



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 77 of 2007**

1. Land and Environmental Law Division
2. Subject of main Suit/land – LR8822/

LR 8637

LR 6617

Eldoret

- ii) Declaratory suit against defendants 4 – 10 that the plaintiffs are absolute owners
  - iii) Eviction orders against 4 – 10 defendant from suit land
  - iv) Injunction against 4 – 10 defendant
3. Application 8 March 2007 seeking orders by plaintiff 1 – 3 to restrain defendant 4 – 10 from entering upon land trespassing and alienating suit land because plaintiffs are registered owners – Enforced tribunals orders by defendants be stopped.
  4. Preliminary Objection by defendant/applicant in Preliminary Objection
- i) That the tribunal Soy Land Dispute Tribunal is functus Officio. The plaint cannot be used to file suit. Only option is by way of Judicial Review in an appeal.
  - ii) Applicants had filed a Judicial Review but same withdrawn. Instead plaint filed in High Court of Nairobi.

5. In reply by plaintiff/respondent in the Preliminary Objection

The court can grant declaratory suit even if the plaintiff have no right to file suit

6. The reply by Attorney General - Nil

7. Held:

- 1: Preliminary objection is hereby upheld
2. Application and suit struck out
3. Temporary injunction to remain till filing of a Judicial Review within 14 days
8. Case law

9. Advocates

D.K. Magare for Magare & Co. Advocates for the plaintiff/respondent

M. Cherogony for Attorney General for 1<sup>st</sup> and 3<sup>rd</sup> defendants/respondent

I.S. Kuloba Nyairo & Co. Advocates on behalf of the 4<sup>th</sup> – 10<sup>th</sup> defendants/application in the Preliminary Objection

**PETER NGETICH .....1<sup>ST</sup> PLAINTIFF**

**JOSEPH CHERUIYOT .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SOY LAND DISPUTE TRIBUNAL .....1<sup>ST</sup> DEFENDANT**

**THE COMMISSIONER FOR LANDS .....2<sup>ND</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT**

**WILSON BUSIENI .....4<sup>TH</sup> DEFENDANT**

**SUSAN CHEPKOSGEI .....5<sup>TH</sup> DEFENDANT**

**TABRANTICH KIPROTICH .....6<sup>TH</sup> DEFENDANT**

**KIPTOO ARAP KOECH .....7<sup>TH</sup> DEFENDANT**

**KIPTIONY RUGUT .....8<sup>TH</sup> DEFENDANT**

**KIPROP RONO .....9<sup>TH</sup> DEFENDANT**

**KIPTOO MAGUT .....10<sup>TH</sup> DEFENDANT**

**RULING**

**ON A PRELIMINARY OBJECTION BY DEFENDANTS 4 to 10 IN THE MAIN SUIT**

**1: BACKGROUND OF PRELIMINARY OBJECTION**

**A) PROCEDURE**

1. This matter before me is extremely contentious. It concerns land ownership. There have been several suits filed in the High Court of Kenya at Eldoret. This present suit filed is by way of a plaint. The litigants include the Commissioner of Lands and the Attorney General. The plaintiffs advocate stated from the bar that both the High Court of Kenya at Eldoret and at Nairobi had declined to accept the plaint on grounds that where the government have been sued, a suit may only be filed in Nairobi. After the Hon. the Chief Justice in intervened suit was finally filed in Nairobi.

2. On the day the matter came up for inter parties hearing the advocate for the defendant raised a Preliminary Objection that the plaintiffs ought to have come to court by way of a Judicial Review and or

appeal but not by way of a plaint.

### 3. BACKGROUND

To understand this whole preliminary objection I wish to give a back ground as per the pleading put by the plaintiffs.

