



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 64 OF 2006**

**HENRY MOCHOGE OGARO.....PLAINTIFF**

**VERSUS**

**BARNABAS MAJIMBO NASET.....1<sup>ST</sup> DEFENDANT**

**JOSEPH WAFULA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In this case the plaintiff seeks orders of declaration that he is the lawful owner and is entitled to occupation, possession and use of a suit property measuring **50x100 feet** which is part of **Namanjalala Farm LR No. 2048**, a declaration and/order that the tribunal award and decree in **Kitale SPMC Land Case No. 63 of 2000** in so far as it affects the suit property herein, was unlawful, bad in law, a nullity, and based on a breach of the Rules of Natural Justice and the same ought to be set aside and costs of the suit.

2. It is the plaintiff's case that he bought the suit land from the 2<sup>nd</sup> defendant in **1992** and thereafter he was given possession, use and occupation of the same. The plaintiff developed the land and according to him, the defendants knew of his developments.

3. The plaintiff further pleads that in the **year 2000** the 1<sup>st</sup> defendant sued the 2<sup>nd</sup> defendant before the Kwanza Land Disputes Tribunal. The Tribunal awarded the 1<sup>st</sup> defendant two plots in Namanjalala Farm. The Tribunal award was confirmed in court proceedings vide **Kitale SPMC Land Case No. 63 of 2000 - Barnabas Majimbo -vs- Joseph Wafula** and a decree issued therefrom stating as follows:-

**“By judgment of this court date (sic) 20<sup>th</sup> September, 2000, it is decreed and ordered that following the Elder's Award of Kwanza Land Disputes Tribunal dated 16<sup>th</sup> August, 2000 and received by this court on the 5<sup>th</sup> September, 2000 the same is adopted as judgement of this court as follows:-**

**1. The plaintiff - Barnabas Majimbo should retain his plot he bought from the defendant - Joseph Wafula and should start making development therein.**

**2. The defendant - Joseph Wafula Mungai and others in that plot should leave plot to owner Mr. Barnabas Majimbo”.**

4. It appears that **Civil Appeal No. 10 of 2004 - Henry Mochoge Ogaro -vs- Barnabas Majimbo Naseti and Joseph Wafula** was preferred in the High Court against this decree but it was not successful. In its judgment dated 26/4/2006 the court found that an earlier application for review of that decree had been

dismissed in the Magistrate's Court and that that ruling was the basis of the appeal before it. The main ground for the dismissed appeal was that the plaintiff in the instant suit was not a party in the case before the Kwanza Land Disputes Tribunal yet orders were issued against him. However in the appeal cited the court ruled that the proper way of challenging such decree was by way of Judicial Review which had not been filed by the plaintiff herein.

5. Soon after the decision in **Civil Appeal No. 10 of 2004 - Kitale** was issued, this suit was filed. In the instant suit the plaintiff contends that any other sale of the suit land to any other person after the suit land was sold to him was unlawful. He further avers that he has been in occupation of the suit land for 14 years. It is his case that the decision of the Kwanza District Land Tribunal offends Natural Justice as it purports to deprive him of the suit property without due process of the law.

6. The 1<sup>st</sup> defendant denies the claim. In a defence filed on 19/6/2006, he states that “*it was not necessary to notify the plaintiff in the said tribunals proceeding since the suit plots were visited by the Panel of Elders and the plaintiff, if he was in possession, but which is denied, was at liberty to attend the proceedings to safeguard his interest if any....*”.

7. The 1<sup>st</sup> defendant avers that the decision of the Magistrate's Court, not having been set aside on appeal or Judicial Review, cannot be challenged in the present suit. He terms the present suit an abuse of the process. The 1<sup>st</sup> defendant further avers that his agreements with the 2<sup>nd</sup> defendant in 1979 and 1980 were lawful, valid and beyond reproach and that he stayed on the land he purchased from the 2<sup>nd</sup> defendant until he was forced out by the 1992 ethnic conflicts, only to return in 1994 when he found strangers living on his land without any justification.

8. The 1<sup>st</sup> defendant avers that the 2<sup>nd</sup> defendant, having sold the suit land earlier, lacked proprietary rights and could not, pass good title to the plaintiff. Further, the plaintiff was aware of the proceedings before the tribunal yet he never opposed them. According to the 1<sup>st</sup> defendant the judgment in the **Kitale SPMC Land Case No. 63 of 2000** and **Kitale HCCA No. 10 of 2004** rendered the present suit *re-judicata* and that the orders sought in this suit cannot obtain.

9. The 2<sup>nd</sup> defendant also filed a statement of defence on 23/6/2006. He admits the plaintiff's claim. He says that he sold the land to the plaintiff on 7/8/1992. The 2<sup>nd</sup> defendant denies ever having had dealings with the 1<sup>st</sup> defendant in respect of the suit land; he says that he first met the first defendant when he was summoned to the Kwanza Land Disputes Tribunal on 21/3/2000. He accuses the 1<sup>st</sup> defendant of “*fabricating*” proceedings in **Land Case No. 63 of 2000** with the intent of obtaining a property which he does not deserve. He refers to the proceedings therein as “*imaginary*”. The greater proportion of the 2<sup>nd</sup> defendant's defence amount to a challenge against the decisions in **Kitale Land Case No. 63 of 2000**.

