



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
JUDICIAL REVIEW NO. 57 OF 2009

ELIEZER MWANGI KARIUKI.....APPLICANT

VERSUS

JACINTA NYAMBURA KARIUKI & ANO.....RESPONDENT

RULING

Eliezer Mwangi Kariuki, the Applicant herein took out the originating notice of motion dated 2nd June 2006 in which he sought for the following orders:

- 1. *The Murang'a Land Disputes Tribunal which heard Land Dispute Case no. 13 of 1997 between Jacinta Nyambura Kariuki and Eliezer Mwangi Kariuki did not have jurisdiction to determine the dispute before it and consequential decision/award dated 20/6/97 is null and void and of no effect.***

- 2. *The two elders, Jeremano Mwangi Kinyanjura and John Ngugi Mwangi, who heard the dispute and gave an award, had no jurisdiction to hear and determine the dispute.***

- 3. *The costs of this application be provided for.***

The Applicant filed an affidavit he swore in support of the motion. When the motion came up for hearing, parties were directed to file written submissions. I have perused at the court file and I have seen no response from Jacinta Nyambura Kariuki, the Land Disputes Tribunal Murang'a and the Resident Magistrate's court Murang'a being the 1st and 2nd and 3rd Respondents respectively. The 1st Respondent was the only party who filed written submissions.

I have considered the material placed before me and the 1st Respondent's written submissions. It is clear that the 1st Respondent herein filed a complaint before the Kigumo Land Disputes Tribunal claiming for an eviction order against Eliezer Mwangi Kariuki from Loc. 18/Kihere/781. The Tribunal heard the Dispute and gave judgment to the 1st Respondent which decision was adopted by the Murang'a Principal Magistrate's court. It is the Applicant's submission that the Tribunal heard and determined a matter which did not have jurisdiction to do so. It is also alleged that the dispute was heard by only two elders as opposed to three under S 4 of the Land Disputes Tribunals Act no. 18 of 1990. On the basis of the above reasons the Applicant urged this court to declare the decision to be unconstitutional hence null and void under S 65 of the old constitution.

The 1st Respondent on her part gave detailed history of the dispute relating to the land in dispute. She stated that the Applicant had filed H.C.C.C. no. 3575 of 1988 claiming to be declared to have acquired the land in dispute by adverse possession. That suit was dismissed by Justice (retired) Khamoni. Again, it is alleged that the Applicant with his mother Beth Wanjiru and Samuel Njore, filed H.C.C.C. no. 775 of 1997 (O.S.) claiming to have acquired the same land by adverse possession. The aforesaid was dismissed by Justice (retired) Kuloba for being resjudicata. The 1st Respondent further pointed out that the Applicant was ordered to vacate the suit land vide Murang'a Land Disputes Tribunal case no. 13 of 1997 but has refused to do so. It is said the Applicant only rushed to court to file the current motion when the 1st Respondent attempted to evict him from the land.

I have carefully considered the rival submissions. I note that the applicant's application is based on section 65 of the old constitution. That section gave this court the power to supervise subordinate courts and tribunals. Basically the Applicant is challenging the jurisdiction of the Land Disputes Tribunal and the validity of the Land Disputes Tribunal's decision. In my view the Applicant ought to have moved this court either by taking out Judicial Review proceedings to quash the decision or by appealing and or by filing a declaration suit. A constitutional reference cannot be treated like any ordinary suit. There are guidelines given under S 67(1) the old constitution. It is clear from the aforesaid provision that before a constitutional reference is filed in such cases the following conditions must be fulfilled:

- (i) *There must be a pending case in the subordinate court.***
- (ii) *The reference must be filed when the case is still pending.***
- (iii) *A party must request for the questions for interpretation by the High Court.***

In my view the motion before me does not satisfy those conditions. The dispute has been the subject of two High Court decisions. At no one time did the Applicant raise any question relating to jurisdiction. He did not even raise those questions before the subordinate court sitting at Murang'a. It is obvious that the current motion amounts to an abuse of the court process. I have already stated the issues raised in the motion relates to the jurisdiction of the Land Disputes Tribunal as well as the Resident Magistrate's

decision to adopt the Tribunal's decision as its judgment. Those issues do not fall within those envisaged under s. 67(2) of the old constitution.

In the end, I see no merit in the originating motion dated 2nd June 2006. The same is ordered dismissed with costs to the 1st Respondent.

Dated and delivered this 29th day of July 2011.

J.K. SERGON
JUDGE

In open court in the presence of Maatwa holding brief Nyaanga for the Respondent. No appearance for Applicant.