



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 41 OF 2004

PETER GICHARU NGIGE
.....**PLAINTIFF**

VERSUS

KIIRU CHOMBA.....1ST DEFENDANT

**CHRISTINE WAMBUI MWAURA.....2ND
DEFENDANT**

**HANNA WAMBUI MUREITHI.....3RD
DEFENDANT**

**ATTORNEY GENERAL ON BEHALF OF THE
CHAIRMAN**

SOY LAND DISPUTES TRIBUNAL.....4TH DEFENDANT

RULING

When this application dated 20th April 2004 came for hearing on 29th April 2004 counsel for the respondent Mr Ngingi Mbugua raised preliminary objections to the application. He stated that he had already served notice of the preliminary objections on the advocate for the applicant.

He submitted that the plaint in this matter does not comply with the requirements of order 7 rule 1 (e) of the Civil Procedure Rules. Though paragraph 22 of the plaint discloses two previous proceedings, it does not fully disclose that Eldoret Chief Magistrate’s Land Disputes Tribunal Case No 47 of 2001 is still pending a ruling. He submitted that the plaint is therefore not in conformity with the legal requirements.

Secondly, he submitted that this Court does not have jurisdiction to entertain the suit or application for interlocutory orders. Following an earlier ruling in Eldoret Chief Magistrate’s Land Disputes Tribunal Case No 47 of 2001 adopting the Tribunal’s award, the plaintiff filed Eldoret High Court Miscellaneous application No 17 of 2002 which has been determined by the Court and a ruling given on 11th March 2004. This current suit seeks to quash the proceedings and award of the Land Disputes Tribunal No 26 of 2001 which formed the basis of Eldoret High Court Miscellaneous Civil Application No 17 of 2002. In that miscellaneous application, the plaintiff elected to file action for judicial review under order 53 of the Civil Procedure Rules, which is in itself a suit. The Court has already made a decision on those

proceedings, and any party aggrieved is at liberty to prefer an appeal. What the plaintiff is now seeking in the fresh suit is declaratory orders, which if allowed, will have the effect of quashing the High Court ruling in Miscellaneous Civil application No 17 of 2002 as well as the adoption of the decision of the Tribunal by the lower court. In his view, this was wrong as this Court is not sitting on appeal and secondly it has not been constituted to exercise supervisory power over the lower court. Therefore the plaint and all attendant applications are incompetent and should be struck out. He cited the case of Eldoret High Court Civil Suit No 194 of 1998 *Kiptot Mungen –vs- Kitur arap Muzee and another* to support his submission that a declaratory suit is an alternative to a judicial review, so one cannot file both. He further submitted that time was also against the plaintiff, as the time started running from the time the lower court adopted the Tribunal’s decision. In this regard he referred me to the case of *Kahuha vs Kahuha* Nairobi HCCA No 502 of 2000.

On the issue of the competence of the application he submitted that all the annexures to the affidavit supporting the application are photocopies, but they were not certified copies of the originals. In his view, section 35 (2) of the Evidence Act requires such copies to be certified as true copies of the original. This not being merely a procedural requirement, those photocopies cannot be considered.

Mr Gicheru for the applicant/plaintiff opposed the preliminary objection. He submitted that the ruling of Justice Jeanne Gacheche does not remove jurisdiction in the matter from this Court. What was before the judge was a preliminary objection on the application for judicial review, and the judge struck out the application as it was defective. Parties did not go to the merits. Where a matter has not been determined on the merits, a party can bring a suit as the matter was not *res-judicata* under section 7 of the Civil Procedure Act. He referred me to the case authorities – Nairobi Civil Application No 312 of 1999 (CA) *Robert Entwistle – vs- Trustees of Nairobi Baptist Church* in which it was held that the mere fact that a decision can be challenged by way of judicial review does not prevent a party from taking proceedings for a declaratory suit. In Eldoret HCCC No 55 of 1998 *Daudi Ngetich Kimibei -vs- Attorney General and Another* it was held that where an application for judicial review has been struck out without hearing it was on the merits, the only option available is to file a declaratory suit. He submitted that the decision in Eldoret HCCC No 19 of 1998 *Kiptot Mungen –vs- Attorney General* was similar. Also that in Eldoret HCCC No 1 of 2003 *Kipkering Arap Muzee -vs- Kitur Arap Muzee and another* it was held that once an application is struck out, one can bring a declaratory suit. He submitted further that in Kisumu Civil Appeal No 157 of 2000 *Asman M Wepukhulu and Another –vs-600 Francis M Buketi* (CA) it was held that where the Land Disputes Tribunal did not have jurisdiction, the parties have to go to the High Court for determination.

