



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT NYAHURURU
ELC CASE NO 161 OF 2017
(FORMERLY NAKURU ELC 177 OF 2014)

DANIEL MAINA KARIUKI.....PLAINTIFF/RESPONDENT

VERSUS

SAMMY MAINA MBUGUA.....DEFENDANT/APPLICANT

RULING

1. Coming up before me for determination is a Preliminary Objection which was raised by the Defendant vide his notice dated the 29th May 2018 wherein he sought for the court to find the present suit fatally defective on account of challenging a decision of the Land Tribunal by way of a plaint instead of through a Judicial Review. That secondly, the cause of action, being orders of Certiorari is filed out of time.
2. The said application was canvassed by way of written submissions wherein the Defendant filed his written submissions on the 31st May 2018 while the Plaintiff filed his on the 6th July 2018.

Defendant's submission.

3. The Defendant gave a brief history of the matter in question to the effect that the suit land, which had initially belonged to his father had been transferred to the Plaintiff who now claimed the whole parcel of land.
4. That the matter had been forwarded to the Nyandarua Land Disputes Tribunal wherein it was arbitrated upon and the Defendant was awarded 5 acres of land. The Plaintiffs, being dissatisfied with the Land Tribunal's verdict, filed an appeal to the Provincial Land disputes Tribunal wherein the District Land Tribunal's verdict was upheld and the award was adopted at the Nyahururu Magistrate's Court. The same was executed, the land was sub-divided and 5 acres excised from thereon.
5. That before the titles were issued, the Plaintiff filed the present suit challenging the legality of the decree of the lower court.
6. It was the Defendant's submission therefore that, Order 53 Rule 2 of the Civil Procedure Rules was clear that for one to challenge a decision of the Land Dispute tribunal, an aggrieved party either had to do so through an application for Judicial Review to the High Court by way of Certiorari within 6 months from the date of the decision, or through an Appeal as envisaged under Section 8 (9) of the Land Dispute Tribunal Act.
7. That given the said provisions, the Plaintiff had failed to exploit these provisions to present their claim to the High Court.
8. That Order 53 Rule 2 of the Civil Procedure Rules does not envisage a situation where the Plaintiff can argue a point of law through a plaint, hence the orders of Certiorari cannot be granted through a plaint. That the suit was defective to the effect that Article 159 (2) (d) of the constitution cannot cure the defect.

Plaintiff's Submission.

9. The Application was opposed by the Plaintiff who submitted that he was registered as proprietor of the suit parcel No. Nyandarua OI Joro Orok West/495 in 1974 wherein he has lived therein exclusively since 1965.
10. He confirmed that indeed in 1997, about 24 years after he had been registered as the proprietor of the suit land, the Defendant had, without obtaining letters of Administration, filed a claim before the Nyandarua District Tribunal claiming that his father was entitled to a

portion of the suit land wherein the Tribunal had issued an award to the effect that 5 acres were to be excised from his land and transferred to one Ruth Mugure Wambugu who was not a party to the proceedings. That an appeal against the said award was not successful.

11. That he did not appeal against the finding of the Appeals committee within the stipulated time but opted to file the present declaratory suit, which was an alternative to a judicial Review, for an order that the elder's award of 29th October 1998 could not be executed as it was null and void for want of jurisdiction.

12. That the Defendant in his Preliminary Objection did not file or quote any authority that prohibited the filing of a plaint to challenge a decision of a quasi-judicial Government body such as the District Land Tribunal.

13. Further submission was that, with the establishment of the Environment and Land Court, this court had jurisdiction to preside over decisions arising from the subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court, powers which are further confirmed by Article 165(6) of the Constitution.

14. That he would suffer great prejudice if a portion of his land was taken away by a party who was not party to the proceedings before the tribunal, especially since the tribunal had no jurisdiction to order the transfer of land.

15. That the claimant before the tribunal had no locus standi and further that the suit had been filed out of time hence the court had the power to right a wrong and declare that the defendant cannot enforce a flawed award.

16. That the Preliminary Objection had no merit and the same ought to be dismissed since he was seeking a declaratory orders through the present suit which was an alternative to a judicial Review.

17. The Plaintiff relied on the following authorities:

i. Peter Gicharu Ngige vs Kiiru Chomba & 3 Others [2004] eKLR

ii. Kiplagat Arap Biator vs Esther Tala Chepyegon [2016] eKLR Joseph Njogu Muriuki vs James Ngari Ibrahim Nakuru HCCC No. 285 of 2009

iii. Johana Nyokwoyo Buti vs Walter Rasugu Omariba & 2 Others [2011] eKLR

18. I have considered the Preliminary Objection raised by the Defendant herein, the response by the Plaintiff as well as their written submissions and the authorities herein cited.

19. I find the Matters for determination being:

i. Whether the Preliminary Objection raised is sustainable.

ii. Whether the said Preliminary Objection has merit and should be upheld.

