



REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 164 of 2010

JOHN KIPKEINO KICHWEN.....PLAINTIFF

VERSUS

SAMWEL KIPKENY ROP.....DEFENDANT

RULING

On 1st December, 2011 **S.K. Kitur and Company Advocates** for the defendant filed a Notice for Preliminary Objection to the effect that the prayer for injunction sought in prayer 9(a) of the plaint cannot issue because Aldai Land Disputes Tribunal, whose award is being challenged, has not been joined to this suit. In their written submissions the said advocates contend that if the plaintiff was not satisfied with the award of the said tribunal, he should either have appealed to the provincial appeals committee or sought judicial review of the same. In the premises the prayer for injunction cannot stand in the absence of the Land Disputes Tribunal as a party to this suit.

The preliminary objection is opposed on the grounds that it is an attempt to limit the court's jurisdiction and further that no adverse order is sought against the said tribunal and the non-joinder is therefore not fatal. Besides, according to counsel for the plaintiff, the preliminary objection is not a proper preliminary objection because facts have to be obtained.

I have considered the notice of preliminary objection and the rival submissions of counsel. Having done so, I take the following view of the matter. The predecessor of our present Court of Appeal said as follows in **Mukisa Biscuit Manufacturing Company Limited -Vs- West End Distributors Limited [1969] E.A. 696:**

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

A perusal of the plaint shows that the plaintiff does not seek any adverse orders against Aldai Land Disputes Tribunal even though its award is being challenged. I also observe that a determination of the point raised in the preliminary objection would involve a consideration of the award made by the said Land Disputes Tribunal which in reality means that facts have to be ascertained. In the premises I agree with counsel for the plaintiff that the preliminary objection has not been properly raised. The same is overhauled with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 5TH DAY OF SEPTEMBER, 2012

**F. AZANGALALA
JUDGE**

Read in the presence of:

Mr. Choge for the plaintiff

**F. AZANGALALA
JUDGE**

5TH SEPTEMBER, 2012