



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 37 of 2004

DAVID K. MITEI:.....PLAINTIFF

VERSUS

RAPHAEL SEREM & 15 OTHERS:.....DFENDANT

RULING

The plaintiff/applicant filed a complaint with Kapseret Land Disputes Tribunal against sixteen people he alleged had trespassed on his piece of land **Reg. No. LR.7946/KABONGO** on which he had constructed a cattle dip. The Tribunal heard the dispute and awarded the land where the dip was to the respondents. The dip is on **No. UG/SS/RG/1869/91**. That award was adopted as the judgments of the court vide Eldoret CM.CC.Award No.14 of 2003. Thereafter vide plaint filed on 30th March 2004 the plaintiff/applicant brought this suit against sixteen defendants. In the plaint he sought for:-

- a) Declaration that the tribunal as constituted was ultra-vires the land Disputes Tribunal Act, it lacked jurisdiction to entertain the dispute and therefore its decision was null and void.
- b) A permanent injunction preventing the defendants from taking possession trespassing into, interfering with peaceful occupation, transferring and/or in any way and/or manner dealing with the plaintiffs share of land in the reference **No. 7946/KABANGO**.
- c) Costs of this suit.

Later the applicant amended his plaint and stated he is the registered owner of land No. **NGERIA/MEGUM BLOCK 1 (KABONGO)** 10 where dip Reg. No. UG/88/REG/4936/99 is. Six of the original defendants had been struck out. The prayers remained basically the same save for the title number.

The defendant raised a preliminary objection and submitted that the award can only be challenged by way of prerogative orders under Order 53 CPR, the suit is res judicate since a decree has already been issued in the Eldoret court after the award was adopted, that the suit does not disclose reasonable cause of action and that it is fatally defective for non-joinder. It was also said that the verifying affidavit accompanying the amended plaint did not disclose that there was another suit between the parties.

Mr. Cheluget told the court that the applicant should have filed an application for judicial Review under Order 53 CPR or appealed against the finding of the Tribunal to the provincial Appeals Board.

Further it was submitted that the suit is res judicata. The award was adopted by the magistrate's court and it became a judgment. The issues were the same and so were the parties.

Further it was stated that in the amended plaint the plaintiff did not depone that there was another suit which was in court between the parties involving the same subject matter.

Lastly Mr. Koko took issue with the fact that the Tribunal or the A.G. was not made a party to the suit and that the suit does not disclose any cause of action against the defendants.

Mr. Cheruiyot opposed the preliminary objection. He said that in par. 13 and 15 of the amended plaint the plaintiff discloses that there were other suits. He said the matters decided by the Tribunal were not fully ventilated. The issues in the Tribunal were different. Plaintiff is now seeking for declaratory orders.

I have carefully considered the submissions by both counsels and the pleadings. I find that the preliminary objection has merit. The plaintiff is the one who filed a dispute with the Tribunal. The Tribunal made a finding which he was not happy with. As held by my brother ***Ochieng J' in Kitale HC.CC.NO.51 of 2005 MICHAEL BARTENGE VS.STEPHEN BARTANGE*** the plaintiff had only two options after the award was given either appeal in the provincial Appeals Board as provided for under S.8 of the Land Disputes Act or file for an application seeking for orders of certiorari under Order 53 of CPR. He cannot re-open the suit by seeking for declaratory orders. The plaintiff seems to have been alive to that fact as he stated in Par.15 of the plaint that he filed an application seeking for judicial Review vide Eld.HC.MIS. APPL.NO.7 OF 2004 but was caught up by time. He therefore filed this suit because he could not prosecute that application due to the fact that it was time barred. What he should have done was to apply for extension of time to bring such application.

The award by the Tribunal was adopted by the magistrate court as a judgment of the court and a decree issued. That judgment still stands as it has not been set aside and is not even a subject of this suit. This suit is therefore Res judicata of that judgment. The judgment dealt with the ownership of the suit property. This suit seeks court to declare the award leading to that judgment as null and void and yet leave the judgment still standing. This court cannot do that as to do so would lead to confusion. The court cannot also issue an injunction against the defendants when there is a judgment declaring them to be the owners of the land.

The plaintiff seeks the court to declare the decision of the land Tribunal as illegal, null and void as it acted ultra vires. The Tribunal is not a party to this suit. Court cannot condemn it unheard. There is therefore misjoinder of parties. Though the court can under the provisions of Order 1 rule 10 CPR order joinder of other parties it is clear that the plaintiff never wanted the tribunal to be a party. I say that advisably. By the time the plaintiff applied to amend his defence the defendant had already filed his notice of preliminary objection. One of the issues was that there was misjoinder of parties and yet the plaintiff never sought to bring in the Tribunal as a party. Court cannot make orders against people not parties to the suit.

Lastly I find the plaintiff's case does not disclose any cause of action. The first prayer in the plaint is not directed to the plaintiff. It seeks court to declare award of Tribunal as null and void. The defendants were not a party to making that award. They were not members of the Tribunal and as such they cannot be able to say if the Tribunal acted illegally. They are not even the ones who had filed the dispute with the Tribunal. It is the plaintiff who filed the complaint there. He should have been aware if the Tribunal had jurisdiction or not. He has only turned against the Tribunal after it ruled against him.

There is no issue of ownership between the plaintiff and the defendants claimed in the plaint. The issue of issuing an injunction therefore does not arise.

In the circumstances I upheld the preliminary objection and hereby strike out the plaint with costs to the defendants.

Dated and Delivered at Eldoret on 13th day of March, 2008

KABURU BAUNI

JUDGE

DELIVERED IN PRESENCE OF:-

C/C - David

N/A for the Respondent

Mr. Chelugat for plaintiff