure provided by the statute in dealing with a dispute, that procedure must be exhausted. In **The speaker of the National Assembly** V. **The Hon. James Njenga Karume**, Civil Application No. NAI.92 of 1992 the Court of Appeal emphasized that:

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, the procedure should be strictly followed."

Without going into the other grounds raised, it is enough to point out that the seven years the applicant has wasted since the decision of the Tribunal, disentitles him the exercise of this court's discretion. The application dated 17th April, 2012 for those reason is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 26th day of July, 2012.

W. OUKO
JUDGE