



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 82 of 2007

1. KASSIM SUNGURA KULECHO }

2. CHIRANGOSI KANUSU } :::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. THE ATTORNEY GENERAL(on behalf

Of THE CHAIRMAN KABRAS L.D.T. } :::::::::::::::::::::: DEFENDANTS

2. NORAH NYAKOHA KULECHO }

RULING

The court has been moved by the Plaintiffs, through a Chamber Summons, which is expressed as having been made pursuant to Order 9A rule 7 of the Civil Procedure Rules, as read together with section 3A of the Civil Procedure Act.

Essentially, the plaintiffs are seeking an order that Judgement be entered against the Attorney General, in default of defence.

The Attorney General, who was the 1st defendant in this suit, was said to have been served with the Summons to Enter Appearance on 27th November 2007.

According to the plaintiffs, notwithstanding service of summons, the Attorney General had failed to enter an appearance or to file a defence. As the plaintiffs hold the view that there had been inordinate and inexcusable delay in the filing of the defence, they ask this court to enter judgement against the Attorney General.

Although the Attorney General was duly served with the application, he did not respond thereto, by way of a replying affidavit or by any grounds of opposition.

Furthermore, the Attorney General failed to attend court, at the hearing of the application.

In effect, the application was unchallenged.

However, the court did not feel inclined to simply grant the orders sought, just because the application was unchallenged. Indeed, on 24th June 2008, when the application first came up for hearing, I invited

the plaintiffs to satisfy me that it was proper for them to challenge the decision of the Land Disputes Tribunal through a Plaint.

When the hearing of the application resumed on 9/7/2008, Mr. Wafula, learned advocate for the plaintiffs submitted that the suit before me was of a declaratory nature, as it sought to have the decision of the tribunal declared null and void.

Mr. Wafula explained that the plaintiffs were time-barred in seeking judicial review.

Inherent in that explanation was an acknowledgement that ordinarily, the manner in which the plaintiffs would have gone about challenging the decision of the Land Disputes Tribunal, was by way of judicial review.

As the Plaintiffs submitted, rightly, in my humble opinion, by virtue of section 65 (2) of the Constitution;

“The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts.”

The power vested in the High Court, to supervise subordinate courts or court martial extends to tribunals of a judicial or quasi-judicial nature, such as Land Disputes Tribunals etc.

The applicants submitted that the High Court has unlimited original jurisdiction, and that therefore, the said court could not stand aside and weep, saying that its hands were tied.

There can be doubt whatsoever that by virtue of section 60 (1) of the Constitution, the High Court is vested with

“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.”

Clearly therefore the only jurisdiction of the High Court which is unlimited is the original one. In other words, when any person has any legal issue which he wishes to have adjudicated, he can bring the issue before the High Court, as the first port of call. The High Court would not shut him out.

However, where appropriate, the court could give directions that the matter be transferred to any other court or tribunal, which was subordinate to the High Court.

In this instance, the High Court is not the first port of call, as the plaintiffs themselves have conceded that the Land Disputes Tribunal at Kabras had already heard and determined a dispute as to the ownership of L.R. NO. KAKAMEGA/MALAVA/1206.

Therefore, the plaintiffs’ cannot invoke the original unlimited jurisdiction of the High Court in this case. They could only invoke the High Court’s supervisory jurisdiction.

I would certainly have wished to say more on the issue of the jurisdiction of the Kabras Land Disputes Tribunal. But, I have restrained myself from so doing (although I was invited so to do, by the plaintiffs), because the application before me is only against one of the two defendants.

The 2nd defendant has not been served with the application, nor is the said application directed against her.

However, in my considered opinion, if I were to hold, as the plaintiffs have submitted, that the Kabras Land Disputes Tribunal lacked jurisdiction to determine the dispute between the persons laying claim to the suit property (or parts thereof), I would have made a determination which would directly impact on

the 2nd defendant, without having accorded her an opportunity to be heard. That, I believe, would constitute an injustice to the 2nd defendant.

To my mind this will be an interesting and challenging legal battle. I say so because, in my considered opinion, any decision which is made without the requisite legal authority is ordinarily a nullity. Therefore, for the 2nd defendant to defend such title as was bestowed upon her by the Kabras Land Disputes Tribunal, she would have to persuade the court that the Tribunal had the necessary jurisdiction to hear and determine the dispute which was before it.

On the other hand, the plaintiffs would be expected to persuade the court that even though they failed to challenge the decision of the tribunal through either an appeal to the Provincial Appeals Committee, or through an application for judicial review, they should nonetheless be accorded an opportunity to challenge the tribunal's award, through a side-wind, as it were.

As the real issue before me has not yet been determined, the application dated 25th March 2008 is deemed to be pending.

It can only be resolved either after it is expanded to incorporate the 2nd defendant, who would then have an opportunity to make submissions thereon, or alternatively, the issues could be determined after the substantive suit itself is canvassed.

For now, I decline to enter judgement against the Attorney General. I also order that the costs of the application be in the cause.

Dated, Signed and Delivered at Kakamega, this 13th day of October, 2008.

FRED A. OCHIENG

J U D G E