



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L 47 'A' OF 2012

DAVID KIPLETING

CHEMEI:.....PLAINTIFF

VERSUS

KANAMOI CHEPTOO KIMOITUK:.....1ST DEFENDANT

THE ATTORNEY GENERAL (ON BEHALF OF

THE UASIN GISHU DISTRICT LAND DISPUTE TRIBUNAL:.....2ND DEFENDANT

RULING

INTRODUCTION

This ruling is in respect of a Notice for a Preliminary Objection dated 11th March, 2016 filed on the same day by the Advocates for the 1st defendant herein.

The 1st defendant raises the Preliminary Objection on the following grounds:

1. THAT this suit is incompetent, frivolous, embarrassing and an abuse of the due process of this Honourable court.
2. THAT this suit is *res-judicata*.
3. THAT this Honourable court lacks Jurisdiction to entertain this suit.
4. THAT this suit is fatally defective and non-starter.

This matter was listed for hearing of the preliminary objection on 16th February 2017 when the Advocates for the 1st defendant were not present to prosecute their application. Counsel for the Plaintiff urged the court to dismiss the preliminary objection for want of prosecution and the court dismissed the same and ordered that the matter be set down for hearing.

On 17th February 2017 Counsel for the defendant filed an application under certificate of urgency seeking for the reinstatement of the preliminary objection. Both parties agreed by consent to allow the application dated 17th February 2017. The Preliminary Objection was then fixed for hearing on 23rd March 2017.

1st Defendant's Counsel's Submission

The 1st defendant was represented by Mr Kiplagat and Mr. Kigen . Counsel submitted that the amended plaint dated 29th October 2010 seeking for orders for a declaration that the proceedings and the order made by the Land Disputes Tribunal are null and void and without jurisdiction and cannot be entertained by this Honourable court.

Mr. Kigen Counsel for the 1st defendant further submitted that the main issue for determination is whether this is the proper forum to adjudicate this matter and whether adverse orders can be made against the Eldoret Chief Magistrate's court who is not a party to this suit. Counsel stated that the court entered judgement and issued a decree on 8th December 2006. He submitted that there were available avenues for challenging the decree under the Act and that a declaratory suit was not one that was contemplated in the land Disputes Tribunal Act. (Now repealed)

Mr Kigen cited Section 8(1) which provided that an aggrieved party could appeal to the Appeals Committee within 30days. Counsel submitted that there is nothing to show that the plaintiff herein lodged an appeal according to the Act. He stated that having been no such appeal, it was presumed that the plaintiff was not aggrieved by the award. Counsel filed a list of authorities containing six authorities to support the preliminary objection

Mr Kiplagat acting together with Mr. Kigen concurred with Counsel's submission and urged the court to allow the preliminary objection.

Plaintiff's Counsel's Submission

Mr. Aseso Counsel for the Plaintiff opposed the preliminary objection. He also objected to the reliance of the list of authorities filed on 21st March 2017 which were served on him the previous day. He relied on the famous case on preliminary objections of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696** where it was held at page 700E that:

“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.”

Counsel further submitted that the plaintiff is a stranger to Eldoret CMCC No. 13of 2010 which judgement and ruling were not tabled before the court. He submitted that for a claim to be *res judicata*, the suit must have been by same parties, same subject matter and must have been heard and determined by a court of competent jurisdiction. Counsel stated that the Land Disputes Tribunal did not have competent jurisdiction. He urged the court to dismiss the preliminary objection and set the suit down for hearing.

2nd Defendant's Counsel's Submission

Mr Ngumbi Counsel for the 2nd defendant submitted that paragraph 4 of the plaintiff's list of documents, the court order amounted to an eviction order . He stated that the plaintiff ought to have moved the court for stay of execution of that decree. Counsel supported the preliminary objection by submitting that the plaintiff ought to have challenged the award through a Judicial review or an appeal in the Land Disputes Tribunal Appeals Committee. Counsel relied on the authorities in the case of **Paul Muraya Kaguri VS Simon Mbaria Muchunu Nyeri E& L No. 71 Of 2014** where it was held that where a Statute establishes a dispute resolution mechanism that has to be followed , parties cannot be heard to say that they were denied a hearing. He further relied on the case of **Costa Sote Kandie HCC No 31/11** where it was held that the suit was *res judicata* as it lacked merit.