20. On the first issue raised I am obliged to revisit the all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** A Preliminary Objection per Law J.A. was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the same case Sir Charles Newbold, P. stated:

‘.....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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.’

21. The summation of the Defendant's Preliminary Objection is that the present suit is fatally defective on account of the fact that the Plaintiff filed the same to challenge the decision of the Land Tribunal by way of a plaint instead of through a Judicial Review.

22. Secondly, that since the same was to be filed by way of Judicial review seeking orders of Certiorari, such application would now be time barred as the same ought to have been filed 6 months from the date of the decision.

23. Third, that the decision could also be challenged through an Appeal as envisaged under Section 8 (9) of the Land Dispute Tribunal Act, but not through a plaint.

24. I have considered the pleadings herein filed as well as the annexures thereto. I find that indeed this suit was filed by way of Plaint on the

2nd March 2004 wherein the Plaintiff sought for Declaratory Orders to issue to the effect that the Defendant cannot enforce the elders' award dated the 29th October 1998, as the same was null and void ab initio for want of jurisdiction and for being bad in law.

25. I note that this matter was heard and determined before the Nyandarua Land Disputes Tribunal vide case No 12 of 1997 wherein an award was issued that Land parcel No Nyandarua/Ol Joro Orok west/495 be subdivided as follows;

- i. 5.0 acres to be registered in the name of Ruth Mugure Wambugu as trustee of the rest of the family
- ii. 11.5 acre be registered in the name of Daniel Mwangi Kariuki, the Plaintiff herein.

26. The Plaintiff, being dissatisfied with the award had preferred an appeal to the Provincial Land Disputes Tribunal Appeal Committee wherein on the 5th February 2003, the Committee upheld the finding of the Nyandarua Land Disputes Tribunal. No Appeal was preferred thereafter to the High Court and a decree was subsequently adopted as the judgment of the court in the Principal Magistrate's Court Nyahururu vide Land case No 36 of 2003 on the 28th July 2003.

27. From the pleadings and documents filed in this suit, it is clear that the Plaintiff, through his plaint is challenging the excision of 5 acres of land from parcel No. Nyandarua /Ol Joro Orok West/495 in execution of a decree that had been issued on the 28th July 2003 in Nyahururu Principle Magistrate's Court Land Dispute Case No. 36 of 2003.

28. That the said decree, which was pursuant to an adoption of an elder's award, had inter alia awarded the Defendant's grandmother one Ruth Mugure Wambugu, who was not party to the proceedings, 5 acres of land as trustee for the rest of the family.

29. The Plaintiff's take is that since the tribunal had no jurisdiction to order the transfer of land, the award was void ab initio. Secondly that the claimant before the tribunal had no locus standi as he had no letters of administration taken out, and last, that the suit had been filed out of time.

30. These prayers could have perfectly fitted the bill under Judicial Review because they sought to quash decisions of an inferior court and/or tribunal.

31. In the decided case of case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2014] eKLR**, the Court of Appeal agreed with the finding of High Court at Kisii in High Court Civil Case No. 139 of 2009 where *Makhandia, J held as follows*;

"It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime the 1st defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree."

32. The award of the Nyandarua Land Disputes Tribunal having been adopted by the Principal Magistrate's Court at Nyahururu ceased to exist on its own, and thus, could not be the subject of a declaration but could only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in an appropriate proceedings.

33. It is a well settled principle of law that the High Court is given supervisory powers to check the excess of jurisdiction and compliance with the rule of law by inferior tribunals and other public bodies or persons discharging such public acts. For example an order of certiorari is a quashing order issued by the High Court to quash decisions of an inferior court or tribunal, public authority or other body which is susceptible to Judicial Review.

34. From the pleadings on record, I find that this matter was determined in accordance with the provision of the Land Disputes Tribunal Act No. 18 of 1990. The Award was adopted as a decree of the court. There was neither an Appeal preferred thereafter to the High Court nor Judicial Review proceedings filed to either quash the decision of the tribunal or the proceedings.

35. In the case **Paul Muraya Kaguri vs Simon Mbaria Muchunu [2015] eKLR**, Waithaka J opined as follows:

"It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say that their rights were denied."

36. In **Republic vs Marakwet District Land Disputes Tribunal & 6 others ExParte Shaban Clan & 3 others [2016] eKLR**, the court had held that the Land Disputes Tribunals Act did not contemplate filing of declaratory suits. Ultimately, the order of declaration is not available.

37. I find that a declaratory suit is not a remedy available to a party aggrieved by a decision of the Land Disputes Tribunal (now repealed). To allow a fresh declaratory suit against a decision and valid Judgment made within the framework of the repealed Land Disputes Act would therefore go against the spirit of finality in litigation and would offend public policy.

38. To that effect therefore, I find that said Preliminary Objection dated the 29th May 2018 is merited and is hereby upheld, with the upshot that the suit dated the 2nd March 2004 is herein struck out entirely with costs to the Respondent.

Dated and delivered at Nyahururu this 18th Day of March 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE