REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 58 of 2006

M'BASITI M'NJAU …….....……. PLAINTIFF

VERSUS

WILSON KABURU KOBIA …… DEFENDANT

RULING

The application to which this ruling relates is a motion on notice seeking an order of inhibition to restrain any dealings with parcel of land number Mwimbi/Kiraro/800 (the suit land) until the suit is heard and determined.

The applicant has averred that he is the registered owner of the suit land. That originally the suit property was Mwimbi/Kiraro/25 which was subdivided into two, the suit land and Mwimbi/Kiraro/799.

There has been a dispute involving the applicant and the respondent's families dating back to 1952. In 1979 the magistrate's court at Chuka in Criminal Case No. 528 of 1979 ordered the respondent's father and brothers to be evicted from the suit land after being fined Kshs. 900/=. While the respondent's uncles moved out his father refused to do so.

In 1981 the respondent's father and brothers filed HCCC No. 32 of 1981 (O.S.) in Nairobi. That suit was dismissed. But of immediate relevance is a dispute before the Land Disputes Tribunal No. 47 of 2001 referred by the applicant herein. He had sought eviction of the respondent. The Tribunal instead, in its award ordered him to transfer three (3) acres to the respondent. Due to ill-health, he was unable to appeal within the time stipulated.

The applicant brought a judicial review application being HCC Misc. Application No. 61 of 2002 which was dismissed on 7th June, 2006. That constitutes the brief history of this dispute.

The respondent filed grounds of opposition in which he argues that the application is incompetent.

I have considered these arguments and the two authorities cited in support of the application. Having lost reference to the tribunal, the applicant filed a judicial review application which was dismissed by the court (Lenaola, J) acting *suo motu.*

The applicant has also averred that he was unable to file an appeal against the decision of the Tribunal because of ill-health which resulted in time running out.

Where a party elects to pursue his rights through one avenue he is bound to follow and exhaust that avenue to the end. The applicant submitted himself to the jurisdiction of the Land Disputes Tribunal established under the Land Disputes Tribunal's Act. The Tribunal made its award and the applicant ought to have moved to the next level if he was aggrieved within 30 days. The level is the Land Disputes Appeals Committee. In the alternative within six months of the Tribunal's decision the applicant ought to have brought judicial review proceedings to quash the decision. He did not appeal because he was unwell but he brought a judicial review application which was declared incompetent.

All avenues having been closed on the applicant he now brings a declaratory suit that the respondent cannot enforce the award for reasons that the Tribunal lacked jurisdiction.

I am alive to the provisions of Order 2 Rule 7 of the civil Procedure Rules which states:-

"***7. No suit shall be open to objection on the ground that a mere declaratory judgment or order is sought thereby and the court may make a binding declaration of rights whether any consequential relief is or could be claimed or not."***

While it is unobjectionable under the above rule to seek a declaratory judgment or order, the court retains the discretion in an action for a declaration. Of course the court must exercise that discretion judicially. The applicant having failed to challenge the decision of the Tribunal according to the prescribed procedures is precluded from coming to court via this route. It amounts to an abuse of the process of the court.

An inhibition under section 128 of the Registered Land Act is a remedy intended to stop the registration of any dealings with any land. It is not, contrary to counsel for the respondent's submissions, intended against the registered owner of the land only. The provision is wide enough to permit even the registered owner to apply for inhibition against third parties. However, in the light of when I have stated earlier on, the inhibition sought herein will serve no purpose. Two authorities were cited,, **Daniel Mwangi Kariuki V. Sammy Maina Mbugua** HCCC No. 19 of 2004 and **Alexander Mugambi V. Harriet Mugambi,** HCCC No. 217 of 2001, decisions of courts of on current jurisdiction.

In the first case Sitati, J found that the applicant went to court via a short cut and ought to have either appealed to the High Court in terms of the Land Disputes Tribunals Act or brought a judicial review application to challenge the decision of the Land Dispute Appeals Committee.

The Judge, nonetheless, held that the issue being the jurisdiction of the Tribunal the applicant was entitled to relief sought. My humble view is that even where the jurisdiction of a Tribunal is being challenged, it must be challenged procedurally. The same argument applies to the second case.

For the reasons stated I find no merit in the application and the same is dismissed. The suit itself is incompetent and amounts to an abuse of the process of the court. It is struck out. I award costs to the respondent.

Dated and delivered at Meru this 15th. day of February 2008.

W. OUKO

JUDGE