



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

Civil Case 101 of 2006

ROSALIA KITHUNI NGARE. PLAINTIFF

VERSUS

SILAS GATOBU KABUTURA DEFENDANT

RULING ON A PRELIMINARY OBJECTION

1. The Preliminary Objection by Mr. Mwanzia, Advocate for the Defendant is dated 10.11.2006 and is straight forward; that the suit herein is statute time barred; is in contravention of s.8 of the Land Disputes Tribunal and is otherwise an abuse of court process. The arguments made are that the remedies being raised in the suit are unavailable to the plaintiff, as they should only be brought to this court not by a declaratory suit but by way of orders of Judicial Review.

2. It is further argued on behalf of the Defendant that the suit is time barred because being a claim for land the suit should have been instituted within six(6) years and not after eight (8) years as the plaintiff has done.

3. The response by Ms Mwangi for the plaintiff is that there is no limitation of time where a party seeks declaratory orders and that the suit being premised on the sensitive issue of land should not be struck out but leave to amend should instead be granted.

4. I have perused the plaint in this matter and I note that in fact the dispute between the parties was initially brought to court vide SRMCC No. 125/1997 (Nanyuki) but the court referred the matter to arbitration under the Land Disputes Tribunals Act. The Tribunal determined the matter as follows:

“The Plaintiff proved ownership of the parcel in dispute. He has all the relevant documents in support of his ownership. Copies of these documents annexed herein. We have further ruled that the defendant vacate the same parcel within 90 days to enable the purchaser develop his land as he wishes.”

5. It is admitted by the Plaintiff at paragraph 7 of the Plaint that she challenged that decision through a summons seeking leave to institute judicial review proceedings but failed as the summons was filed outside the period allowed. She then instituted this suit and now seeks orders as follows: -

“a) An order for permanent injunction restraining the defendant from entering, alienating and or any other way interfering with Land Parcel No. MWICHUIRI 11/KANTAITA/227.

(b) A declaratory order of prohibition, prohibiting the implementation of the undated elders award but which was filed in court on 23.11.1998.

(c) The court do issue further orders that it deems fit and just.

(d) Costs of this suit.”

6. With this background in mind, I am of the respectful view that the objection is merited because firstly, once the parties submitted themselves to the Jurisdiction conferred by the Land Disputes Tribunals Act, No. 18 of 1990, then it would be expected that any aggrieved party would challenge the Tribunal's award by following procedures within that Act. I say so because the award of the Tribunal was founded on s.7 of that Act and s.8 thereof provides as follows:-

“(1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.

(2) The Appeal shall be registered in a register of appeals in the same manner as the register of claims under section 3 (3); and a notice thereof shall be served on the other party or parties to the dispute in the same manner as provided in subsection (4) of section 3.

(3) The appeal shall be in documentary form and shall contain a brief statement, to be divided into separate grounds of appeal, of the reasons upon which the party appealing wished to rely.

(4) The Appeal shall then be set down for hearing by the Appeals Committee at a date, a time and place to be notified to the parties thereto.

(5) The appeal shall then be determined by the Appeals Committee which shall consists of three members appointed under section 9.

(6) At the hearing of the appeal, the party bringing the appeal shall begin.

(7) After giving each party an opportunity to state his case the Appeals Committee shall determine the appeal giving reasons for its decision.

Provided that the Committee may in its discretion permit the party appealing to reply to the other party's submission if that submission contains any new matter not previously introduced at the hearing or on the appeal.

(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:

Provided that no appeal shall be admitted to hearing by the High court unless a judge of that court has certified that an issue of law (other than customary law) is involved.

(10). A question of customary law shall for all purposes under this Act be deemed to be a question of fact.

7. The proper procedure would therefore have been an appeal to this court after exhausting the procedures in s.8 above and not a direct challenge to the award by filing a separate suit. A party that comes to the High Court as aggrieved by the decision of the Land Disputes Tribunals can only also do so by invoking the provisions of Order LIII of the Civil Procedure relating to judicial review orders. A party cannot seek a declaratory relief as has been done by the Plaintiff for reasons given by Lord Scarman in **R vs Inland Revenue Commissioners ex-parte National Federation of Self-employed and Small Businesses Ltd (1982) AC 617 at 649** where he said:

“Before the introduction of the new order 53....a declaration could not be obtained by a private citizen unless he could show (as in a claim for an injunction) that a private right of his was threatened or infringed. The new order has made the remedy available as an alternative, or an addition to a prerogative order. Its availability has therefore, been extended, but only in the field of public law where a prerogative order may be granted”

8. Putting this holding in the line of the matter before me, the Plaintiff was right in challenging the decision of the Tribunal as a matter of public law but cannot, with its decision still binding, purport to clothe this court with jurisdiction to issue orders of judicial review by way of a declaratory relief. That would be extending jurisdiction to issue orders of Judicial relief too far and in fact it would be extending that jurisdiction to unknown legal spheres. Once the plaintiff abandoned proceedings under Order LIII, as she did, then she ought to have backtracked and challenged the award by way of appeal which she has apparently failed to do.

9. Secondly, it is not disputed that the cause of action in this suit arose after the decision of the Tribunal on 23.11.1998 or thereabouts. I say this because the suit challenges that award and its effectualisation. If it be so, then I agree with Mr. Mwanzia in his reading of s.4(1)(c) and (e) of the Law of Limitations Act Cap 22 which provides as follows:

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued-

(a);

(b)

(c) Actions to enforce an award

(d) Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this act or by any other written law”.

10. The point here is that the award being challenged and the reliefs sought could only be available six (6) years after the award was given and not later. A suit that is time barred is a non suit and if filed, can be struck out because the remedy sought cannot be granted. As Diplock L J stated in **Letang vs Cooper [1964] ALL E.R.929;**

“The Act is a Limitation Act; it relates only to procedure. It does not divest any persons of rights recognized by law; it limits the period within which a person can obtain a remedy from the courts for the infringement of them. The mischief against which all limitation Acts are directed is delay in commencing legal proceedings; for delay may lead to injustice, particularly where the ascertainment of the relevant facts depend on oral testimony.”

11. The above holding was held to be true in **Kenya Cargo Handling Services Ltd vs Ugwang [1985] KLR 593 at 600** by Kneller J.A. and it aptly sums up the situation obtaining in this matter and it is also my finding that the suit is time-barred for the same reasons.

12. Lastly, the suit herein is clearly one where the doctrine of **per rem Judicatum** applies - this is that form of estoppel which gives effect to the policy of the law that parties to a judicial decision should not afterwards be allowed to relitigate the same question, even though the decision may be wrong. If the Tribunal’s decision is wrong, as is claimed by the Plaintiff, I have elsewhere above stated that there are other lawful channels, so far as I know, that are open for her to do so. I should only say this as I close; there is aside from the prayer for a declaratory relief, another prayer for injunction. That prayer is superfluous for the same reasons that I have stated above because the Defendant has a valid order of a

lawful Tribunal, which has not been overturned. It cannot stand on its own in any event.

13. In the end, the objection is clearly merited and is hereby upheld and that being the case the entire suit herein is struck out with costs to the Defendant.

14. Orders accordingly.

DATED SIGNED, AND DELIVERED AT MERU THIS 26TH DAY OF JULY 2007

ISAAC LENAOLA,

JUDGE

In the presence of:

M/S Mwangi Advocate for the Plaintiff

Mr. Mwanzia Advocate for the Defendant

I. LENAOLA,

JUDGE