



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL CASE 116 “B” OF 2008

LUCIA WAITHERA MAINA.....PLAINTIFF

VERSUS

JAMES GAKURE KAMAU.....DEFENDANT

RULING

In his amended statement of defence, the defendant intimated that he would be raising a preliminary point of objection regarding the jurisdiction of this court to entertain the suit herein.

It is that objection that was argued before me and to which this ruling relates. The objection raises three points, namely that the plaintiff having made a reference to the Land Disputes Tribunal could only challenge the decision of the Tribunal by appealing to the Land Disputes Appeals Committee (the Appeals Committee) and if still aggrieved by the decision of the Appeals Committee appeal, to this court on matters of law. It is suggested, in the alternative that the plaintiff also could challenge the decision of the Tribunal in this court by way of judicial review. The second ground raised is that the plaintiff has not disclosed that the dispute had been adjudicated by the Tribunal.

Finally the suit is objected to on the ground that the plaintiff does not have *locus standi* to agitate the suit on behalf of the estate of her deceased husband as she has no grant of representation.

Applying the strictures enunciated in the case of Mukisa Biscuit Manufacturing Co. Ltd. Vs. West End Distributors Ltd. (1969) EA 696, the three points raised herein are pure points of law, namely jurisdiction, violation of Order VII rule 1(1)(e) of the Civil Procedure Rules and *locus standi*. They are points which if successfully argued may dispose of the suit.

This court's jurisdiction is donated by the Constitution, the Judicature Act and various laws of the land. That jurisdiction extends to disputes under the Land Disputes Tribunal Act. The jurisdiction under this Act is, however limited to appeals and only on points of law, from the decision of the Appeals Committee. This court can also exercise its supervisory jurisdiction under the Constitution, the Law Reform Act and Order 53 of the Civil Procedure Rules.

The Land Dispute Tribunal Act is a special legislation in the sense that it was enacted for a specific mischief which is clearly stated in its preamble thus:

“An Act of Parliament to limit the jurisdiction of magistrates' courts in certain cases relating to land, to establish the Land Disputes Tribunals and define their jurisdiction and powers and for connected purposes.”

The parties having invoked and submitted themselves to the jurisdiction of the Land Disputes Tribunal, the plaintiff was expected to pursue her remedy under the Land Disputes Tribunal Act. The Tribunal having rendered its award in favour of the defendant, the only two routes open to the plaintiff were either to exhaust the appellate process under the Act or seek, by *certiorari*, to quash the decision of the Tribunal.

The Tribunal having found that the defendant had title to the suit land, by seeking a declaration, in this suit that the very suit land belongs to the plaintiff, the latter is seeking orders which are likely to cause serious confusion as to the ownership of the suit land as there will be in effect two decrees awarding ownership of the land to two persons. An appeal or application for judicial review by the plaintiff if successful would have had the effect of annulling the decree from the decision of the Tribunal.

While it is appreciated, by dint of Order II rule 7 of the Civil Procedure Rules, that no objection can be raised for the reason that the suit merely seeks declaratory judgment, the suit herein for the reasons stated amounts to an abuse of the process of the court.

The second objection is with regard to the non-compliance with Order VII rule 1(1)(e) of the Civil Procedure Rules which requires the plaintiff to make an averment that there is no suit pending or there have been no previous proceedings in any court between the parties. The provision does not prescribe a sanction for failure to make the above averment. Being a matter for the exercise of the court's discretion, that ground does not qualify to be argued as a preliminary objection.

The final point relates to the plaintiff's capacity to institute the suit. There is a specific averment in the plaint that the plaintiff has brought the action in her capacity as the administratrix of the estate of the deceased. There is nothing to suggest that she does not have a grant of representation. An inquiry beyond this would take the point outside the purview of a preliminary objection. For the first point, the court has already found that the suit is an abuse of its process. The objection is sustained and pursuant to Order VI rule 13 (d) of the Civil Procedure Rules the suit is hereby struck out with costs to the defendant.

Dated, Signed and Delivered at Nakuru this 26th day of February, 2010.

W. OUKO
JUDGE