10. The 2<sup>nd</sup> defendant also avers that he filed an application for **Judicial Review, Kitale High Court Misc. Application No. 92 of 2000 - Republic -vs- Onyango Wao and 2 Others, exparte Joseph Mungai**, which he admits was subsequently dismissed for want of prosecution.

11. In reply to the 1<sup>st</sup> defendant's defence, the plaintiff avers that he is affected by the decree in **Kitale Land Case No. 63 of 2000** and that indeed the 1<sup>st</sup> defendant has attempted to evict him from the plot, that the suit is not *res judicata*, and that the declaratory judgment sought is appropriate in the circumstances. He avers that the decision in the **Kitale HCCA 10 of 2004** was only on the issue of whether the Magistrate's Court had jurisdiction to review the Tribunal decision, hence it was not on the merits. The plaintiff filed his written submissions on 5/10/2017, the 1<sup>st</sup> defendant on 30/10/2017, and the 2<sup>nd</sup> defendant on 9/10/2017.

12. I have considered those submissions. The questions that arise for determination in this suit are as follows:-

**(1) Is this suit Res Judicata?**

**(2) If the suit is not Res Judicata, who owns the suit land?**

**(3) What orders should issue?**

The issues are discussed as hereunder:-

**(1) Is the instant suit Res Judicata?**

13. The law states that 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. This previous matter has to have been lodged in a court of competent jurisdiction. Such matter must also have been finally decided in such court.

14. I have examined the documents produced in evidence in this case. They show that there was a decision, an award made by the Panel of Elders in the Kwanza District Land Disputes Tribunal. The decision of the Land Disputes Tribunal was adopted by the Magistrate's Court as stipulated by law. No appeal was preferred against the Land Dispute Tribunal's decision. No Judicial Review proceedings were concluded to quash the decision of the Magistrate's Court adopting the award of the Land Disputes Tribunal.

15. The dispute at the Land Disputes Tribunal was between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant. Both the defendants have conceded that the Panel of Elders even visited the disputed land this was on 30/3/200. The 2<sup>nd</sup> defendant himself attended the Land Disputes Tribunal proceedings, though he claims that the proceedings were flawed. Curiously, the plaintiff omitted to produce the copies of the Tribunal proceedings or ruling. However, the same were produced by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant features in the record of the proceedings before the Tribunal. He is on record as having questioned the 1<sup>st</sup> defendant during those proceedings. He also appeared in that record to be conceding that there was a sale of land to the 1<sup>st</sup> defendant followed by a proposal for a refund of the purchase price. The 2<sup>nd</sup> defendant purportedly refunded the 1<sup>st</sup> defendant the purchase price by way of post. However, there is no evidence that was adduced in this case that the refund was ever received by the 1<sup>st</sup> defendant. In their conclusion the Panel of Elders in the Kwanza Land Disputes Tribunal found in favour of the 1<sup>st</sup> defendant and against the 2<sup>nd</sup> defendant.

16. The parties at the Magistrate's Court and at the subsequent appeal in this dispute were the same, save that in the appeal the current plaintiff was the appellant.

The suit herein is distinct from the Judicial Review proceedings which would have been expected to quash such decisions of the Land Disputes Tribunal and the subsequent decree of the Magistrate's Court. The Judicial Review Proceedings may have been meant to challenge procedural irregularities which may include breach of Rules of Natural Justice. The Appeal lodged by the 2<sup>nd</sup> defendant also raised breach of Rules of Natural Justice.

17. In the appeal the court found that one of the issues in the appeal was "*whether the learned Trial Magistrate erred in law and in fact in failing to find that the appellant was not given a hearing, contrary to the principles of natural justice before he was deprived of his property...*" The same allegation forms the very bedrock of the instant case in that **prayer No. (b)** of the plaint herein reads as follows:-

**"Declaration and/or order that the tribunal award and decree in Kitale SPMC Land Case No. 63 of 2000 in so far as it affects the suit property herein was unlawful bad in law a nullity and based on a breach of the rules of Natural Justice and same ought to be set aside".**

**Paragraph 12** of the body of the plaint reads as follows:-

**“The plaintiff shall further aver that the said Kwanza Land Dispute Tribunal award offends or is in breach of the fundamental rules of Natural Justice among others as it purports to deprive off the plaintiff’s suit property/plot without the due process of the law and the plaintiff will beseech the court to find and declare so”.**

18. There is no new issue to be determined herein. The inclusion of a declaratory prayer is not in itself a redeeming factor that can render this suit not to be *re-judicata*. It must be clear at this point that the matters raised herein which have been litigated on earlier are being raised afresh in this suit and among the same parties.

19. I agree with the 1<sup>st</sup> defendant’s submissions. If the plaintiff herein was claiming under his agreement with the 2<sup>nd</sup> defendant, his interest was represented by the 2<sup>nd</sup> defendant in the Tribunal’s proceedings.

