



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 132 OF 2009

MARY NYAMBEKI ONDIEGA.....PLAINTIFF

VERSUS

CHARLES OKACHI OBWAYA.....1ST DEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

INTRODUCTION

1. By a Plaint dated 9th May 2009, the Plaintiff herein filed suit against the Defendants seeking a declaration that the proceedings, award and decree or judgment in Kisii CM Miscellaneous Application No. 94 of 2008 were irregular, wrongful and a nullity. He also sought an order restraining the 1st Defendant from laying any claim and/or rights pursuant to the decree in Kisii CM Miscellaneous Application No. 94 of 2008.

2. It is the Plaintiff's claim that the 1st Defendant filed a suit against the Plaintiff at the Suneka Land Disputes Tribunal. The case was heard ex-parte and the award of the Tribunal was filed in court and adopted as a judgment of the court on 18th February 2008 vide Kisii CM Miscellaneous Application No.94 of 2008. It is the Plaintiff's case that since the Defendant was challenging a Sale Agreement entered between the Plaintiff's late husband and one Omwaya Omwaya (deceased) in 1972, and the Plaintiff had not obtained letters of administration in respect of her late husband, she lacked the *locus standi* to be sued. It is his further contention that since the sale agreement took place in 1972, the suit before the Land Disputes Tribunal was statutorily barred. Additionally, it is her contention that the Tribunal lacked the jurisdiction to hear and determine a case involving a contract.

3. In his Defence dated 9th July 2020, the 1st Defendant denied the Plaintiff's claim and stated that "the Plaintiff's suit as mounted is bad in law, misconceived, incompetent, lacks merit, is brought in bad faith, is a sham and/or a non-starter, that the Plaintiff has come to court with tainted hands and is guilty of non-disclosure of material particulars relevant to the suit, that the Plaintiff is guilty of pleading conscious falsehoods, misrepresentations and distortion of facts, and the Plaintiff lacks the *locus standi* to mount the suit. That the Plaintiff's pleadings are factually incorrect and this Honourable court lacks the jurisdiction to hear, try and determine this suit and/or is statutorily barred from hearing trying and determining this suit". He further alleged that the suit is vexatious, frivolous, scandalous and otherwise an abuse of this Honourable Court's process.

4. The 1st Defendant claimed that the Plaintiff was engaging in a fishing expedition and was forum-shopping as she had squandered the legally provided avenues for seeking legal redress, as she ought to have filed an appeal to the Kisumu Land Disputes Tribunal or lodged an application for Judicial Review within six months from the date of the judgment. He contended that failure to lodge appropriate proceedings within the time stipulated by law rendered her suit legally untenable and fatally defective.

5. He stated that the legal process in Suneka Land Disputes Tribunal Case No. 546 of 2008 was proper as was the judgment in Kisii CM Miscellaneous Application No. 94 of 2008

6. The 1st Defendant then proceeded to give notice that he would raise a Preliminary Objection on points of law as pleaded in the Defence.

7. When the suit came up for hearing on 27th July 2020, the parties agreed to first have the Preliminary Objection disposed of by way of written submissions. Both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION.

8. The issues that the court is called upon to determine are as follows:

1. Whether the Plaintiff lacks the locus standi to bring this suit.
2. Whether this court has jurisdiction to hear and determine this suit
3. Whether the suit is incompetent and bad in law

ANALYSIS AND DETERMINATION

9. With respect to the first issue Counsel for the Plaintiff submitted that the Plaintiff has the capacity to sue because she is the one who was sued at the Land Disputes Tribunal and she has come to this court to claim that she was wrongly sued at the Tribunal, as she did not have letters of administration in respect of her late husband's estate. Counsel further submitted that the 1st Defendant also lacked the locus standi to sue the Plaintiff at the Land Disputes Tribunal as he did not have letters of administration in respect of his late father's estate as he obtained a Grant of Letter of Administration on 23.10.2020 and a Certificate of Confirmation of Grant on 29.10.2020 whereas the case at the Tribunal was filed in 2008. He therefore submitted that the actions of the 1st Defendant at the Tribunal amounted to intermeddling with the estate of Omwaya Omwaya-deceased, contrary to the provisions of section 45 of the Law of Succession Act Cap 160 of the Laws of Kenya. It is therefore his submission that on this ground alone, the Preliminary Objection is untenable.

