IN THE HIGH COURT OF KENYA
AT KITALE
Civil Case 51 of 2005

MICHAEL BARTENGE……..……PLAINTIFF.

VERSUS

STEPHEN BARTENGE……...…….DEFENDANT.

R U L I N G.

This ruling is on the defendant's preliminary objection, which is in the following terms;

"(i) The suit is bad and improper in law as the court has improperly been moved by way of declaratory suit and the application seeks to injunct due process of a court of law which has already taken place.

(ii) The court is functus officio as ***the issues raised are res judicata.***

(iii) ***The application dated 20th April, 2005 is an abuse of court process in view of section 8 of the Land Dispute Tribunals Act No. 18 of 1990."***

When canvassing the preliminary objection, Mr. Limo, advocate for the defendant submitted that the suit was improper because it had been brought by way of a plaint, yet it was a claim for adverse possession.

As far as the defendant was concerned, such suits ought to be brought by way of Originating Summons, pursuant to the provisions of Order 36 rule 3 (6) of the Civil Procedure Rules.

Secondly, the defendant submitted that the issues raised in this suit are res judicata, and that this court is functus officio. The reason for that contention is that the issues were dealt with by the Kaplamai Land Disputes Tribunal, at the instance of the plaintiff herein.

The said Tribunal heard and determined the matter, after which the award was filed as SPMCC (Kitale) No. 74/03. The Decree arising from the award was issued on 26th May, 2004.

It is the defendant's contention that following the adoption of the award as a judgment of the court, it ceased to be an award, by virtue of section 8 of the Land Disputes Act.

At that stage, any party who felt aggrieved had 30 days to lodge an appeal, if they were so minded.

Alternatively, the respondent said, any aggrieved party could have moved the court for judicial review, in terms of Order 53 of the Civil Procedure Rules.

Having not either appealed or brought an action for judicial review, the plaintiff is said to be caught up by

the doctrine of res judicata.

Thirdly, the defendant faults the plaintiff for seeking the annulment of the provisions of the Land Disputes Tribunal Act, without filing a constitutional reference.

The plaintiff is also said to be trying to obtain an injunction to restrain a court of law from executing one of its official duties, namely the execution of a decree. That, the defendant says, is not permissible in law.

For those reasons, the defendant asked the court to strike out the suit, with costs.

However, the plaintiff put up a spirited fight against the preliminary objection.

In the first instance, he pointed out that the claim is not one for adverse possession, but a declaratory suit.

Having perused the plaint herein, I noted that the substantive prayer is for;

*"**A declaration that the aforesaid** award of the Land Disputes Tribunal, Kaplamai, and the subsequent adoption in Kitale S.P.M.C Land case No. 74 of 2003 are illegal, null and void, and for a permanent injunction restraining the defendant, his agents, servants, assigns and/or legal personal representatives and/or any such person claiming interest through the defendant from enforcing and/or executing the Decree in Kitale SPMC Land Case No. 74 of 2003 and/or entering and/or in whatever other way interfering with the plaintiff's quiet possession of plot No. 70 Karara Farm."*

To that extent, there is no doubt that this is a declaratory suit. Nowhere does the plaintiff pray for an order that he be declared the owner of the suit property, by virtue of adverse possession.

In so saying, I have not missed out on the particulars of the alleged excess or want of jurisdiction or illegality on the part of the Land Disputes Tribunal. One of the said particulars is in the following terms;

"The Tribunal erred to have deprived the plaintiff of a parcel of land which he had occupied for over 12 years, peacefully, continuously and uninterrupted since 1985."

Whilst it is true that the said particulars are suggestive of a claim for adverse possession, the plaintiff did not then seek an order to that effect. At most, he wishes to have the court take the said particulars into consideration, so as to arrive at the declaration sought.

In the result, I do, respectively, agree with the plaintiff that he was not making a claim for adverse possession, in this suit.

Had I come to the conclusion that this claim was for adverse possession, I would have had no option but to strike it out on that ground alone.

In GITHURAI TING'ANG'A CO. LTD VS. MOKI SAVINGS CO-OPERATIVE SOCIETY LTD & ANOTHER, CIVIL APPLICATION NO. NAI. 286 OF 1999, the Court of Appeal unanimously said;

*"**That being the position in the matter,** we say at the outset that a claim for adverse possession can only be made or raised if the provisions of Order 36 rule 3D of the Civil Procedure rules are complied with."*

In arriving at decision, the Court of Appeal also reiterated the following words of Omollo Acting J.A. (as he then was) in **BWANA VS. SAID (1991) 2 KAR 262 at 268;**

*"……**.. The respondents being** the registered owners, the appellant could only claim from them that 'minor portion' of their plot by adverse possession. An order for adverse possession could only be made in his favour if he complied with Order 36, rule 3D."*

That is the law. But as I have come to the conclusion that the suit herein was not for adverse possession, the said authorities are inapplicable to this case.

As regards the contention of res judicata, the plaintiff submitted that the issues raised herein could not have been raised before the Land Disputes Tribunal. For that reason, the plaintiff believes that this suit was not res judicata.

It was also submitted that the jurisdiction of the High court was unlimited, and could not therefore be limited by the provisions of the Land Disputes Tribunal Act.

In any event, the plaintiff believes that he is entitled to seek a declaratory relief, in lieu of an order of certiorari was time-barred.

Furthermore, the plaintiff submits that the injunction he was seeking was not directed against the court, but was against the defendant. As far as the plaintiff was concerned, if the injunction was issued, it would stop the defendant herein from executing the judgment obtained in the lower court.

