



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**E.L.C CIVIL SUIT NO. 5 OF 2012**

**NDIOGO OLE TARURU ..... PLAINTIFF**

**VERSUS**

**MARY BENSON KUYO .....1<sup>ST</sup> DEFENDANT**

**SELIFINA WANJIRU THENDEU.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a plaint dated **8<sup>th</sup> October, 2012** the plaintiff **Ndiogo Ole Taruru** instituted this suit against the respondents **Mary Benson Kuyo and Selifina Wanjiru Thendeu** seeking among other orders that the award of **Olokurto Land Dispute's Tribunal** dated **12<sup>th</sup> May, 2011** and the decree in **Narok Misc. Land Tribunal No. 41 of 2011** together with all consequential orders be set aside and an order of perpetual injunction restraining the defendants from trespassing, entering, transferring, registering alienating or dealing in any other way whatsoever with land parcel No. **Cis Mara /Olosimoru /51** (suit property) be granted.

2. Simultaneously with the plaint, the plaintiff brought a notice of motion of even date seeking an order of temporary injunction. Before this application could be heard and determined the same was withdrawn on **24<sup>th</sup> October, 2012**. On the same date, the plaintiff filed an application seeking an order to stay execution of the decree dated **20<sup>th</sup> December, 2011** granted in Narok Misc. Land dispute No. 14 of 2011 and the award of the Olokurto Land Dispute Tribunal dated **23<sup>rd</sup> May, 2011**. An order of stay was granted on **30<sup>th</sup> October, 2012** but lapsed on **17<sup>th</sup> June, 2013**.

4. The 2<sup>nd</sup> defendant did not enter appearance and neither did they file any response to the application. On **23<sup>rd</sup> January, 2014** counsels for the plaintiff and the 1<sup>st</sup> defendant agreed that the application be disposed of by way of written submissions. Only the 1<sup>st</sup> defendant filed her submissions on **6<sup>th</sup> May, 2014** which I have considered together with the pleadings and the affidavit evidence presented in support thereof.

5. The application is anchored on the grounds on the face of the application and is supported by the affidavit of the plaintiff sworn on **12<sup>th</sup> October 2012**, that the plaintiff is the registered owner of the suit property, having purchased the same from **Benson Thendeu Rebo**, deceased husband to the defendants herein for **Kshs. 837,000**. He avers that he has developed the suit property extensively and has lived there with his family since 1995.

6. That in the year 2012, he learnt that the 1<sup>st</sup> defendant had filed a claim before the Olokurto Land Dispute Tribunal claiming that the 2<sup>nd</sup> defendant was occupying her land whereas the 2<sup>nd</sup> defendant should have been occupying the plaintiff's land. The tribunal found in her favour and made a decision that the plaintiff's title be cancelled and the same be registered in the names of Benson Thendeu Rebo and the 2<sup>nd</sup> defendant herein.

7. It is the plaintiff's contention that he was not made a party to the proceedings by the tribunal thus a violation of the rules of natural justice. Further, this decision by the tribunal was outside the tribunal's jurisdiction therefore the award was ultravires and illegal as a tribunal cannot make orders for cancellation of titles.

8. The award was adopted in **Narok Misc. Land dispute No. 14 of 2011** as judgement of the court and a decree issued cancelling the plaintiff's title. It is the applicant's contention that unless this court grants the orders sought the defendant may give effect to the orders of the court and the applicant will be dispossessed of his land.

9. In opposition to the application, the respondent filed a notice of preliminary objection and a replying affidavit sworn on **29<sup>th</sup> November, 2012**. The preliminary objection is filed on the grounds summarised as follows;

i) This court has no jurisdiction to either entertain this suit or grant the orders sought as the plaintiff's claim is resjudicata.

ii) The plaintiff has no cause of action against the 1<sup>st</sup> defendant.

iii) The 1<sup>st</sup> defendant has no legal capacity to be served on behalf of the deceased's estate.

10. In the replying affidavit, the 1<sup>st</sup> defendant admits that she filed a claim before the Tribunal and the award adopted as judgement of the court. She also admits that the plaintiff was not enjoined as a party in the tribunal's proceedings. She confirms that it was wrong and illegal for the tribunal to cancel the plaintiff's title when he was not a party to the proceedings. This award has however been adopted as judgment of the court and the applicant has sought to be enjoined in the suit before the Magistrate's court which application is still pending.

