

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 54 of 2005

STEPHEN KYALO MBUTHI
PLAINTIFF

VERSUS

CHARLES MUOKI & 17 OTHERS
DEFENDANT

R U L I N G

This suit was filed by the plaintiffs through the firm of Katumbi Isika and Company Advocates on 14.6.2005. The verifying affidavit to the plaint verifies in paragraph 4 that there is no other suit pending between the plaintiffs and the defendants on the same subject matter. In paragraph six of the plaint the plaintiffs aver that defendants have trespassed and continue to trespass into plots No. 1219, No.39 and No. 998, Kathyaka Settlement Scheme. They then seek a declaration that the defendants have no rights over the said pieces of land and are trespassers. They seek an injunction against the defendants.

The defendants deny trespass into those pieces of land and deny that 1st plaintiff is the bona fide registered proprietor of piece No. 1219 Kathyaka Settlement Scheme. They admit that 2nd Plaintiff is the registered owner of plot No. 39 and deny that 3rd plaintiff is the registered proprietor of plot No. 998.

By Notice of Preliminary Objection on points of law dated 27.9.2005 Mulwa and Mulwa Advocates for the defendants raise two points:-

- (a) That the suit is incompetent for lacking the Land Adjudication officer's consent before it was instituted.
- (b) That this court lacks jurisdiction owing to the provisions of section 3(1) of the Land Disputes Act No. 18 of 1990.

When these issues came before me for argument on 7.12.2005 Mr. Nyakweba for the defendant chose not to argue the first objection. He did not say why but he did not cancel or remove it from the record.

On the 2nd point of jurisdiction he argued that S. 3(1) clearly gave jurisdiction of land disputes therein described, to the tribunal established under Section 4 of that Act.

Mrs. Isika for the plaintiff replied that what Section 3(1) of the Land Disputes Act provides is clear, but its provisions were trying to limit this courts wide jurisdiction as granted to it under Section 60 of the Constitution and that such should not be allowed to happen. That to the extent it tried to conflict with Section 60 aforesaid, the Act should be declared null and void.

I have carefully considered the points raised from both sides. Starting with the provisions of section 3(1) of the Land Tribunal Act matters specified therein "shall be heard and determined by the Tribunal" The purpose for this limitation was probably the fact that such cases would more effectively be heard by a tribunal made of elders from the local community who would be in a better position to

understand some local intricacies involved in such land claims. The provision sounds like one which ties coding of local customary interests and issues. The legislators may have considered that such issues, especially those arising from ownership of land could be better dealt with by those tribunals. Apart from restricting those disputes to the tribunal, Parliament has said nothing more. Mrs. Isika thinks the Act flies on the face of Section 60 of the Constitution. My view is that the restriction serves a good and useful purpose and I see no good reason to presently disturb it. May be when the issue is seriously brought up and argued in full in the future, a court may need to make a fully considered decision. Until then, let the provisions stay in peace.

The 2nd point which was raised first but curiously not argued is the jurisdiction of this court in a civil claim of a land still under adjudication. I have examined the record. There is clear evidence that the process of Land Adjudication in the Kathyaka Settlement Scheme where parcels of land Nos 1219, 998 and 39 are situated, is still going on. There are correspondences in the file from the Land Adjudication officer to that effect. And yet I find no consent from the Land Adjudication Officer authorising the filing of this suit. At least none is attached to the plaint as it ought. In my understanding that denies this court jurisdiction to entertain the suit and nullified the validity of the suit altogether. Lack of such consent at the filing of the suit cannot be cured even if such consent is issued thereafter. That is why the court found it curious that Mr. Nyakweba did not wish to say even a word about the issue. However since he did not withdraw it from the court, the court finds it proper to act on it.

From the above reasons the court upholds Mr. Nyakweba on both points of objection. The result is that this suit for either ground aforementioned, has no business hanging in the court's record. It is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Machakos this 24th day of February 2006.

D. A. ONYANCHA

JUDGE