



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 68 OF 2012

PRISCILLA WARUI NYAGAPLAINTIFF

VERSUS

JOSEPH NJOKA KAARA1ST DEFENDANT

OCTAVIAN KIURA KAARA2ND DEFENDANT

RULING

By his amended plaint filed herein on 10th January, 2013, the plaintiff sought from the defendants the following remedies:-

- a. *A declaration that the proceedings and findings of the Gichugu Land Disputes Tribunal in respect of L.R No. BARAGWE/GUAMA/1279 and the subsequent confirmation as the judgment of the Court in Land Tribunal Case No. 13 of 1999 Kerugoya Senior Principal Magistrate's Court were null and void and cannot be effected.*
- b. *A declaration that the plaintiff does not hold L.R No. BARAGWE/GUAMA/1279 as trustee for the defendants*
- c. *An order that the defendants be permanently restrained from entering, utilizing, occupying or in any way interfering with the plaintiff's peaceful use of L.R No. BARAGWE/GUAMA/1279*
- d. *Costs of the suit with interest*
- e. *Any other relief the Court may deem just to grant*

The basis of this claim is that whereas the plaintiff is the registered owner of the property L.R No. BARAGWE/GUAMA/1279 (hereinafter the suit property), the defendants filed a suit at the Gichugu Land Disputes Tribunal which went on to order the sub-division of the suit property to be shared equally among four persons including the two defendants herein. That decision was made an order of the Court in L.D.T No. 13 of 1999 at Kerugoya Court. It is the plaintiff's case that the said Tribunal had no jurisdiction to make such orders hence this suit.

The defendants filed a defence stating that the award of the Gichugu Land Disputes Tribunal was adopted by the Court and no longer exists and these issues are res-judicata in view of Kerugoya Senior Resident Magistrate's Court L.D.T No. 13 of 1999 which had been substantially executed.

This Court having stayed the proceedings in Kerugoya Senior Resident Magistrate's Court L.D.T No. 13 of 1999 pending the hearing of this suit, the defendants/respondents have raised a Preliminary Objection to this suit on the following grounds:-

1. *That the plaintiff has improperly moved the Court by way of a plaint*

2. That the plaintiff ought to have invoked the jurisdiction of the Court by way of Judicial Review or an appeal to the Appeals Committee against the decision of the Gichugu Land Disputes Tribunal as provided for under Section 8 of the Land Disputes Tribunal Act.

That Preliminary Objection by the defendants is the subject of this ruling. Both sides have put in their written submissions to the same.

I have considered the Preliminary Objection and the submissions by Ms Wanjiru for the plaintiff/respondent and those by the defendants/applicants who are acting in person. I have also considered the case of **COSTA SOTE KANDIE VS LEGETYO KOYIN AND ANOTHER H.C.C.C No. 31 of 2011 (KITALE)** which the defendants/applicants have referred me to. It is the defendants/applicants case that since the dispute subject matter of the suit property was determined by the Gichugu Land Disputes Tribunal under the now repealed Land Disputes Tribunal Act, the only remedy available to the plaintiff/respondent was to file an appeal against the Tribunal's decision to the Provincial Land Disputes Appeals Committee and if dissatisfied with the decision of the Appeals Committee, file an appeal to the High Court on points of law. The plaintiff/applicant could also file Judicial Review proceedings. Therefore, the filing of this plaint is not open to the plaintiff/respondent.

On her part, Ms Wanjiru is of the view that this Court has powers under the **Environment and Land Court Act**, specifically **Section 13** of the said Act, to call for the record of any proceedings before any Court or Tribunal and make any orders it considers appropriate to ensure the fair administration of justice and in this case, the plaintiff/respondent should be given an opportunity to show that the Gichugu Land Disputes Tribunal had no jurisdiction to do what it did.

When this matter first came before me on an application for stay, I expressed my reservations on whether infact the plaintiff/respondent could move the Court by plaint as he has done rather than by way of Judicial Review or appeal to the Appeals Committee. I have looked at the decision of OBAGA J. in the case of **COSTA SOTE KANDIE** (supra) which has been cited by the defendant/applicants herein. OBAGA J. seems to share the same views that I had expressed earlier in my ruling dated 4th July, 2013. In the **COSTA SOTE KANDIE** case (supra), however, the Court was dealing with a situation where the plaintiff was seeking to quash proceedings of the Land Disputes Tribunal and the Court said that that procedure was not available to the plaintiff.

In the case now before me, the plaintiff/respondent is seeking two declaratory orders in addition to another order restraining the defendants/applicants from interfering with his use of the suit property. The plaintiff/respondent is not seeking to quash any judgment or order of a Court or tribunal. The Court of Appeal in the case of **JOHANA BUTI VS WALTER RASUGU OMARIBA AND THREE OTHERS C.A. CIVIL APPEAL NO. 182 of 2006 (KISUMU)** while dealing with a similar situation had this to say:-

“A declaration or declaratory judgment is an order of the Court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force – that is, it does not require anyone to do anything. It is available both in private and public law save in Judicial Review jurisdiction at the moment. The rule gives general power to the Courts to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter”.

The Court of Appeal then went on to make the following observation which is relevant to this case:-

“Moreover, although the Resident Magistrate’s Court entered judgment in accordance with the decision of the tribunal, such a judgment could be challenged in fresh proceedings if obtained by fraud or mistake”

Citing the House of Lord’s decision in **JONESCO VS BEARD (1930) A.C. 293** and also **KUWAIT AIRWAYS CORPORATION VS IRAQI AIRWAYS CO. & ANOTHER (NO 2) I.W.L.R. 429**, the Court of Appeal went on to add that the proper way of impeaching a complete judgment on the ground of fraud is by action. The Court of Appeal went on to conclude as follows:-

“It seems to us that the 1st respondent had no other remedy. Since the Supreme Court had jurisdiction to entertain both a declaratory suit and an ordinary suit impeaching the judgment of the Magistrate’s Court, the Preliminary Objection was not maintainable. It is after the hearing of the suit that the Superior Court can determine whether or not to grant a declaration in the circumstances of the case”

That decision is binding on me and it clearly demonstrates that there is nothing wrong in a party moving the Court to grant declaratory orders arising from what he considers to be illegal orders of a Court or Tribunal.

In the circumstances, the Preliminary Objection is dismissed with costs to the plaintiff.

B.N. OLAO

JUDGE

5TH DECEMBER, 2014

5/12/2014

Before

R. Limo – Judge

Mbogo – CC

Mr. Magee holding brief for Ms Wanjiru for Plaintiff – present

Plaintiff – present in person

Defendants – present in person

COURT: Ruling delivered in the presence of Mr. Magee holding brief for Ms Wanjiru for Plaintiff

Plaintiff present in person

Defendants present in person.

R. Limo

JUDGE

5TH DECEMBER, 2014