



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Suit 12 of 2006

JOYCE KANJA RINTURA 1ST PLAINTIFF

FRANKLINE MUTHURI 2ND PLAINTIFF

DAMARIS GACHERI 3RD PLAINTIFF

VERSUS

MARION KANJA 1ST DEFENDANT

ANN NAOMI 2ND DEFENDANT

SABERA KARIMI 3RD DEFENDANT

MERU CENTRAL DISTRICT

LAND DISPUTES TRIBUNAL 4TH DEFENDANT

RULING

The plaintiffs brought this action by way of plaint. In the plaint the plaintiffs are challenging the award of Meru Central Land Dispute Tribunal Case No. 22 of 2004. It is pleaded that the said award was ultra vires and illegal. The pertinent paragraphs of the plaint are as follows:-

5. That on or about the year 2004, the 1st, 2nd and 3rd defendants who are sisters to the 1st and 3rd plaintiffs and aunts to the 2nd plaintiff, filed a dispute with the 4th defendant claiming shares out of land parcel No. NYAKI/CHUGU/570 on allegation that the 1st plaintiff had held the land in trust for them in Meru Land Disputes Tribunal Case No. 22 of 2004.

6. The 4th defendant heard and determined the dispute in favour of the 1st, 2nd and 3rd defendants on the 27th May, 2004 by holdings that the said parcel be sub-divided as between the 1st and 3rd plaintiff and the 1st, 2nd and 3rd defendants equally.

7. The 4th defendant further held that the 1st plaintiff held the land in trust for herself, the 3rd plaintiff, 1st, 2nd and 3rd defendants.

8. The plaintiffs aver that the award/decision by the 4th defendant was ultra –vires, that it lacked the jurisdiction to make such a finding and was thus null and void *ab-initio*.

9. As a result of the defendants' acts, the plaintiffs have suffered loss and damage and prays for a declaration

that the said award was illegal, unjustified, ultra-vires, against the rules of natural justice and null and void *ab-initio* and the 4th defendant did not have the jurisdiction to entertain such a dispute.

10. The plaintiff aver that the said award should not be confirmed as the judgment of this honourable court as the plaintiff's will suffer irreparable loss and damage.

The defendants have raised preliminary objection to the plaintiffs' and suit. The objection is as follows:-

- (1) That the suit herein is *res judicata* High Court Application No. 169 of 2004.
- (2) That this suit is an abuse of the court process as it seeks for orders which are unavailable to the applicant/plaintiff in law, to wit, a declaration to quash a quasi judicial body award.

In respect of the first objection, the defendant failed to show the court that this suit is *res judicata* to HCC Application No. 169 of 2004. Instead the defendant's counsel in submissions stated the issues in this suit having been determined in LDT Case No. 22 of 2004 leads this suit to be *res judicata*. Section 7 of the Civil Procedure Act provides:-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

The plaintiffs by their plaint confirmed that the issue relating to parcel No. NYAKI/CHUGU/570 had been heard and determined by the Land Dispute Tribunal. In the plaint, the plaintiff in my mind did not seek to relitigate the same issues determined by the Land Dispute Tribunal, rather they sought a declaration that the decision of the Land Dispute Tribunal was ultra-vires and illegal. It therefore follows that the plaintiff suit herein cannot be said to be *res judicata* for that very reason. I hereby reject the first ground of objection of the defendants. In support of the second ground of objection the defendants' counsel argued that the plaintiffs' present suit is an abuse of the court process because after the Tribunal gave its award, the plaintiffs should then have proceeded as provided under the Land Dispute Tribunal Act and in particular S. 7 and 8 of that Act. Defence submitted that the plaintiff in alternative to proceeding under those sections ought to have moved under Judicial Review if they were dissatisfied with the award. In that regard defence relied on the case HCCC No. 101 of 2006 **Rosalia Kithuni Ngare – Vrs – Silas Gatobu Kabutura** which on facts is similar to this present suit. In that case Hon. Mr. Justice I. Lenaola stated:-

"A party that comes to the High Court as aggrieved by the decision of the Land Dispute Tribunal can only also do so by invoking the provisions of Order LIII of the Civil Procedure relating to judicial review orders. A party cannot seek a declaratory relief as has been done by the plaintiff....."

The Judge proceeded to state that the plaintiff in that case could not purport to clothe the high court with jurisdiction to issue orders of judicial review by way of declaratory relief. I am fully persuaded by that decision. Plaintiffs' counsel's response to this ground of objection were not fully clear to me. Counsel first submitted that the plaintiffs' prayer for declaration were under Order 53 of the Civil Procedure Rules. It is to be noted that the orders, which can be sought under that order are mandamus, prohibition and certiorari. To approach the court for those orders one need as per Order LIII Rule 1(1) to obtain the leave of the court. The plaintiffs' hereof did not obtain such a leave. Plaintiffs' counsel further submitted that section 7 and 8 of the Act do not prohibit a party from filing a suit such as this one. Parliament by the Land Dispute Tribunal Act provided the Land Dispute Tribunal with jurisdiction to hear land matters touching on division, determination of boundaries, claim to occupy or work land and trespass to land. Once the tribunal entertained a matter filed before it and an award is made, the chairman of the Tribunal should then file such an award before the Magistrate's court. The magistrate's court should then enter judgment as per section 7 of the Act. Section 8 provides that a party aggrieved by the Tribunal's decision should appeal to the Appeals Committee within 30 days of such a decision. Whichever party is aggrieved by the Appeal Committee's decision section 8(9) provides that they can file an appeal in the High Court. Parliament having set clear demarcation of where a party aggrieved should proceed the plaintiffs' were not entitled to come to the high court, on being aggrieved with the decision of the Land Dispute Tribunal as they did seeking declaratory orders. I wholly agree with the conclusions of Hon. Mr. Justice I. Lenaola in the case of **Rosalia Kithuni Ngare** (supra) when considering such action by plaintiff where he stated:-

"That would be extending jurisdiction to issue orders of Judicial relief too far and in fact it would be extending that jurisdiction to unknown legal spheres."

The defendant's objection to the plaintiffs' suit is well taken for indeed the plaintiffs' present suit not only is it an abuse of the court process but more importantly it is incompetent for failure to follow the laid down procedure in the Land Dispute Tribunal Act. The defendant's preliminary objection succeeds and the order of this court is that the

plaintiffs' suit is hereby struck out with costs being awarded to the defendants. The defendants are also awarded costs of the preliminary objection.

MARY KASANGO

JUDGE

Dated and delivered at Meru this 2nd day of July 2009.

M.J.A. EMUKULE

JUDGE