11. The question for determination is whether the applicant is entitled to the order of stay of execution of the decree dated **20<sup>th</sup> December, 2011** in Narok Misc. Land Tribunal No. 14 of 2011 and the award of Olokurto Land Dispute's Tribunal dated **23<sup>rd</sup> May, 2011**.

12. This application has been brought **under section 63(e), 3A, 1A and 1B** of the **Civil Procedure Act**. **Section 63(e)** provides generally that to prevent the ends of justice from being defeated courts may "..... **make such other interlocutory orders as may appear to the court to be just and convenient.**" General provisions such as the aforementioned cannot be invoked where there are clear provisions like **Order 22 Rule 25** of the **Civil Procedure Rules** which this application should have been brought under. **Order 22 Rule 25** provides "**Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree as passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided**".

13. It is common ground that a suit or application not commenced in the prescribed manner is incompetent. This application was improperly instituted and is therefore fatally defective. That should dispose of the application but I wish, in case I have arrived at a wrong conclusion, to consider whether the applicant is entitled to the orders sought.

14. The dispute between the parties related to occupation of land. The tribunal having found that the 2<sup>nd</sup> defendant was in occupation of the wrong parcel, went ahead to make a decision relating to ownership of land. The Tribunal clearly exceeded its jurisdiction enumerated under Section 3 of the repealed Land Disputes Tribunal Act in can in making findings that the plaintiff's title **Cis Mara/Olpusimoru/51** be cancelled and the same be registered in the name of **Benson Thendeu Rebo** and **Selfina Wanjiru Thendeu** and that **Selfina Wanjiru Thendeu** occupies the said parcel registered in the applicant's name.

15. It is common ground that the plaintiff was not made aware of the claim before the tribunal and only became aware of the happenings after the award had been adopted by the Magistrate's court and a decree issued on **20<sup>th</sup> December, 2011**. This is against the principle of '*audi alteram partem*' foundational pillar of natural justice, which affords all parties the chance to have their day in court. It underscores their right to be heard and to a fair trial under Article 25(c) of the Constitution of Kenya. By denying him an opportunity to be heard he was also denied the options of going to the Appeals Committee and then to this court on points of law and also to apply by way of Judicial Review proceedings to quash the decision of the tribunal and the magistrate's court.

16. Having made that observation, it is equally clear that the applicant in bringing this action as a civil suit is side- stepping the procedure for challenging that decision. Once a constitutional question arises, a constitutional petition should be filed under **Article 22** of the **Constitution of Kenya** citing the provisions of the Constitution infringed and the manner in which they are alleged to be infringed. Article 22 provides;

**22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**

The Constitution has given the High Court jurisdiction to entertain such matters under Article 23 which provides;

**23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.**

Equally the Environment and Land Court under **Section 13 (3)** of the Environment and Land Court Act may entertain such a petition.

**13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other written law relating to Environment and Land.**

**(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes?**

(a) .....

(b) .....

(c) .....

(d) .....

(e).....

**(3) Nothing in this Act shall preclude the Court from hearing and determining applications for**

**redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.**

17. Although not all matters filed as constitutional petitions should be decided as such, I am convinced that this is a matter that should be filed under Article 22 of the constitution as what is left for the plaintiff to claim is only available under Article 23(3) of the constitution of Kenya.

See the case of **Minister of Home Affairs vs Bickle & Others (1985) L.R.C. Cost. 755**, cited with approval by **Lenaola J** in **Hon. Uhuru Kenyatta –vs- The Nairobi Star Limited High Court Petition No 187 of 2012** where the court stated;

**“It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd. 22).....Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.” Emphasis mine**

18. The Environment and Land Court under **Section 13(3)** of the Environment and land court Act has the jurisdiction to deal with both civil matters and constitutional petitions. The challenge that will arise if I continue to entertain this civil suit are the practical differences in aligning a civil suit required to comply with the provisions of the Civil Procedure Act and Rules with a constitutional petition which has its own required form and procedure for filing of a petition alleging violation of constitutional rights by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013(**The Mutunga Rules**).

19. For the above reasons, I dismiss the Application before me and strike out the suit with costs to the defendants.

**Dated, signed and delivered on this 11th day of July 2014.**

**L N WAITHAKA**

**JUDGE.**

**PRESENT**

Mr Mwangi for the plaintiff

N/ A for the Defendants

Emmanuel Juma : Court Clerk

**L N WAITHAKA**

**JUDGE**