On *res-judicata* under section 7 of the Civil Procedure Act, he submitted that there is need to show that the Chief Magistrate’s Court had jurisdiction. As the tribunal did not have jurisdiction to deal with matters relating to registered land, the lower court also did not have jurisdiction. He submitted that he disclosed in the plaint the previous suits as required by the law. Where there is no verifying affidavit, the Court has a discretion to strike out the plaint. That power is permissive not mandatory under order 7 rule 1(3) of the Civil Procedure Rules.

On the annexures to the affidavit, he submitted that the requirement for certified copies under section 35(1) of the Evidence Act, refers to documents produced on oral evidence and not affidavits. Affidavits are governed by the Oaths and Statutory Declarations Act (cap 15) and order 18 of the Civil Procedure Rules. There is no requirement for certified true copies. The copies only require to be sealed with the seal of the Commissioner for Oaths and marked for identification. In any event, *resjudicata* the proceedings which determined the matter should have been placed before this Court. He urged me to dismiss the preliminary objections.

I have considered the submissions of both counsel in the preliminary objections. On the issue of the plaint not complying with the requirements of order 7 rule 1(e) of the Civil Procedure Rules, I note that the rule provides that there should be –

‘an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter.’

Under paragraph 22 of the plaint, the plaintiff did disclose that there were previous proceedings in Eldoret Miscellaneous Application No 17 of 2002, which application was struck out and was not heard and determined on the merits; and Eldoret Chief Magistrate's Land Disputes Tribunal No 47 of 2001 for adoption of the elders' award in Soy Division Land Disputes Tribunal Case No 26 of 2001 and which is the subject matter of this suit. Though the respondents' advocate argued that this was not a complete disclosure of pending/previous proceedings and that there is a pending ruling in Eldoret Chief Magistrate's Land Disputes Tribunal Case No 47 of 2001, my view is that there was compliance with the requirements of Order 7 rule 1(e) of the Civil Procedure Rules on disclosure. Also I do not see which ruling is pending in Eldoret Chief Magistrate's Land Tribunal Case No 47 of 2001, as the advocate for the respondent did not give particulars of the pending ruling.

On the issue of this Court lacking jurisdiction due to the decision of Justice Gacheche on 11th March 2004 in 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 in that matter. I have perused the ruling of Justice Gacheche dated 11th 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. I have perused the decision of Justice Nambuye made on 4th July 1998 in Eldoret High Court Civil Suit No 55 of 1998 *David N Kimibei –vs- Attorney General and another*. I agree with counsel for the respondent that a declaratory suit is an alternative to review proceedings. 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 reliefs still existed, ie filing a fresh application or this declaratory suit. In the case above where Justice Nambuye made a ruling, the plaintiff had already been granted conditional leave to file for judicial review, but chose to file a declaratory suit, possibly because the time of six months allowed by law had lapsed. In that situation therefore, just like in our situation, the two alternatives were open to the plaintiff. As Eldoret High Court Miscellaneous Application No 17 of 2002 was not dismissed on the merits, I come to the conclusion that the plaintiff had the two options open to him ie pursuing judicial review proceedings by filing another application for leave of the Court, or coming to court through a declaratory suit.

On the issue of time to file the declaratory suit, I have not been addressed and informed that the suit itself is statute barred. The counsel for the respondent has only stated that the time started running from the date of adoption of the Tribunal's decision by the lower court. In case counsel for the respondent considers that the suit is statute barred, he can raise it in the defence to the suit, and it will be dealt with at the appropriate time.

On the issue of competence of the application due to the non-certification of annexures to the supporting affidavit as certified copies of the original,

I have perused section 35(2) of the Evidence Act. The section relates to the production of copies of documents by a witness giving oral evidence. The Oaths and Statutory Declarations Act does not have such a requirement with regard to documents that are annexed to affidavits. It only requires that the Commissioner of Oaths seals the copies with his seal and marks them for identification.

On the above reasons, I dismiss the preliminary objection and direct that the application dated 20th April 2004 will be heard and determined on its merits. Costs in the cause.

Dated and Delivered at Eldoret this 9th day of June 2004.

G.DULU

JUDGE

