Andrew v Muchungu (Legal Representative of the Estate of Martha Muthoni Muchungu – Deceased) (Environment & Land Case 8 of 2016) [2024] KEELC 13277 (KLR) (16 October 2024) (Judgment)

Neutral citation: [2024] KEELC 13277 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE 8 OF 2016

A KANIARU, J

OCTOBER 16, 2024

BETWEEN

NJUE ANDREW ..... PLAINTIFF

AND

JOHN MURIITHI MUCHUNGU ..... DEFENDANT

LEGAL REPRESENTATIVE OF THE ESTATE OF MARTHA MUTHONI MUCHUNGU – DECEASED

JUDGMENT

1. The plaintiff herein - Njue Andrew – filed this case here against the defendant – Martha Muthoni Muchungu now substituted with John Muriithi Muchungu - vide a plaint dated 04.02.2015. In the plaint he was seeking a declaration that he was the absolute owner of the whole of that parcel of land known as Mbeti/Kiamuringa/313. He was also seeking a declaration that the award of the Land Disputes Tribunal at Gachoka as adopted by SPM's court at Siakago in Land Disputes Tribunal no. 2 of 2012 awarding land parcel Mbeti/Kiamuringa/313 to the defendant is illegal, null and void. He wanted the defendant, her children and her family members to be evicted from the suit land. He also sought costs and interest of the suit. In his plaint, he stated that the Tribunal had been dissolved by the repealing of the Land Disputes Tribunal Act, hence the proceedings and decisions of the said tribunal were null and void. That the award of the tribunal that was later adopted as a decree of the court in Siakago was also null and void as it was based on an award that was null and void.

2. The defendant filed a defence on 06.05.2017 where she denied that the plaintiff was the absolute owner of the suit land. It was her case that her deceased husband purchased 15 acres out of the 35.08 acres of the suit land owned by the plaintiff. She stated that the award of the tribunal was made after considering all facts and evidence and the decree arising out of it was lawful and executable. She also stated that

the order of declaration cannot quash the decision of the Tribunal as that can only be done by way of judicial review. She asked for the suit to be dismissed.

3. The matter was set down for hearing on 22.11.2023 and the plaintiff testified as PW1. He began by adopting his written witness statement. It was his testimony that sometime in the year 2010, the defendant lodged a claim against him before the District Land Tribunal in Gachoka claiming 15 acres out of his land. That she was claiming that her late husband - Muchungu Kombo - had entered into a sale agreement with him to purchase the 15 acres. He denied there was any sale agreement or that he ever sold the land to the deceased. It was his contention that the Tribunal awarded the defendant the 15 acres without a proper basis for doing so. On cross examination, he testified that he, together with a Munene Kombo and the defendant who are both deceased occupied the suit land but the land belongs to him. He testified that the defendant and her deceased husband, and their son are buried on the land. He produced in evidence the land disputes tribunal proceedings, a green card, a decree as PEXH 1 -3.

4. The defendant testified as DW1. It was his testimony that he is the son of Martha Muthoni Muchungu and that the plaintiff is his neighbor. That they live on the plaintiff's land where they also work. He adopted his written statement as well as that of his deceased mother. According to his statement, on 07.04.2003 he was a witness that the plaintiff was given one goat as demanded by him which customarily signifies that the land deal is sealed and concluded. That all his deceased family members, including his mother and father, are buried on the suit land which happened without resistance from the plaintiff. That together with his other surviving siblings, they live on the suit land. He asked that the decision of the tribunal, which tribunal he says visited the suit land, should be implemented.

5. On cross examination, he testified that the tribunal case was heard on 01.02.2011 and the decision made on 08.03.2012. He produced in evidence a sale agreement drawn in 1980 and its translation, an acknowledgement for payment of the purchase price, pleadings in HCC no. 55/2012, grant of letters of administration, application for consent of the land control board dated 06.07.1981, decision of the land disputes tribunal Gachoka Division, Decree of the SRM Gachoka in LDT No. 2 of 2012, Order given on 19.11.2015, Chiefs letter dated 19.03.2014, death certificate for Bernard Muchungu Kombo, burial permit for Mary Njoki Muchungu, death certificate for Martha Muthoni Mucungu, death certificate for Jacob Njeru Muchungu as DEXH 1-13.

6. It was agreed that parties file written submissions. The plaintiff submitted that this court has the jurisdiction to hear declaratory suits. That section 3 of the repealed Land Disputes Tribunal Act provided for the jurisdiction of the Tribunal which was limited to land disputes involving division of or determination of boundaries, claims to occupy or work on land and trespass to land. That the Tribunal therefore did not have the jurisdiction to issue the orders that it did and therefore the plaintiff had proved his case as per the plaint. The cases of Kagunyi & Anor v Mwathi (sued as the legal representative of Gatumu Kiricho – Deceased) & 6 others (2024) KEELC 882 (KLR), m'Marete v Republic & 3 others, Andrew Njue v Martha Muthoni Muchungu (2016) Eklr, among others, were proffered in support of the submissions.

