



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC CASE NO. 14 OF 2021

{Formerly at Environment and Land Court at Kisii Case No. 461 of 2013}

ERIC ONGUBO MAKANA.....PLAINTIFF

- VERSUS -

MELLEN K. NYABWARI.....RESPONDENT

RULING

Issue: Procedure to be followed in setting an Award of the Land Disputes Tribunal Act No. 18 of 1990 (now Repealed). This suit was filed on 15/11/13 by the Plaintiff seeking for a Declaration that the Award of Rigoma Land Disputes Tribunal filed in the Senior Resident Magistrate's Court at Keroka on 04/02/2005 and adopted by the said court on 03/05/2005 together with the said adoption are null and void for lack of jurisdiction. The Defendant filed a Defence on 09/12/13 where among other things she raised the issue of jurisdiction and averred that this court lacks jurisdiction to issue the orders sought for in the Plaintiff. The Decree that is being challenged is worded in the following terms:

UPON reading the award of Rigoma Lands Disputes Tribunal filed in court on 04/02/05, **IT IS HEREBY ORDERED** as herein below:

- 1. THAT it be and is hereby ordered that parcel No. EAST KITUTU/BOTABORI II/1327 be shared equally among the Plaintiff/Applicant and the Defendants/Respondents.**
- 2. THAT it is hereby ordered that the District Land Registrar and Surveyor (Nyamira) be involved in this transaction.**
- 3. THAT IT IS HEREBY FURTHER ORDERED THAT THE Executive Officer of this Honourable Court be and is hereby ordered to sign all the necessary documents of mutations and transfer of the said land till the title deeds are obtained.**

This is the order that forms the core of this suit.

After the matter was certified ready for hearing but the same could not proceed on a number of occasions, Counsel for the Defendant filed a Preliminary Objection on 21/10/2020 which was to be canvassed by way of written submissions which submissions were to be exchanged within 30 days with effect from 02/06/2021. Mr. Orina complied by filing the Defendant's submissions on 04/06/2021. To date the Plaintiff's Counsel has never filed his. The matter has come up for mention severally but the Plaintiff has failed to turn up in court. I must therefore do what is the natural cause. To deliver my Ruling.

The Defendant's Preliminary Objection is buttressed by the grounds that there is a clearly set down Procedure for quashing an award emanating from a Land Disputes Tribunal Act No. 18 of 1990 (now Repealed). I have looked at the pleadings herein and the submissions by Counsel for the Defendant. The issue for determination is whether this court has Jurisdiction to entertain this suit or not and if not whether the suit should be struck out.

Sec. 4 (2) of the Repealed Act (Land Dispute Tribunal Act No. 18 of 1990) provides:

“Every dispute referred to in subsection (i) shall be instituted by presenting a claim to the Tribunal for the area to which the land is situated.....”

Sec. 7 (2) of the said Act provides that:

“The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a Decree shall issue and shall be enforceable in the manner provided for under the civil Procedure Act.”

Should a party be aggrieved by the decision of the Tribunal he is allowed 30 days within which to appeal to the Appeals Committee. Thereafter, any party aggrieved by the decision of the Appeals Committee may appeal to the High Court on a point of law within 60 days from the date of the Committee’s Decision, but there is a proviso here. The High Court (now ELC) must certify that an issue of law (other than customary Law) is involved for the Appeal to be admitted in the High Court.

I do not intend to go into the merits of the Award because the Preliminary Objection is based on the issue of whether this court has jurisdiction to quash the Decision of the Rigoma Land Disputes Tribunal or not. The Plaintiff does not indicate anywhere that after the Tribunal filed its Decision and the same was adopted by the Keroka Senior Resident Magistrate Mr. Nathan Shiundu on 04/03/2010 that he ever appealed to the Appeals Committee. He can therefore not jump the gun by coming to this court. And even if this had been followed he would not have moved this court by way of a Plaintiff.

I do agree with Mr. Orina for the Defendant that where the law has established a procedure to resolve disputes, parties are bound to follow the procedure. Had the Plaintiff moved the court by way of Judicial Review for whatever orders the same would have been entertained. But unfortunately, this court was moved by way of a Plaintiff which is a Jurisdiction that is mainly reserved to fresh matters save in a few other instances and the current suit does not fall in that category. Having said so what is left to the court to do. I am well guided by the case of *Mukisa Biscuit Manufacturing Co. Ltd =Vrs= West End Distributors Ltd (1969) E.A.* that;

“.....a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued on a Preliminary point may dispose of the suit.”

In this particular case the issue of Jurisdiction has not only been pleaded but also comes out quite clearly from the Plaintiff dated 15/11/13 where from the contents of paragraphs 4 to 8 (inclusive) this matter was adjudicated by the Lands Disputes Tribunal (Rigoma) and its Award was pronounced as a Judgment of Keroka Senior Resident Magistrate’s Court in *Miscellaneous Application No. 2 of 2005*. The same was never challenged in the Appeals Committee as provided for by law. This suit is therefore not properly before this court. Consequently, the suit is incurably defective. The court of Appeal in *Owners of the Motor Vessel “Lillian S” =Vrs= Caltex Oil (Kenya) Ltd (1989)* held as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....Jurisdiction must be acquired before judgment is given.”

Since I am not allowed to imagine what would have happened had the correct Procedure been followed, I forthwith down my tools and rule that I have no Jurisdiction to hear this matter and the same is hereby struck out and since costs follow the event, the Defendant is awarded the costs of this Preliminary Objection as well as the entire suit. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 7TH DAY OF OCTOBER, 2021

MUGO KAMAU

JUDGE