To my mind, those submissions of the plaintiff clearly show that the plaintiff does appreciate that he could have sought an order of certiorari, with a view to quashing the decision of the Land Disputes Tribunal. He also concedes that he has only brought this declaratory suit because he was already time-barred from pursuing the process of judicial review.

Indeed, the plaintiff expressly conceded that avenues available to him were as enumerated by the Hon. Lady Justice W. Karanja in **ZEDEKIAH M. MWALE VS. BIKEKE FARM DIRECTORS & ANOTHER, KITALE HIGH COURT CIVIL APPEAL NO. 25 OF 1998**. At page 6 of her judgment, the learned judge said;

"***The appellant's only option was to go*** *on appeal as provided for under section 8 (1) of the Land Disputes Tribunal Act or to come to the superior court by way of Judicial Review if he thought that the decision of the tribunal was illegal or arrived at in excess of jurisdiction on the part of the Panel of Elders. Having failed to pursue any of those options that were open to him, the appellant cannot now come to this court and ask that a third avenue be created for him where none exists."*

In that case, the third avenue which the appellant sought was the review of the decree issued by the Resident Magistrate, at Kitale, when she adopted the award of the Land Disputes Tribunal as a judgment of the court.

In rejecting the appeal which had challenged the refusal by the Resident Magistrate to review or set aside the decision of the tribunal, the learned judge carried out an indepth analysis of the mischief which the legislature sought to address by limiting the role of the courts – and especially the subordinate court, to the bearest minimum.

I am fully in agreement with the sentiments expressed by my learned sister, in that regard, when she held as follows;

"***The mischief the legislature intended to combact and sort out once and for all was the mischief of land cases once again being returned to the courts and being subjected to the merry go round like before."***

Does that mean that even though the plaintiff failed to utilize the two avenues, which were available to him, he ought to be allowed to seek a declaratory relief, or should the plaintiff be told in no uncertain terms that he cannot be allowed to re-open the dispute through this declaratory suit?

On the one hand, the plaintiff says that the holding in Kitale civil Appeal No. 25 of 1998 was not exhaustive. His reason for so saying is that the leaned authors of "**Constitutional Law**", 6th Edition, said as follows at page 637-638 of that text;

"***In Bernard vs. National Dock Labour Board (1953) QB 18, where the Board had delegated its disciplinary powers to a port manager without statutory authority, certiorari did not lie to quash an order which suspended certain dock workers because an application for that remedy would have been out of time. But the court, without laying down the bounds of its jurisdiction, expressed itself competent and willing to declare any injustice as unlawful in the absence of any available remedy and further to restrain that injustice by an injunction. The court stated that this discretionary relief would only be used sparingly, without defining the bounds of its application; it is however, available against domestic as well as administrative courts."***

On the basis of that persuasive authority, the plaintiff urged this court to reject the preliminary objection.

On the other hand, the defendant argued that as this is a court of law, it enforces such laws as are passed by parliament. Therefore, if one wished to challenge any such laws, he would need to bring a constitutional reference.

After giving due consideration to the competing views expressed by the parties herein, I have come to the conclusion that the only proper mode of challenging the legality of a decision by the Land Disputes Tribunal is by either an appeal or through judicial review.

In any event, once the decision of the tribunal was adopted by the magistrate's court, it ceased to be simply an award. Instead, it acquired a wholly new status, as a judgment of the court.

At that stage, if the court were to purport to revisit the proceedings before the tribunal or the award itself, that would be tantamount to overlooking the action undertaken by the court.

Assuming for a moment, that the Tribunal had exceeded its jurisdiction, or that it acted without jurisdiction, and that this court then so declared, the question that would then arise is, what happens to the decree passed by the Senior Principal Magistrate's Court?

In order to answer that question, another question needs to be asked. And that is;

"***Is execution of a decree undertaken by a party or by the court?"***

That question arises from the submissions by the plaintiff that he was only seeking an injunction against the defendant and not as against the court. He said that the injunction, if granted, would stop the defendant from executing the decree issued by the Senior Principal Magistrate's Court.

By virtue of section 30 of the Civil Procedure Act;

"***A decree may be executed either by the court which passed it or by the court to which it is sent for execution***."

In effect, it is the court which executes decrees. The party who holds a decree which is in his favour, only applies to the court to execute the decree.

Therefore, if the order to stop the execution was issued in the nature of an injunction, it would effectively be addressed against the court. And, as it is the duty of the court to execute its decrees, an injunction to restrain it from so doing would be purporting to stop the court from performing one of its roles. That, in my considered view, would not be proper, even if the orders were clothed is such language as suggested that the orders were directed against the defendant.

The only manner in which courts are stopped from taking steps to execute decrees is through orders for stay of execution. No such order has been sought herein.

By virtue of section 8 of the Land Disputes Tribunal Act;

*"**The court shall enter judgment in** accordance with the decision of the Tribunal and upon judgment being entered, a decree shall issue and*

*shall be enforceable in a manner **provided for under the Civil Procedure Act."***

On a prima facie basis therefore, the action taken by the Senior Principal Magistrate's Court cannot be faulted, as it was in compliance with the provisions of statute.

I understand the plaintiff to be saying that he is not challenging the said action.

If that be the case, and the judgment on record is regular, I find no reason to go behind it, by seeking to revoke the award upon which it was founded.

Accordingly, I uphold the preliminary objection, and thus proceed to strike out the suit herein. The costs of the preliminary objection and of the suit are awarded to the defendant.

It is so ordered.

Dated and delivered at Kitale, this 21st day of March, 2007.

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FRED A. OCHIENG.

JUDGE.