



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

CIVIL DIVISION

CIVIL SUIT NO. 1273 of 2003

TETU OLE NABORRUPLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT
ISAAC MACHARIA.....2ND DEFENDANT
NJOROGE KIIRU.....3RD DEFENDANT
JEREMIAH MUNGAI.....4TH DEFENDANT
MUNGAI NJOROGE.....5TH DEFENDANT

R U L I N G

1. Tetu Ole Naborru is the plaintiff in this suit. He has sued the Hon. The Attorney General, Isaac Macharia, Njoroge Kiiru, Jeremiah Mungai, and Mungai Njoroge (hereinafter referred to as 1st, 2nd, 3rd, 4th and 5th defendants respectively). The plaintiff contends that he was at all material times the registered owner of Loitokitok/Kimana/Tikondo/ 1017 (hereinafter referred to as the suit property). The plaintiff subdivided the land into 5 parcels (i.e. Loitokitok/Kimana/Tikondo/1156 – 1160), and entered into an agreement with the 2nd to 5th defendants to transfer one parcel to each of the defendants. The plaintiff was to retain the 5th parcel. However, the agreements with each of the defendants were rendered *void ab initio* when the Land Control Board failed to give its consent as required under Section 6 of the Land Control Board Act.

2. The 2nd, 3rd, 4th and 5th defendants later filed proceedings at

the Kajiado Land Disputes Tribunal, being Tribunal Case No.165/12/2001 against the plaintiff. The plaintiff maintains that the land dispute Tribunal in excess of its jurisdiction, and in contravention of the Land Disputes Tribunal Act No.18 of 1990, purported to hear the dispute. The Tribunal issued an award requiring *inter alia* that the plaintiff transfers to each of the 2nd, 3rd, 4th and 5th defendants their respective parcels of land as per their respective agreement. The Tribunal award was adopted as judgment by the Kajiado Senior Resident Magistrate's Court. In accordance with the judgment, each of the four parcels of land was subsequently transferred and registered in the names of the 2nd to 5th defendants respectively. The plaintiff was registered as the owner of the 5th parcel.

3. The plaintiff now contends that the award of the Land Disputes Tribunal which was adopted by the Kajiado Senior Resident Magistrate's Court as a Judgment was null and void for amongst other things, want of jurisdiction, and also being statute barred. The plaintiff further maintains that the award and consequent cancellation of the plaintiff's title and transfer of the plaintiff's land to 2nd to 5th defendants was fraudulent in that the 2nd to 5th defendants misled the Land Disputes Tribunal into believing that the Land Control Board had granted consent to the plaintiff to transfer the suit land to the defendants. Further, the plaintiff claims that he was not notified of the proceedings of the Land Disputes Tribunal, and the Kajiado Senior Resident Magistrate's Court. As a result his right of appeal and judicial review lapsed by effluxion of time before he was aware of the orders made.

4. The relief sought by the plaintiffs in this suit includes *inter alia*, declaratory orders as follows:

- (a) A declaration that the Kajiado Land Disputes tribunal acted *ultra vires* its powers by purporting to adjudicate on matters of ownership of the suit land.

- (b) A declaration that the Kajiado Land Disputes Tribunal acted *ultra vires* and contrary to law, in purporting to specifically enforce an otherwise unenforceable contract.
- (c) A declaration that the Kajiado Land Disputes Tribunal acted *ultra vires* by purporting to order the removal of cautions and restrictions on the plaintiffs parcels and by ordering the cancellation of the plaintiff's titles and issuance of new titles thereof to the defendants.
- (d) A declaration that the Kajiado Land Disputes Tribunal acted contrary to law by entertaining a claim that was statute barred.
- (e) A declaration that the Kajiado Land Disputes Tribunal and the Kajiado Senior Resident Magistrate's Court acted contrary to law by purporting to enforce a transaction that was null and *void ab initio* for want of consent of the relevant Land Control Board.
- (f) A declaration that the proceedings before the Kajiado Land Disputes Tribunal, its purported "award" and the subsequent adoption of the "award" as a judgment of the Court by the Kajiado Senior Resident Magistrate's Court were irregular, null and *void ab initio*.
- (g) A declaration that all the acts done subsequent to the "award" and "judgment" are null and void and of no legal effect whatsoever.

5. The plaintiff also sought an order setting aside the purported award of the Kajiado Land Disputes Tribunal and the judgment of the Kajiado Senior Resident Magistrate's Court, as well as an order cancelling the titles issued to the 2nd to 5th defendants, and an order for registration of the plaintiff as the proprietor of the 5 parcels.

