



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

**Civil Suit 98 of 2004**

**DAVID WANJALA CHELOTI**

**CONCEPTA NAFULA NYONGESA.....PLAINTIFFS**

**VERSUS**

**LIVINGSTONE BULINGA MUSUNGU**

**EDWARD MAKHAPILA MUKITE.....**

**DEFENDANT**

**R U L I N G.**

The defendants application was expressed as having been made pursuant to the provisions of Order 6 rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules, as read together with section 3A of the Civil Procedure Act.

The defendants' prayer is that the suit be struck out with costs, on the grounds that it was a grave abuse of the process of the court, and also because it was incompetent, frivolous and vexatious.

In support of the application, the 1<sup>st</sup> defendant swore an affidavit, in which he set out the history of the dispute between himself and the plaintiffs herein.

When canvassing the application, the learned advocate for the defendants, Miss Sewe, summarized the factual foundation thereof. She pointed out that in 2000 the 1<sup>st</sup> defendant filed a complaint with the Kibomet Land Disputes Tribunal, in respect to the suit property, which is L.R. No. 12044 Kitale Municipality.

According to the defendants the issues which were in dispute, before the tribunal, were about the excess acreage between the parties.

The defendants also say that the tribunal did handle the question as to whether or not the plaintiff's were trespassing on the 1<sup>st</sup> defendant's land.

In the course of the proceedings before the tribunal, there was a survey and a re-survey. Based on the results of the said surveys, the 1<sup>st</sup> defendant was found to have been successful.

He thereafter applied to the Senior Principal Magistrate's Court at Kitale, in Land Case No. 32 of 2001, and the said court is said to have adopted the findings of the Kibomet Land Disputes Tribunal as the judgment of the court.

After the court had adopted the tribunal's findings as its judgment, the plaintiffs herein sought to quash the proceedings of the tribunal, and also to set aside the order adopting the tribunal's findings as a judgment of the court.

The court was informed that the 1<sup>st</sup> defendant herein successfully objected to the plaintiffs' attempt for judicial review, culminating in the striking out of Misc. application No. 116 of 2001, on 9<sup>th</sup> June, 2004.

It was after the striking out of the judicial review proceedings that the plaintiffs instituted these current suit.

And as far as the defendants were concerned, the Amended Plaint herein seeks essentially an order to the effect that the plaintiffs were staying on the correct acreage of land, which they bought from the defendants. For that reason, the plaintiffs were praying for an injunction to restrain the defendants from interfering with the land. The plaintiffs also seek a declaration that the decision of the Kibomet Land District Tribunal was void.

However, as the plaintiffs did not lodge an appeal against that decision of the tribunal, the defendants submit that the said decision was final, especially when it is borne in mind that it was adopted and became a judgment of the court.

The said judgment is said to have been made by a court of competent jurisdiction, and therefore the defendants ask this court not to ignore it.

The defendants feel that if the plaintiffs had felt aggrieved with the decision in the judicial review proceedings, they should have lodged an appeal, instead of filing a separate suit.

The court was thus asked not to permit the plaintiffs to re-open the issues through the back door, whilst there still subsists a judgment of a competent court.

In answer to the application, the plaintiffs submitted that this suit was not res judicata. Their reason for so submitting was that following the striking out of the judicial review proceedings, the plaintiffs were entitled to file other proceedings for judicial review or for a declaratory suit.

It was the plaintiffs' contention that because Misc. Application No. 116 of 2001 was struck out on a technicality, the plaintiffs could not appeal against it.

It was the plaintiffs' contention that because Misc. application No. 116 of 2001 was struck out on a technicality the plaintiffs could not appeal against it.

On my part, I have never understood the law to provide a bar to any party lodging an appeal against the decision by a court, to strike out an application on a technicality. I do believe that simply because an application was struck out on a technicality is not reason enough to automatically constitute a bar to an appeal against such a said striking out.

The plaintiffs cited the case of **NGIGE VS. CHOMBA & 3 OTHERS (2004) 1 KLR 597**, as authority for the proposition that a declaratory suit was an alternative for judicial review; and also for the proposition that when an action was struck out on a technicality that would give rise to res judicata.

