

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 422 OF 2013

CYPRIAN SHIVACHI SHISANYA.....PLAINTIFF

VERSUS

EMILY KAYANDA (EBENEZER WOMEN GROUP).....1ST DEFENDANT

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

JUDGMENT

Cyprian Shivachi Shisanya has sued *Emily Kayanda (Ebenezer Women Group)* and the *Attorney General* claiming to be the registered absolute of all that parcel of land known as *Kakamega/Kongoni/584* measuring 1.62 hectares. The plaintiff and the 1st defendant entered into an agreement on 16.4.2010 wherein the plaintiff sold the 1st defendant 54.3 ft x 64.4 ft x 71 ft x 55 ft of land parcel Kakamega/Kongoni/584. A dispute arose as to the actual acreage on the ground as between the plaintiff and the 1st defendant. The 1st defendant lodged a claim before the Lugari Land Disputes Tribunal seeking to enforce the terms of the agreement entered into between the plaintiff and the 1st defendant.

The Lugari Land Disputes Tribunal heard and determined in favour of the 1st defendant thus, the plaintiff was to give a full plot to the 1st defendant as per the agreement that is 54.3 ft x 64.4 ft x 71 ft x 55 ft and that the District Surveyor was to confirm the boundaries of the 50 ft x 100 ft commercial plot by the 1st defendant paid for by adding 5.8 metres from the documents prepared by the District Surveyor to be sent to the Land Control Board, Likuyani to enable the transfer of the 54.3 ft x 64.4 ft x 71 ft x 55 ft of the commercial plot and subsequent issuance of the title deed to the 1st defendant.

The Lugari Land Disputes Tribunal Award was lodged at the Senior Resident Magistrate's Court at Butali Award No. 8 of 2011 and the same was subsequently adopted as a judgment of the court on 26.5.2011. The plaintiff claims that the decision of the Tribunal was null and unlawful and in breach of the rules of natural justice. The particulars of nullity, illegality and breach of rules of natural justice according to the plaintiff are lack of jurisdiction, lack of capacity, want of consent of the Land Control Board.

The plaintiff's claim is that the decision of the Tribunal was a nullity and therefore he prays for a permanent injunction to restrain the 1st defendant, their servants, and or agents from occupying, trespassing onto, fencing off, cultivating, constructing, selling or parting possession with, in any way, or interfering with the plaintiff's possession. Both defendants filed memorandum of appearance but did not file defences.

The gist of the plaintiff's submission is that the decision of the Tribunal was a nullity as it lacked jurisdiction to entertain the dispute.

I have not seen the submissions filed by the defendants.

The facts of this case are that the plaintiff and 1st defendant entered into an agreement on 16.4.2010 wherein the plaintiff sold the 1st defendant 54.3 ft x 64.4 ft x 71 ft x 55 ft of land parcel Kakamega/Kongoni/584.

A dispute arose on the enforcement of the agreement and the parties chose to pursue the matter before the

Land Disputes Tribunal under section 3(1) of the Land Disputes Act. The Tribunal made an award which was adopted by the court. On adoption by court, it became a judgment of the court and could only be challenged by way of appeal or Judicial Review. This court finds that judgment cannot be challenged by way of a declaratory suit because judgment of the court is final. The Court of Appeal in the case of *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others Civil Appeal 184 of 2011* 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.”

This court is bound by the decision of the Court of Appeal as the facts in this case are similar to *Florence Nyabokes case* and therefore, I do find this suit to be brought under the wrong procedure in law as a declaratory suit and the same is dismissed wit costs.

Dated and delivered at Eldoret this 28th day of June, 2018.

A. OMBWAYO

JUDGE