



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

**Civil Case 26 of 2008**

**BERNADATTA KANINI MUTUKU ..... PLAINTIFF**

**VERSUS**

**WILLY NDETI ..... DEFENDANT**

**RULING ON A PRELIMINARY OBJECTION**

1. In the Complaint dated 12/3/2008, the Plaintiff claims that she is the registered proprietor of land parcel No. Mavoko Town Block 3/4951 and that in November 2007, the Defendant entered the land and started committing acts of waste and destruction by digging holes and planting trees. An injunction to restrain him from entering the land is sought as is a declaration that he is a trespasser to the land.
2. The objection raised to the hearing of the suit is that it is improperly before this court and should instead have been presented before the relevant Land Disputes Tribunal under the Land Disputes Tribunals Act No. 19 of 1990.
3. Reliance is placed on the decision of Khamoni J in R vs Chairman Land Disputes Tribunal, Kirinyaga District & Another ex-parte Kariuki (2005) 2 KLR 1.
4. The response by the Plaintiff is that the objection is misplaced as the High Court has unlimited jurisdiction and that the Land Disputes Tribunals Act only limits magistrate's courts in matters relating to land. That in Miller vs Miller (1989) KLR 258, the issue was well settled and the objection should be overruled.
5. My mind is clear that the objection is misguided because section 60 of the Constitution provides as follows:-  
  
"60. (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.  
  
(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 3 of the Constitution then provides as follows:-

“3. 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 the 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).”

7. The preamble to the Land Disputes Tribunals Act is on the other hand clear as to its intent. It 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.”

8. Further, in Miller aforesaid, Rauf J held as follows and I agree;

1. “The Constitution in section 60(1) did not create any exception to the High Court’s unlimited original jurisdiction in civil and criminal cases and therefore that jurisdiction could not be ousted unless by a constitutional amendment of that section. Moreover, the High Court had supervisory jurisdiction over the functioning of subordinate courts in addition to its appellate jurisdiction.

2. The provisions of the Civil Procedure Act (cap 21) sections 11 and 18(1) and the Magistrates’ Courts Act section 9 were to be exercised in conformity with the Constitution as provided by the Judicature Act (cap 8) section 3(1) (a).

3. The Judicature Act section 3(2) expressly confirmed that the High Court shall be guided by customary law in civil cases in certain instances. This was consistent and in conformity with the provisions of section 60(1) of the Constitution.

4. Therefore, the plaintiff had a right to initiate any proceedings in the High Court. He had the choice of a forum subject only to the incidence of costs.

5. By filing the counterclaim, the defendant had submitted to the High Court’s jurisdiction. Some issues raised in it were complex and beyond the jurisdiction of a subordinate court.

6. The plaintiff’s main prayer was for a declaration which being an equitable remedy, was best dealt with in the High Court.”

9. From the exposition of the law above, it is clear that the intent of the drafters of section 3(1) of the Land Disputes Tribunal’s Act was never to oust the jurisdiction of the High Court which is unlimited under the Constitution but to limit the jurisdiction of the magistrate’s court. To say otherwise would be to completely misunderstand what unlimited jurisdiction means.

10. Khamoni J in ex-parte Kariuki (supra) was addressing a completely different issue which was whether a party can file an appeal to the Provincial Appeals Committee and at the same time challenge the Land Disputes Tribunal by filing judicial review proceedings in the High Court. That is not the same issue before me and the decision is easily distinguishable.

11. In any event, the objection is lacking in merit and is struck out with costs to the Plaintiff.

12. Orders accordingly.

Dated and delivered at Machakos this 17<sup>th</sup> day of November 2008.

**ISAAC LENAOLA**

**JUDGE**

In presence of: Mrs Nduva h/b for Mr O.N. Makau for Applicant

**ISAAC LENAOLA**

**JUDGE**