



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MERU**

**Civil Suit 18 of 2007**

**M'ERIMBA M'TUARUCHIU GEORGE.....PLAINTIFF**

**VERSUS**

**CHARLES RUITURI NYAGA**

**RICHARD KAMECHU.....DEFENDANT**

**R U L I N G**

Before I consider the preliminary objection to which this ruling relates it is necessary to provide a brief background. The dispute in this matter was dealt with by the Meru North Land Disputes Tribunal and judgment entered in Maua PM LDT No. 9 of 2007.

The plaintiff then brought the present suit in which he avers that the decision of the Tribunal was illegal, ultra vires and without jurisdiction. He therefore claims in the plaint

- (a) a declaration that the decision/award was ultra vires, illegal, null and void, *ab initio* and the same should be set aside and/or quashed.
- (b) A declaration that the plaintiff is the rightful owner of the Land Parcel No. NJIA/BURIERURI 2502 and NJIA/BURIERURI 733 registered in the names of the first and second defendants.
- (c) Orders of cancellation of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' title deeds and rectification of the registrar to read the plaintiff's names.
- (d) An order of permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants from interfering, wasting, damaging, alienating or dealing with the two suit lands.
- (e) Costs of the suit and interest.

The preliminary objection raised by counsel for the defendants is to the effect that the suit is incompetent and ought to be struck out for want of form or procedure. It was submitted in this regard that the suit ought to have been brought by way of judicial review and not by way of a declaration. Counsel relied on the decision of **Rosalia Kathuni Ngare V Silas Galshon kabutura**, Meru HCCC NO. 101 of 2006.

In reply counsel for the plaintiff submitted that the preliminary objection is misplaced as it seeks to challenge the jurisdiction of this suit which was admitted by the defendants in their defence. Counsel maintained that the suit is properly instituted. She relied on the decisions of Daniel Mwangi Kariuki V Sammy Maina Mbugua, Meru HCCC 19 of 2004 and Alexander Mugambi V Harriet G. Mugambi, Meru HCCC No. 217 of 2001.

A preliminary objection must satisfy the strictures outlined in the case of Mukisa Biscuit Manufacturing Co. Ltd. V West End Distributors Ltd (1969) EA 696

In this regard I am satisfied that the issue raised is one of law capable of disposing of the suit as it challenges this court's jurisdiction to adjudicate the dispute in the manner and form it is brought. There are no facts to be ascertained. It is not in contention that the dispute was dealt with by the Land Dispute Tribunal and award accordingly filed in the magistrate's court at Maua.

The first two prayers seek declaratory orders while the 3<sup>rd</sup> prayer is for rectification and the final prayer is for an injunctive relief.

These reliefs which clearly ought to have been brought under Order 53 of the Civil Procedure Rules are cleverly framed to make the suit appear original. The matter having been dealt with by the Tribunal and the plaintiff being aggrieved by the award the latter ought to have either appealed to the Land Disputes Appeals Committee under Section 8(1) of Land Disputes Tribunals Act or applied for judicial review of the tribunal's decision. The court in Apoloto V A.G., (1969) EA 631 held that the court has a very wide power to make a binding declaration of right but it is a discretionary power which should be exercised only with care. Order 11 rule 7 of the Civil Procedure Rules similarly provides;

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

I have observed before in a few cases that since the filing and hearing of judicial review applications were centralized in Nairobi, advocates have developed the tendency of circumventing the legal notice directing such matters to be filed in Nairobi by bringing declaratory suits. That not only amounts to an abuse of the court process but is also incompetent.

For these reasons, I uphold the objection, declare the entire suit and the application incompetent and order the same to be struck with costs to the defendants.

Dated and delivered at Meru this 1st day of February...2008

**W. Ouko**

**JUDGE**