20. I agree with the holding in the case of **Lotta Vs Tanaki & Others 2003 EA 556**, that a person does not have to be formally enjoined in a suit, but will be deemed to claim under the person litigating if he has a common interest in the subject matter of the suit.

21. The 2<sup>nd</sup> defendant has denied that the plaintiff was in occupation of the premises. The plaintiff has not addressed this issue sufficiently as to cast doubt on the 2<sup>nd</sup> defendant’s allegations. In any event it has not been demonstrated how different the Tribunal Ruling could have been had the plaintiff been summoned personally yet he was claiming the land under a purported agreement with the 2<sup>nd</sup> defendant.

22. I note that the plaintiff pleading is evasive when he states as follows at **paragraph 5** of the plaint:-

**“That sometime in the year 2000 the 1<sup>st</sup> defendant sued the 2<sup>nd</sup> defendant before Kwanza Land Disputes Tribunal and the award was filed in court vide Kitale SPMC Land Case No. 63 of 2000 whereby the 1<sup>st</sup> defendant was awarded two plots in Namanjalala Farm with further orders that the 2<sup>nd</sup> defendant and OTHERS in that plot should leave”.**

23. Throughout the entire pleading there is no specific, positive averment that he never knew of the Tribunal Proceedings. It cannot be presumed that simply because the plaintiff states that he was “*not made a party*” to or was “*not notified*” of the proceedings in the Tribunal Proceedings and in the Magistrate’s Court Proceedings, the plaintiff herein was not aware of those proceedings. I find that he was aware of them but he only waited to see which way the decision would go because the 2<sup>nd</sup> defendant was participating therein. His interests were only secondary to the primary interests of the 2<sup>nd</sup> defendant, under whom he could have claimed perchance he had participated in the Tribunal and Magistrate’s Court proceedings. Consequently I find that this dispute has been conclusively litigated and determined in previous proceedings. Therefore the only other issue to be addressed is what orders should issue

### **(3) What Orders should issues?**

24. The only remedy that would have otherwise appealed to the situation, the Judicial Review orders, was not applied for in this case. The plaintiff, and in error I presume, submits that he may not have been entitled to apply for that remedy and appears to suggest that his only remedy is a declaratory suit. I do not agree. I am aware of the provisions of **Order 3 Rule 9** of the **Civil Procedure Rules** which states as follows:

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

25. However, declaratory orders would only issue to a litigant if there are special circumstances that warrant such orders. The court in **Bitange Ndemo vs. Director of Public Prosecutions & 4 Others [2016] eKLR** stated that:

**“A declaration is a formal statement by the court pronouncing upon the existence or non-existence of a legal constitutional state of affairs. It declares what the legal position is and what are the rights of the parties. It does not contain an order which can be enforced against the respondents, as it only declares what is the legal position. It is not a coercive remedy, and can be carefully couched or tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that those public authorities comply with the law.**

26. The Court of Appeal in Johana Nyokwoyo Buti vs. Walter Rasugu Omariba & Others Civil Appeal No. 182 of 2006 expressed itself as follows:

**“A declaration or declaratory judgement is an order of the court which merely declares what the legal rights of the parties to the proceedings 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 judgement 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.”**

27. Whatever interest the plaintiff may have had in the suit property was snuffed out by the orders in *Kitale Land Case No. 63 of 2000*, then the *Kitale HCCA No. 10 of 2004* and judicial review proceedings in *Kitale High Court Misc. Application No. 92 of 2000 - Republic -vs- Onyango Wao and 2 Others, ex-parte Joseph Mungai*.

28. In my view, declaratory orders in civil matters may issue where the facts are clear and where previous court orders are consistent with the declaratory orders sought. That is not so in this case because the appeal hereinabove mentioned dealt with the allegations of breach of natural justice which is essentially the claim herein. The question therefore arises as to what legal position with regard to the plaintiff’s this court can declare in the light of the dismissed appeal and the judicial review proceedings mentioned above. This suit should not be seen as an avenue through which a further appeal may be brought.

29. If allowed, the orders sought in the form of a declaration would forever stand offensively in the way of other previous orders of competent courts, including an appellate court. In my view the circumstances of the instant suit are not of the kind that maybe envisaged or countenanced by **Order 3 Rule 9 of the Civil Procedure Rules**.

30. Besides, while considering the remedy sought herein it is clear that the plaintiff was not short of a remedy; he only he failed to apply for it. Appropriate remedies must be applied to the specific disputes and within the legally stipulated time frames. If a Judicial Review Application for orders of certiorari had been applied for the plaintiff would not be urging this case now. This suit is a consequence of his default.

31. I therefore find that the suit herein is *res judicata*. Consequently, I dismiss the plaintiff’s suit with costs to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant shall not have any costs.

**Dated, signed and delivered at Kitale on this 20<sup>th</sup> day of December, 2017.**

**MWANGI NJOROGE**

**JUDGE**

**20/12/2017**

Before - Mwangi Njoroge -Judge

Court Assistant - Isabellah

Ms. Mufutu holding brief for Kiarie for 1<sup>st</sup> Defendant

N/A for plaintiff

Joseph Wafula – present in person

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**20/12/2017**