7. The defendants on the other hand submitted that the procedure to quash the decision of a quasi-judicial body is provided for under Order 53 of the Civil Procedure Rules and the *Law reform Act*. That if the plaintiff was of the view that the tribunal acted in excess of its jurisdiction he ought to have invoked judicial review proceedings to quash the decision. That there was inordinate delay in bringing the suit. That the plaintiff entered into a sale agreement for the sale of the 15 acres and received full consideration for the same before giving the defendant possession thereby creating a constructive trust in favour of the defendant.

8. It was urged that the suit be dismissed with costs and the plaintiff be ordered to transfer the 15 acres of parcel 313 to the defendant. The cases of Republic v AG & 2 others Ex-parte Benson Irungu Kahura 2012 Eklr, William Kippsoi Sigei v Kipkoech Arusei & Anor (2019) Eklr, Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others (Petition 18 (E020) of 2022 (2023) KESC 106 (KLR) were proffered in support of the submissions.

9. I have considered the pleadings as filed, the evidence tendered during hearing, and the written rival submissions. I find that the issue for determination is whether the plaintiff is entitled to the declaratory reliefs sought.

10. The jurisdiction of the Land Disputes Tribunal was governed by the Land Disputes Tribunal Act (now repealed) under section 3(1) which provided as follows:

> " Subject to this Act, all cases of a civil nature involving a dispute as to—
>
> a) the division of, or the determination of boundaries to land, including land held in common;
>
> (b) a claim to occupy or work land; or
>
> (c) trespass to land
>
> shall be heard and determined by a Tribunal established under section 4."

11. It is true therefore that the Tribunal did not have the jurisdiction to determine issues of ownership of registered land as is the case herein. However, the issue is whether the plaintiff followed the correct procedure to challenge the tribunal's award. Section 8 (8) and (9) of the Land Disputes Tribunal Act provided the mechanisms for challenging a tribunal's decision. An aggrieved party was to appeal to the Provincial Appeals Committee within 30 days of the decision of the tribunal or file for judicial review to quash the tribunal's award to the High Court within 60 days. In particular it was provided as follows:

> 8
>
> (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.
>
> 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".

12. In this case, after the tribunal made its decision, the award was adopted by the Siakago Magistrate's Court in accordance with section 7 of the said Act. The plaintiff neither appealed the tribunal's decision nor sought judicial review. He also never filed an appeal to challenge the judgement and decree of the Magistrate's court in Siakago. Once the award was adopted as a judgment of the court, it ceased to exist independently and it is debatable whether it could be challenged as a nullity through a declaratory suit. Some courts have consistently held that it can not. See the court of appeal case of Florence Nyaboke Machani v Mogere Amosi Ombui& 2 others Civil Appeal 184 of 2011 [2014] eKLR where the Court observed as follows;

> " Once the award of Borabu Land Disputes Tribunal was adopted as a judgment of Senior Resident Magistrate's Court at Keroka, it ceased to exist on its own. It cannot be the subject

of a declaration. And even if it remained alive of what use will it be to declare it a nullity if the decree ensuing therefrom, by SRM's court at Keroka does not face the same fate. The plaintiff has not invited this court to do so. I am sure that he was aware that that would have been an uphill task. The award having become a judgment of the court of competent jurisdiction can only be varied, vacated, set aside or reviewed either by the same court or by an appellate court in appropriate proceedings. That has not been done by the SRM's court at Keroka nor have I been asked to do so in this suit. In any event I do not think that the SRM's court at Keroka has jurisdiction under the Land Disputes Tribunals Act to review, vary, rescind, vacate and or set aside an award filed. The role of that court is merely to adopt the award as a judgment of the court on application and thereafter issue a decree. It has no jurisdiction to examine the award in order to satisfy itself whether it is bad in law and therefore void ab initio"

13. See also Catherine C Kittony v Jonathan Muindi Dome & 2 others [2019] eKLR where the court held that:

> "The Land Dispute Tribunal had mechanisms to deal with outcomes such as the one rendered by the 2nd respondent. The award by the 2nd respondent ceased to exist upon adoption by the court as its judgment and a decree. The award cannot be challenged by filing a fresh suit as it is trite law that where a statute establishes a dispute resolution mechanism that mechanism must be followed and exhausted, where a party fails to do so he cannot be heard to say that his rights were denied."

The court further observed that:

> "In the instant appeal, it is not in dispute that the appellant was aggrieved by the decision of the 2nd respondent. However, instead of lodging an appeal before the Provincial Appeals Committee constituted for the province in which the land which was the subject matter of the dispute was situated and if still dissatisfied to appeal to the High Court on a point of law (see: Section 8(1) and (9) of the Land disputes Tribunal Act) or institute judicial review proceedings to quash the decision by the 2nd respondent as it was alleged that it acted in excess of its jurisdiction in making the award, the appellant opted to file a fresh suit before the ELC which was not in order.

See also *Mathenge v Gatua & another (Civil Appeal 94 of 2018)* [2024] KECA 341 (KLR) (22 March 2024) (Judgment) where the court observed:

> "When the respondents did not follow due process, and the decision of the Tribunal was adopted by the Magistrates' court, it became a legally binding judgment. Later, when the respondents moved the trial court with a case that challenged the legitimacy of the tribunal's decision, they were utilizing a process that was not provided for by law to try and circumvent the judgment of the magistrates' court. As the learned Judge was persuaded that the tribunal lacked jurisdiction, and she so declared, the result was akin to pulling the rug from underneath the feet of the tribunal, whereas the tribunal had long before that ceased to have anything to do with the matter. The tribunal's decision had already metamorphosed into a judgment of the court, following its adoption. In the circumstances, there remains a judgment that is valid and unchallenged by an appeal, whereas the foundation upon which the said judgment was based was being voided by a parallel legal process. In our considered view, the courts are duty-bound to take heed to deliver substantive justice. We must not be enslaved to procedures and technicalities. Nonetheless, the court cannot be expected to harp

on the need to guard against enslavement to technicalities and in the process ignore the real confusion that could arise when we endorse the failure to comply with the written law."

14. May be it is necessary at this stage to consider whether a declaratory suit such as the one filed herein is a suitable alternative to judicial review proceedings. My considered view is that it is but only in appropriate circumstances. In the old English case of Barnard Vs National Dock Labour Board (1953) QB 18, Lord Denning (as he then was) was faced with an argument by counsel to the effect that courts have no right to interfere with the decision of statutory tribunals except by way of judicial review. While respectfully disagreeing with counsel, the learned Law Lord said:

> " .....there is power to do so, not only by way of certiorari, but also by way of declaration, I do not doubt. I know of no limit to the power of the court to grant a declaration except, such limit as it may in it discretion impose upon itself and the court should not, I think, tie hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament so clearly intended. If the tribunal does not observe the law, what is to be done? The remedy of certiorari is hedged round by limitations and may not be available. Why then should not the court intervene by declaration and injunction? It if can not so intervene, it would mean that the tribunal could disregard the law, which is a thing no one can do in the country"

15. The above position as expressed by Lord Denning received approval by Lord Goddard in the case of PYX Granite Co Ltd Vs Ministry of Housing and Local Government (1958) IQB 554 where observation was made thus:

> " I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive"

16. From all this, the position seems to be clear that a declaratory suit is a suitable alternative to judicial review proceedings in an appropriate or deserving case.

17. In Kenya, the judicial approach to the issue is not unanimous. There is for instance the Catherine C. Kittony's case (Supra) where the position espoused is that it is not open to a party to approach the court via a fresh suit where the law has a clear dispute resolution mechanism. There is also the case of the Speaker of National Assembly Vs Karume (1992) KLR 21, where the following observation appears:

> " Where there is a clear procedure for redress of any particular grievance prescribed by *the constitution* or an Act of parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must strictly be adhered to since there are good reasons for such special procedures"

18. But there is also a different approach which embraces the view that a declaratory suit is an unconditional alternative to judicial review process. This is the position for instance to be found in the case of Stephen Kang'ethe Kariuki Vs Samuel Kangere Gatoto: ELC Division case No 222 of 2010 (2015) eKLR where Njage J (as he then was) concurred with the opinion of Dulu J in the case of Emily Chepkemboi Ngeyoni & Another: Eldoret HCC No 27 of 2005 where the Learned Judge said thus:

> " My own opinion of the matter is that there is no bar to filing a suit to declare the decision a land Disputes Tribunal null and void. True, the avenues of appeal and judicial review are available but I am of the view that these are not the sole avenues for relief.... I am of the stand

that the plaintiff is perfectly entitled to file the suit seeking interalia a declaration that the decision of the tribunal was made without jurisdiction"

19. Given these two divergent approaches, my position on the matter is largely informed by the position taken in the old English cases I have already cited and quoted and by the predominant position of the Law in Kenya currently. The position in the old English jurisprudence was that a declaratory suit was suitable because judicial review process is sometimes "hedged round by limitations and may not be available" (Per Lord Denning). Such declaratory suit needs to be allowed only "in an appropriate case" (Per Lord Goddard). Quite clearly, a declaratory suit becomes suitable where judicial review process is not adequate for a given matter or where it is found to have limitations or shortcomings. It is not an unconditional alternative.

20. The current position of the law in Kenya is that where a statute or other law prescribe a procedure for redress of a problem, that procedure must be adhered to. That is why we have the doctrine of exhaustion and/ or avoidance. But I do not understand the current position as ousting the place of a declaratory suit in Kenya. If, for good reason, the procedure prescribed is not suitable for the intended purpose, a declaratory suit is in my view a viable and acceptable alternative. But the good reason has to be explained to the satisfaction of the court in order for it to exercise it discretion to allow a declaratory suit. The plaintiff in this matter should have first explained to the satisfaction of the court why he did not or could not follow the procedure prescribed. It was not his automatic right to come to court the way he did.

21. In this matter itself, such satisfactory reason has not been proffered. My take therefore is that the plaintiff herein is not entitled to the declaratory reliefs sought. The suit herein therefore is for dismissal and I hereby dismiss it with costs to the defendant.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 16TH DAY OF OCTOBER, 2024.

In the presence of plaintiff and the defendant.

Court Assistant - Leadys

A. KANIARU

JUDGE – ELC, EMBU

16.10.2024