Mr Aseso in reply submitted that if there are decrees that are different regarding the same suit, then the court cannot dismiss a suit at a preliminary stage as evidence has to be tendered to explain how the

decrees were obtained. Counsel further submitted that the plaintiff is not only seeking to quash the award but has sought for other prayers as enumerated in the amended plaint. He reiterated his quest for the dismissal of the preliminary objection.

Analysis and Determination

I have considered the submissions of all the Counsels for the parties herein. I have also considered the judicial authorities relied upon by counsels together with other relevant authorities and I have come to the following conclusion. That the issues before me for determination are as follow:

1. Whether this suit is *res judicata*.
2. Whether the court has jurisdiction to entertain this suit.
3. Whether the Land Disputes Tribunal had competent jurisdiction to hear this suit.

The plaintiff is seeking for a declaration that the proceedings and the award made by the 2nd defendant Tribunal on 25th October 2006 and the subsequent judgement and decree given pursuant to the said award in ELD CMCC Award No 37 of 2006 between the plaintiff and the 1st defendant are illegal null and void and without jurisdiction. The plaintiff is also seeking for a declaration that the invasion and demolition of his premises on the suit land is illegal, null and void and amounts to trespass. He further seeks for a permanent injunction restraining the 1st defendant from interfering with the suit land. Finally, he is seeking for the special damages for trespass as particularized in the plaint.

It should be noted that the proceedings which the plaintiff is seeking to have declared null and void were as a result of a procedure provided for under the repealed Land Disputes Tribunal Act. The Act provided for a special procedure by which an aggrieved party can proceed. It has been submitted by Counsel for the 1st defendant that the plaintiff should have appealed to the appeals Committee as provided for under the Act if he was aggrieved by the verdict of the Tribunal. It has also been submitted that the plaintiff had an option of filing a Judicial review in the High Court if he was not satisfied with the award of the land Disputes Tribunal. All this was not done. The question is, why was it not done?

Having considered all the issues that were raised by the parties to this suit, I do find that the 1st defendant's preliminary objection has merit. The defendants have argued that the subject matter of the suit filed by the plaintiff was the same one in the Uasin Gishu Land Disputes Tribunal which matter was decided by the Tribunal in favour of the 1st Defendant as against the Plaintiff. It is the 1st defendant's argument that this decision was later adopted as a Judgment of the court which decision was never appealed. Counsel for the plaintiff has also not denied that the subject matter and the parties to the two suits are the same. He has only submitted that the Tribunal lacked jurisdiction to hear the matter. Counsel has also not told the court why he thinks the Tribunal lacked jurisdiction. Did the Tribunal act ultra vires or did the Act not clothe it with the Jurisdiction? This was not answered.

Section 7 of the Civil Procedure Act provides the doctrine of res Judicata:

“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, ligating 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 hard and finally decided by such court.”

Upon perusal of the proceedings in the Land Disputes Tribunal, I notice that the same parties were involved in the dispute and the dispute was in respect of the same subject matter which is the suit land herein. The issue of the Tribunal lacking jurisdiction cannot be raised at this point as the same had been clothed with the jurisdiction as per the Act. Both parties had submitted themselves to the jurisdiction of the Tribunal and if the plaintiff had issues with the jurisdiction, then he should have raised it then. I find

that the tribunal has requisite jurisdiction as per the Act. The plaintiff had options to appeal the award of the Tribunal either in the Appeals Committee or seek for Judicial Review in the High Court. This did not happen.

Litigation must come to an end at some point in time. That is why there are rules and procedures laid down to assist litigants and the courts. Not all parties to a litigation can be successful. There must be winners and losers. In certain cases, there is a compromise or a middle ground.

I wish also to state that I am alive to the provisions of Article 159 of the Constitution which requires courts to do substantive justice, to administer justice to all without undue regard to procedural technicalities and to all irrespective of status. This provision applies to both the plaintiff and the defendant. Justice delayed for the defendant would amount to justice denied.

I am further guided by the overriding objective under *section 1A* and *1B* of the Civil Procedure Act which enjoins courts to dispense proportionate, substantive and equitable justice when dealing with matters before them. The court cannot apply these principles to do injustice. It follows that the current matter is therefore *res judicata* and the court has no jurisdiction to deal with it.

Having said that, I find that the preliminary objection has merits and the suit herein is stuck out with costs to the defendants.

Dated and delivered at Eldoret on this 12th day of April, 2017.

M.A ODENY

JUDGE