I have perused the said decision, which was made by the Hon. Dulu – J., and note that at page 601, the learned judge expressed himself thus;

***“On the issue of this Court lacking jurisdiction due to the decision of Justice Gacheche on 11<sup>th</sup> March, 2004 in the High Court Miscellaneous Civil application No. 17 of 2002, my view is that indeed the applicant had elected to file an action for judicial review under Order 53 of the Civil Procedure Rules, and the High Court did make a ruling on that matter. I have perused the ruling of Justice***

***Gacheche dated 11<sup>th</sup> March, 2004. She dismissed the application because it was defective. The application was therefore not argued on its merits. The applicant, instead of filing another application, has elected to file this suit.***

It was in that scenario that the learned judge went on to hold that a declaratory suit is an alternative to review proceedings. His reasons for so holding are as follows;

***“As I have noted earlier the decision of Justice Gacheche was on preliminary points. If it was on substantive points and the merits of the application, I would be persuaded that this court cannot entertain this suit. However, as that application was dismissed on preliminary points, the two alternative relief's still existed i.e. filing a fresh application or this declaratory suit.”***

To the extent that Misc. application No. 116 of 2001 was struck out, this case would be comparable to that in the authority cited above.

And I would be in agreement with the Hon. Dulu J. that when an application was struck out on a technicality, the issue of res judicata does not ordinarily arise.

In this case, there appears to be no dispute about some facts. For instance, it is not in issue that the 1<sup>st</sup> defendant herein lodged a complaint against the plaintiffs herein, before the Land Disputes Tribunal, Kibomet. The said complaint is case No. 90 of 2000.

After a full hearing the Tribunal upheld the complaints of the 1<sup>st</sup> defendant, and directed the plaintiffs herein to remove their fencing posts and wire from the 1<sup>st</sup> defendant's farm. The Tribunal also found that the 1<sup>st</sup> defendant was entitled to 3.1 acres.

It is also not in dispute that after the Tribunal had passed its verdict, the 1<sup>st</sup> defendant herein filed Land Case No. 32 of 2001, before the Senior Principal Magistrate's Court, Kitale. Pursuant to that case, the Resident Magistrate ordered that the decision of the Kibomet Land disputes Tribunal be adopted as the judgment of the court.

The plaintiffs then instituted judicial review proceeding in the High Court, at Kitale, being High Court Miscellaneous application No. 116 of 2001.

It is in respect to that Application that the 1<sup>st</sup> defendant herein raised an objection.

In a reasoned ruling, which was delivered by the Hon. Karanja – J., on 8<sup>th</sup> June, 2004, the court struck out the application for non-compliance with the law which required an applicant for judicial review to first obtain leave of the court.

Whereas the court did not adjudicate on the application on the basis of substantive merit, I am not sure that it can be said that the decision was founded on nothing more than a technicality.

Order 53 rule 1 of the Civil Procedure Rules expressly stipulates that no application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted.

In my considered view, the failure to comply with that express requirement of the rules cannot be termed as a mere technicality. It is actually a mandatory requirement, without which an application for judicial review becomes a non-starter.

Furthermore, the plaintiffs herein now wish to have this court skip the judgment in Kitale SPMC Land case No. 32 of 2001; and to only declare proceeding of the Kibomet Land disputes Tribunal, a nullity. To my mind that would be the wrong way to go about things.

The plaintiffs do not appear to have a problem with the judgment on record, as it was entered in

accordance with the provisions of section 7 (2) of the Land disputes Tribunal Act. Insofar as the said judgment was entered regularly, and by a court whose jurisdiction has not been challenged, it would be regular.

As its validity is not being challenged, the said judgment would stand. Yet the plaintiffs, who had failed to utilize the avenues available to them through section 8 of the Land Disputes Tribunal Act, wishes to use a round-about route to challenge the decision of the Tribunal.

The said section 8 enables any aggrieved party to appeal against the decision of the Tribunal. The appeal is to be lodged with the Provincial Appeals Committee, within 30 days of the decision.

Of course, an aggrieved party could also move the High Court by way of judicial review. However, I believe that once the decision of the Tribunal was adopted as a judgment of the court, and if the court had thrown out the plaintiffs' attempt at judicial review, it would not be open to the said plaintiffs to seek declaratory relief's against the Tribunal's decision. I say so, not because the High Court lacks jurisdiction to supervise Tribunals or because the issues raised in the judicial review are res judicata: but because the process of supervision is ordinarily through the judicial review process, which in this case was already struck out.

Had the said judicial review been successful, the decision of the Tribunal would have been quashed.

In any event, I find that the prayers in the plaint are not of a declaratory nature. They are substantive reliefs, which if granted would grant to the plaintiffs the very reliefs which they had sought through judicial review. In other words, this suit is one for judicial review, but clothed otherwise.

For those reasons, I hold that the suit constitutes an abuse of the court process. Accordingly, the suit is struck out, with costs to the defendants.

Dated and Delivered at Kitale, this 7<sup>th</sup> day of May, 2007.

**FRED A. OCHIENG.**

**JUDGE.**