6. The 2nd, 3rd, 4th and 5th defendants have filed a joint statement of defence to the plaintiff's claim. In the defence the defendants maintained that they were put in possession of the respective parcels of land by the plaintiff between 1984 – 1986. They remained in possession until they were

issued with their title deeds in the year 2002. The defendant therefore pleaded sections 6, 17 and 38 of the Limitation of Actions Act and maintained that the plaintiff has no cause of action against them. The defendants further argued that the Kajiado Land Disputes Tribunal had jurisdiction to deal with the dispute before it, and make the award in question. The defendants denied the allegations of fraud made by the plaintiff, and pleaded Section 28 of the Registered Land Act.

7. By a notice of preliminary objection filed on 17th July, 2008, the 2nd, 3rd, 4th and 5th defendants raised an objection to the plaintiff's suit, on the ground that the suit was bad in law, in view of the existence of the award of the Land Disputes Tribunal (Kajiado) dated 10th January 2002, and the judgment and decree in SRMCC Kajiado in Land Case No.30 of 2002, which have not been challenged or appealed against by the plaintiffs.

8. In support of the preliminary objection, Mr. Mwaura Shairi who appeared for the defendants argued that the 2nd, 3rd, 4th, and 5th defendants were issued with the title deeds to their respective parcels of Land pursuant to the proceedings in the Land Disputes Tribunal, and the Senior Resident Magistrate's Court. It was therefore argued that the matter before this court is *res judicata*, and the plaintiff cannot open it afresh in another suit. Relying on Section 8(9) of the Land Disputes Tribunal Act, Mr. Mwaura argued that the High Court has only appellate jurisdiction.

9. Ms Sinkiani who appeared for the plaintiff urged the court to overrule the preliminary objection arguing that the suit before the court was for declaratory orders which this court has powers to grant. Ms Sinkiani relied on ***Ngige vs Chomba and 3 others [2004] 1KLR 597***. Ms Sinkiani argued that contrary to Order VI Rule 4(1)(a) of the Civil Procedure Rules, the defendants did not plead the facts which they contend make the plaintiff's suit unmaintainable. Relying further on section 1A and 1B of the Civil Procedure

Act, Ms Sinkiani submitted that it was in the interest of justice that the suit do proceed to hearing.

10. I have carefully considered the preliminary objection. The objection is not concerned with the merit of the plaintiff's suit but the appropriateness of the procedure adopted. i.e. whether the suit before the court is bad in law, in view of the Kajiado Land Disputes Tribunal award dated 10th January, 2002 relating to the suit property, and the Senior Resident Magistrate's Court Kajiado Land Case No.30 of 2002 adopting the Kajiado Land Dispute Tribunal award. The objection relates to an issue of law, and therefore has been properly brought by way of a preliminary objection.

11. The following facts are common ground. The dispute arbitrated upon by the Land Disputes Tribunal, was a dispute between the 2nd, 3rd, 4th and 5th defendants, and the plaintiff. The dispute related to the said defendants' claims to the four of the five parcels created pursuant to the subdivision of the suit property. Kajiado Land Disputes Tribunal gave an award dated 10th January, 2002 in favour of the 2nd, 3rd, 4th, and 5th defendants. The award was forwarded to the Kajiado Senior Resident Magistrate's Court and adopted as a judgment on 27th November, 2002. The plaintiff did not appeal against the award or the judgment. Consequently the judgment of the Kajiado Senior Resident Magistrate's Court was executed and the four parcels registered in the name of each of the defendants.

12. The plaintiff has now come to this court seeking declarations that the Kajiado Land Disputes Tribunal acted *ultra vires* its powers by purporting to adjudicate on matters of ownership of the suit land, which was not a matter within its jurisdiction. Plaintiff maintains that in adopting the award of the Land Disputes Tribunal, the Kajiado Senior Resident Magistrate's Court acted contrary to law, by purporting to enforce a transaction that was

irregular, null and void. Plaintiff therefore invites this court to order cancellation of the titles issued to the 2nd to 5th defendants and registration of the plaintiff as the sole proprietor of the land parcels.

13. The preliminary objection raises the question as to whether the plaintiff having failed to appeal against the award of the Kajiado Land Disputes Tribunal, and also having failed to appeal against the order of the Senior Resident Magistrate's Court Kajiado adopting the award, it is open to him to come to this court, to seek declaratory orders which in effect challenge the award and order of the Senior Resident Magistrate's Court. That is, whether the plaintiff's suit is properly before this court.

14. It was submitted by the defendant's counsel that the plaintiff's suit is *res judicata*. The principle of *res judicata* as set out in Section 7 of the Civil Procedure Act is as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

15. It is evident that the dispute in the Land Disputes Tribunal and the Senior Resident Magistrate's Court Kajiado, was between the same parties who are now before this court. The matter directly and substantially in issue in the Land Disputes Tribunal and the Kajiado Senior Resident Magistrate's Court, was the proprietary rights over the suit property. However, for Section 7 to apply the former suit must have been tried in a court competent to try that suit. In this case, the plaintiff is challenging the jurisdiction of the Kajiado Land Disputes Tribunal, and the Kajiado Senior Resident Magistrate's court. Although the issue of jurisdiction was a pertinent issue which ought to have been raised and addressed in the previous suit, the issue of jurisdiction was not addressed or determined. Jurisdiction is a legal issue which goes to the very core of the proceedings. Jurisdiction not having been dealt with as a

substantive issue in the Land Dispute Tribunal, the proceedings herein cannot be said to be *res judicata*.

16. Assuming that the Kajiado Land Disputes Tribunal and the Kajiado Senior Resident Magistrate's Court acted in excess of their jurisdiction as contended by the plaintiff, can the plaintiff challenge the Tribunal award and judgment of the court by way of another suit seeking declaratory orders as the plaintiff has purported to do? In ***HCCC No.26 of 2001 (Eldoret) Emily Jepkemei Ngeyoni & another vs Nicholas Kipchumba Kogo & another***, Hon. Dulu J. faced with a similar situation had this to say:

“In my view, that is not legally possible. The two options for challenging a Land Disputes Tribunal’s award are through an appeal to the Provincial Appeals Committee, within 30 days, and before the award was registered in the magistrate’s court. The other option was to file proceedings for judicial review in the High Court under Order LIII Civil Procedure Rules, after the decision of the Tribunal was registered with the magistrate’s court. Therefore it is my finding that the decision of the Land Disputes Tribunal cannot be challenged through a suit. As the decision of the Tribunal was registered in the subordinate court filing suit would, in any event, be fresh proceedings, in a matter in which a decree of the subordinate court has already been issued. Filing multiplicity of cases in court on the same matter is not acceptable in law.”

17. I entirely agree with the sentiments expressed by my brother Dulu J. Indeed, in this case, the Land Disputes Tribunal award was issued on 10th January, 2002. The award was adopted by the Senior Resident Magistrate's Court at Kajiado on 27th November, 2002. Although the plaintiff had the option of appealing against the award or filing judicial review proceedings, the plaintiff took no such action. Contrary to the submissions that were made by the defendants' advocate Section 8(9) of the Land Disputes Tribunal Act, which gives the High Court appellate jurisdiction over Tribunal proceedings does not take away the High Court's powers of Judicial review nor does it take away the High Court's original jurisdiction with regard to declaratory orders.

18. It should be noted that the plaintiff filed his action for a declaratory suit on 5th December, 2003 which was about one year after the

Tribunal award was adopted as judgment of the court. The plaintiff's suit directly challenged the Tribunal proceedings and award. Should the plaintiff be allowed to circumvent the appellate procedure provided under the Land Disputes Tribunal Act which required him to lodge his appeal against the Tribunal award within 30 days? Or should the plaintiff be allowed to escape the requirements of Judicial Review which required him to obtain leave to institute judicial proceedings to quash the questioned proceedings? In my view, the answer is in the negative as to do so, would be an abuse of the process of the court.

19. I find persuasive support in my view, in ***O'Reilly vs Mackman 1983 3All ER 680***. In that case, the plaintiffs who were prisoners aggrieved by an award made by the Board of Visitors, sought a declaration that the finding and award of the Board of Visitors was void and of no effect for breach of rules of natural justice. The court found the suit which was brought four years after the cause of action arose, an abuse of the process of the court, as the action ought to have been brought by way of judicial review under Order LIII, and leave for such an action would probably have been refused because of the inordinate delay.

20. Lord Denning M.R. Observed that:

“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 by resulting to an action at law so also if he deliberately omits to apply under 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 safeguards.”

21. Likewise, although a declaratory suit is an alternative to judicial review proceedings, in this case the plaintiff's declaratory suit is not brought in good faith. It is simply an attempt to circumvent the safeguards provided under Order LIII of the Civil Procedure Rules for orders of Judicial Review by filing a fresh suit for declaratory orders. This is an abuse of the

process of the court.

22. Moreover, as defined in Blacks Law Dictionary, 8th Edition, “*a declaratory judgment*” is a binding adjudication that establishes the right and other legal relations of the parties, without providing for or ordering enforcement. Although the plaintiff has sought other orders such as the setting aside of the award and judgment, and the cancellation of the registration of the defendants, as well as a claim for damages, these prayers are dependent on the declaratory relief and cannot therefore stand alone. Further, the award issued by the Land Disputes Tribunal has already been executed, and the land parcels registered in the names of the 2nd to 5th defendants. A declaratory judgment establishing legal rights to the land parcels, may be inconsistent with the title of the defendants issued pursuant to a court judgment. What purpose would such an order serve other than cause embarrassment and confusion?

23. I come to the conclusion that in the circumstances of this case, the plaintiff’s suit, though not *res judicata*, is an abuse of the process of the court and therefore bad in law. I accordingly uphold the preliminary objection and strike out the plaintiff’s suit.

Dated and delivered this 16th day of September, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Sankale H/B for Sinkian for the plaintiff

Ms chesoni for the defendants

Kosgei - Court clerk