REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 59 of 2007

STEPHEN KYALO MBUTHI::PLAINTIFF

VERSUS

CHARLES MAKAU

NZINGA MUOKI::DEFENDANTS

RULING ON A PRELIMINARY OBJECTION

1. The Preliminary Objection dated 19.6.2008 raises only one issue; that this court lacks jurisdiction to hear and determine this matter by virtue of section 3(1) of the Land Disputes Tribunals Act No. 18 of 1990. Mr. Ogude, learned advocate for the Defendants in his submissions relied on section 3 (1) aforesaid Act to argue that since the cause of action in the suit would seem to be the issue of alleged trespass, that issue should be determined by the Land Disputes Tribunal and not the Court. He relied on the decision of *Onyancha, J.* in Stephen Kyalo Mbuthi vs Charles Muoki & 17 Others HCCC 54/2005 where the learned judge took the view that there was good purpose in the enactment of section 3(1) aforesaid and that even with the express provisions of section 60 of the Constitution, he saw no good reason to disturb the effect of that section.

2. Mrs. Isika for the Plaintiff said that the objection was premature as the attack is on an Application dated 10.6.2008 wherein the Plaintiff seeks to amend the Plaint. That since that document is not yet a Pleading; it cannot yet be scrutinized by this court. That in any event, section 60 of the Constitution gives this court wide powers and section 3(1) aforesaid cannot be a fetter to that power.

3. I have considered the rival submissions as well as the decision in Stephen Kyalo Mbuthi (supra). I also note that the objection is to *"the hearing of the application dated 10th day of June 2008."* That application seeks to amend the Plaint dated 23.7.2007. It has not been heard nor determined and to that extent, Mrs Isika is right in that until the same is allowed, it remains a mere annexture to the Affidavit sworn on 10.6.2008 and it cannot be the subject of a Preliminary objection. It is not a pleading that can be challenged.

4. Even if the Application and the draft Amended Plaint could be properly challenged, I think that the objection has no merit for the following reasons;

5. Firstly, it must be understood that the High Court of Kenya enjoys a unique status by virtue of section 60 of the Constitution which provides as follow:-

"(1) *There shall be a High Court, which shall be a superior*

Court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law. (emphasis added)

(2) The judges of the High Court shall be the Chief Justice and such number, not being less than eleven, of other judges (hereinafter referred to as puisne judges) as may be prescribed by Parliament.

(3) The High Court shall be duly constituted notwithstanding a vacancy in the office of a judge of that Court.

(4) The office of a puisne judge shall not be abolished while there is a substantive holder thereof.

(5) The High Court shall sit at such places as the Chief Justice may appoint."

6. Section 60 aforesaid must be read with section 3 of the Constitution which provides as follows:-

"*This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution this Constitution shall prevail and other law shall, to the extent of the inconsistency, be void-"*

Provided that the provisions of this section as to consistency with this Constitution shall not apply in respect of an Act made pursuant to section 15A(3)"

The Proviso relates only to the National Accord and Reconciliation Act 2008.

7. It simply follows therefore that any statute that purports to limit the jurisdiction of the High Court is inconsistent and a nullity only to that extent. Section 3(1) of the Land Disputes Act although in mandatory terms was never meant to override the express and similarly mandatory provisions of the Constitution. It is obvious why.

8. Secondly, it must be remembered why the Land Disputes Tribunal Act was enacted. Its preamble reads as follows;-

"*An act of Parliament to limit the jurisdiction of magistrates' courts in certain cases relating to land; to establish Land Disputes Tribunals and define their jurisdiction and powers and for connected purposes."*

9. The reason for the above provision was explained for different purposes by *Onyancha, J*. In Stephen Kyalo (supra). The judge stated thus:-

"*The provision sounds like one which ties coding of local customary interests and issues. The legislators may have considered that such issues, especially those arising from ownership of land could be better dealt with by those tribunals. Apart from restricting those disputes to the tribunal, Parliament has said nothing more. Mrs Isika thinks the Act flies on the face of section 60 of the Constitution. My view is that the restriction serves a good and useful purpose and I see no good reason to presently disturb it. May be when the issue is seriously brought up and argued in full in the future, a court may need to make a fully considered decision. Until then let the provisions stay in peace."*

10. My view is that the provision was actually meant to remove simple matters of land from Magistrates Courts which previously handled them under the Magistrates Courts Act and retire them to elders then to be assembled as a Tribunal. The powers of the High Court which are both original and appellant remained untouched. It is of course convenient and, cheaper to try the matters before the elders but convenience and the constitution are strange bedfellows.

11. In the end, it is clear that I see no merit in the objection which is overruled with costs to the Plaintiff.

12. Orders accordingly.

Dated and delivered at Machakos this 29th day of September 2008.

Isaac Lenaola

Judge

In the present of: Mr. Ogude for Defendant

Miss Musila for Plaintiff/Applicant

Isaac Lenaola

Judge