- i) The original suit land totaling 445 acres was owned by John Joseph Hughes. The LR Nos being 8822,6617 and 8637. Both the three plaintiffs, Peter Ngetich, Joseph Cheruiyot and Kimorong Mibei claim and the Seven defendants Wilson Busienei, Susan Chepkosgei, Tabrantich Kiprotich, Kiptoo arap Koech, Kiptiory Rugut, Kiproprono Kiptoo Magut claim to have bought the parcel of land from John Joseph Hughes. They paid Ksh.150,000/- as consideration. His widow appears to have had a life interest until her death.
- ii) The Kenya Government compulsory acquired the suit premises but left a portion. In 1988 the government again compulsory acquired portion of the land for the Kenya Pipeline. This time a portion left was LR8822 for 95 acres LR 6617 – 5 acres.
- iii) The three plaintiffs filed suit for adverse possession and the court granted this to them. It was during the further compulsory acquisition that the defendants discovered that in effect the plaintiffs were registered owners. Not being perturbed the defendants filed a suit with the Lands Dispute Tribunal at Soy. This tribunals task was to share the remaining land amongst the members who had bought the land from Hughes to themselves as the Sangalo Estate. The tribunal shared out the parcel of land to about 26 members – some of whom had passed away.
- iv) The plaintiff alleged they, as registered owner of the parcels of land surrendered the land and was issued with their share of land. The beneficiaries of the land tribunal case were now in the process of evading the land and taking possession.
- v) The defendants were to be therefore restrained by an order of injunction from entering the said land.

### II) PRELIMINARY OBJECTION

To the application of 3 May 2007

4. The parties herein would not have discovered that the plaintiff were the registered owners if it was not the subsequent compulsory acquisition that brought this to their attention. There was several suit filed at the High Court of Kenya at Eldoret.

5. High Court 193/02, Hccc12/02 where the suit was struck out due to representative action being complied with (Omodi Tunya,J). Hccc 35/02 originating summons for claim of land not yet allocated and is still pending at Eldoret. Land Dispute Tribunal 61/01 which awaits and has an adoption of the tribunal case in the Chief Magistrate Court Judicial Review 180/03 at Eldoret – duly withdrawn due to technicalities.

6. These files are not before this court to peruse but are mentioned to indicate the parties engagement with the court to be heard. I believe apart from the Land Tribunal case no full hearing has even been heard.

7. The Preliminary Objection arises to the fact that a plaint has been filed against the Soy Land Dispute Tribunal, the Commissioner of Lands and the Attorney General together with defendants 4 – 10 herein for a declaration that the plaintiffs are absolute owners of he land, that there be eviction orders against the 4 – 10 defendants from the suit land and that there be an injunction against the 4 – 10 defendants.

8. The effect of the injunction is to stay the orders of the Soy Tribunal from taking effect and further to question such orders that will be adopted by the magistrate court.

9. The said Land tribunal is now functions officio. The parties require to in effect have filed a Judicial Review or alternative filed an appeal against the said decision. They are therefore not permitted to file a plaint seeking declaratory orders. There is already a decree and the same cannot have any effect or be interfered with by declaratory orders of the court.

10. The plaintiffs advocate stated that even if the plaintiffs do not have a right to bring a declaratory suit the law nonetheless would allow such rights. That orders for injunction ought to be granted.

### III FINDING

11. The filing of this suit by way of an injunction and plaint cannot stand. The Soy Land Tribunal, the Commissioner of Land and the Attorney General can only be sued by way of a Judicial Review to overturn the decision of the tribunal and alternatively by way of an appeal.

12. I am afraid the advocate for the respondent is right. A declaratory suit in this situation cannot stand. I have not had a look at the suit where a similar Judicial Review application had been struck off by the High court of Kenya at Eldoret due to technicalities but I would in these circumstances hold that either the plaintiffs file a Judicial Review or an appeal against the 1<sup>st</sup> defendant – the suit before court cannot stand.

13. I hold that the application for an injunction and the main suit be hereby struck out with costs to the respondents.

14. As this matter has been so acrimonious the law allows me to issue a temporary injunction pending the filing of a Judicial Review or appeal within 14 days of to day's date which I accordingly do.

Dated this 29<sup>th</sup> May of 2007 at Nairobi.

**M.A. ANG'AWA**

### JUDGE

D.K. Magare for Magaret & Co. Advocates for the plaintiff

Mr. Cherogony for Attorney General advocate for the 1<sup>st</sup> and 3<sup>rd</sup> defendant

I.S. Koloa Nyairo & Co. Advocates for 4<sup>th</sup> – 10<sup>th</sup> defendants.