10. There is no dispute that both the Plaintiff and the 1st Defendant lacked the locus standi to lodge or defend the case at the Land Disputes Tribunal and even though the 1st Defendant subsequently obtained a Grant of Letters of Administration in respect of his late father's estate, the Plaintiff has never obtained a Grant in respect of her late husband's estate. The effect of the Plaintiff's lack of Letters of Administration is that she lacks the locus standi to bring this case against the Defendants. On this ground alone her suit is unsustainable.

11. On the issue of the court's jurisdiction, it has been argued that the Plaintiff squandered her opportunity to institute proceedings before the Provincial Appeals Committee within 30 days after the Land Disputes Tribunal had rendered its decision. Alternatively, she ought to have filed an application for Judicial Review in the High Court within six months from the date when the court adopted the award of the Land Disputes Tribunal as a judgment of the court in Kisii CM Miscellaneous Application No. 94 of 2008. Whereas I agree with the submissions of counsel for the 1st Defendant, it is equally true that under the provisions of Order 111 Rule 9 of the Civil Procedure Rules, 2010, the court can make a declaratory order in respect of the rights of the parties before it. This was so held in the case of **Johana Nyokwoyo Buti v Walter Rasugu Omariba & Others Civil Appeal No. 182 of 2006** where the Court of Appeal observed as follows:

"The important legal issue raised in this appeal is whether the Superior Court had the jurisdiction to entertain the 1st Respondent's suit.

"The starting point is the provisions of Order 11 rule 7 of the 1948 Civil Procedure Act (now Order 111 Rule 9 of the Civil Procedure Rules in the Civil Procedure Act 2010 which provides that:

No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the court may make a binding declaration of rights whether any consequential relief is or could be claimed or not.

*"A declaration or declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceeding 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 court 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. In the present case the 1st Respondent sought a declaration in essence that the decision of the tribunal was unlawful as it was made without jurisdiction. If such a declaration is granted, the result will be that the decision of the tribunal would be a nullity. The 1st Respondent was not a party to the tribunal proceedings. The decision of the Tribunal came to his notice long after the 30 days stipulated by section 8 (1) of the Land Disputes Tribunal Act for appealing to the Provincial Appeal's Committee had elapsed, and also long after the six months stipulated for seeking a judicial review remedy of an order of certiorari had expired. It is true that the 1st Respondent filed a judicial review application but it was dismissed on the ground that the application for leave was made outside the stipulated six months. Since the application for judicial review was not determined on the merits, the doctrine of res judicata does not apply. Moreover, although the Resident Magistrate' 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 etc -See paragraph 1210 of Halsbury's Laws of England, 4th Edition - reissue page 353. In **Jonesco v Beard (1930AC 293)** the House of Lords held that the proper method of impeaching a complete judgment on the ground of fraud is by action which decision was followed in **Kuwait Airways Corporation v Araqi Airways Co & Another (No. 2) [2001] 1WLR 429**. The decision of the Tribunal has of course been merged in the judgment of the magistrate's court. It seems to us that the 1st Respondent had no other remedy. Since the Superior 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".*

12. It is therefore clear that the court can make a declaratory order nullifying a decision based on an award by a Tribunal that had no jurisdiction. This is also in line with the provisions of Section 47 of the Evidence Act provides that a decision of the court may be impeached on grounds of jurisdiction or fraud. The said section provides as follows:

Section 47:

"Any party to a suit or other proceeding may show that any judgment, order or decree which is admissible under the provisions of this Act and which has been proved by the adverse party was delivered by a court not competent to deliver it or was obtained by fraud".

13. I need not say more, suffice is to say that the Preliminary Objection is sustained, not on the ground that this court lacks jurisdiction to entertain this matter, but on the ground that the Plaintiff lacks the locus standi to institute this case as she has not yet obtained a Grant of Letters of Administration in respect of her late husband's estate yet the suit property was registered in the name of the deceased. The suit is accordingly struck out.

As both parties initially lack locus standi, each party shall bear their own costs.

Dated, signed and delivered at Kisii this 19th day of November, 2020.

J.M. ONYANGO

JUDGE