



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 218 OF 2012

Formerly HCC 81 of 2005

JAMIN KIOMBE LIDODO.....PLAINTIFF

VS

EMILY JERONO KIOMBER & ANOTHER.....DEFENDANT

RULING

(Suit filed by plaintiff seeking declaratory orders that in respect of a decision of the Land Disputes Tribunal; preliminary objection raised that the avenue open to the plaintiff was only appeal or judicial review; whether plaintiff barred from instituting suit seeking declaratory orders; no bar to such suit; preliminary objection dismissed)

A. INTRODUCTION

1. I have to determine two preliminary objections, one raised by the 1st defendant, and the other raised by the 2nd defendant. The first preliminary objection is dated 18 April 2006 and is filed by the 2nd defendant. The second preliminary objection is dated 8 May 2010 and is the one filed by the 1st defendant.

2. The preliminary objection dated 18 April 2006 is as follows :-

1. *The Attorney General cannot be sued on or behalf (sic) of Soy Land disputes tribunal.*
2. *The plaintiff seeks to review the decision of the court irregularly as the said decision can only be reviewed through judicial review application or by way of an appeal.*
3. *The plaintiff seeks an order of mandamus against the Uasin Gishu District land registrar which order can only be granted by judicial review court.*
4. *The suit is defective and bad in law.*

The preliminary objection dated 8 May 2010 is as follows :-

(a) The issues raised in the suit ought to have been raised in an application for defence (sic) Judicial review.

(b) There is a suit an award and a decree in Eld. CMCC AWARD NO. 58 of 2002 between the same parties which has not been set aside and the court cannot entertain this suit while the said decree is still

in force.

(c) The suit is therefore an abuse of the court process.

B. BACKGROUND

3. Before I delve into the preliminary objections, let me provide a little background to this suit.

This suit was instituted by way of Plaint on the 1 September 2005. The case of the plaintiff as pleaded is that he was at all material times registered as proprietor of the land parcel Moi's Bridge/Moi's Bridge Block 8 (Natwana ADC)/68 having purchased the same from Natwana ADC Ltd. In November 1998, the plaintiff pledged his title as security in Kitale Criminal Case No. 3385 of 1998 (Republic v Fredrick Masita Kiombe) for bail pending trial. The title got lost. It is claimed that unknown to the plaintiff, the 1st defendant lodged a claim with the Soy Land Disputes Tribunal over the ownership of the said land on 5th June 2002. It is asserted that the Tribunal proceeded to hear the dispute without notifying the plaintiff and made an award that the plaintiff be deregistered as owner of the suit land and the 1st defendant be registered as proprietor in place thereof. This award was adopted in the Eldoret Chief Magistrate's Court in Eldoret C.M Award No. 58 of 2002. A decree was issued on 7 May 2004. The plaintiff in this suit has asserted that the Tribunal did not have jurisdiction to determine the dispute. He has in thus sought the following orders :-

(a) A declaration that the plaintiff is the absolute owner of the whole of that parcel of land known as L.R. Moi's Bridge/Moi's Bridge Block 8 (Natwana ADC)/68 measuring 4.510 Ha.

(b) A declaration that the deliberation of the 2nd defendant in Soy Land Disputes Cause No. 3 of 2002 as adopted by Eldoret CMCC Award No.58 of 2002 is illegal, null and void.

(c) A permanent injunction restraining the 1st defendant, her agents, servants and or employees from trespassing into, cultivating, constructing upon, leasing and or in any way whatsoever interfering with the plaintiff's quiet possession and enjoyment of the suit land.

(d) An order directing the Uasin Gishu District Land Registrar to cancel the registration of the 1st defendant as the owner and proprietor of all that parcel of land known as L.R. Moi's Bridge/ Moi's Bridge Block 8 (Natwana ADC)/68 and its substitution thereof with that of the plaintiff.

(e) Costs of the suit.

(f) Any other or further relief the court may deem just to grant in the circumstances.

4. The 1st defendant entered appearance and filed a Defence which was later amended. In the amended Defence she has denied the claims of the plaintiff. She has pleaded that she is the one who purchased the suit land and was its first registered owner. She has pleaded that at some point she got involved in a road traffic accident and that it was during this period that the plaintiff fraudulently registered himself as the owner of the suit land. She has pleaded that the decree in Eldoret CMCC Award No.58 of 2002 has not been set aside. She has also pleaded a counterclaim. In the counterclaim, she has averred that she bought the suit land from one Kibor Samoei who is now deceased. She has repeated that the plaintiff fraudulently got himself registered as owner of the suit land when she was hospitalized following a road traffic accident. This registration was later cancelled apparently owing to the decree arising from the decision of the Tribunal and now she is the registered owner of the suit land. She has sought orders to have the plaintiff evicted from the suit land and has sought a declaration that she is the lawful owner of the suit land. She has also sought orders that the cancellation of her registration in 1995 was fraudulent. In addition she has sought mesne profits, costs and interest.

The 2nd defendant's defence is basically a denial of all the plaintiff's claims without much elaboration.

5. Pleadings closed and after several preliminaries, the matter was scheduled for hearing on 25 April

2013. It was then that counsels for the defendants pointed out that they had preliminary objections which they argued ought to be heard first. I acceded to the request and directed the preliminary objections to be heard on 30 May 2013.

C. ARGUMENTS OF COUNSEL

6. Mr. D.O. Wabwire, for the 2nd defendant submitted that the plaintiff seeks to quash the decision of the Land Disputes Tribunal made on 5 Jun 2002. He stated that the decision was adopted as an order of court on 7 May 2004 and upon adoption the decision of the Tribunal ceased to exist and what remained was the decree. He submitted that the plaintiff is seeking to challenge that decree and not the award of the Tribunal. He asserted that the decree was to be challenged within 6 months pursuant to the provisions of Section 7 of the Land Disputes Tribunal Act, Act No.18 of 1990 (repealed). Mr. Wabwire also argued that the plaintiff's prayer seeking cancellation of title of the 1st defendant cannot be granted through a suit but through judicial review. He also averred that the decree issued in the Magistrate's Court has not been annexed by the plaintiff and thus the court cannot quash a decision that has not been supplied. Mr. Wabwire did not delve into limb 1 of his Preliminary Objection and my assumption is that it is abandoned.

7. Mr. H.K Ng'eno, for the 1st defendant, argued that the decision of the Tribunal that the plaintiff seeks to nullify was adopted by the subordinate court and a decree issued. He stated that the remedy of the plaintiff was to file an appeal pursuant to Section 8 of the Land Disputes Tribunal Act and not to seek to nullify that decision through a fresh suit. He relied on the case of ***Emily Chepkemei Ngeyoni & Another vs Nicholas Kipchumba Kogo & Another, Eldoret HCCC No. 26 OF 2001***. Alternatively, he was of the view that the plaintiff ought to have filed a judicial review to quash the decree. He further argued that there is already an award and decree which has never been set aside, and thus this court ought not to entertain the present suit. He relied upon the case of ***Rebo Karari vs Gatundu Land Disputes Tribunal, Nairobi High Court Misc Application No. 270 of 2005***. He asked that the suit be struck out as being an abuse of the court process.

8. Mr. A.M. Ngigi for the plaintiff, opposed the preliminary objections. First he pointed me to the provisions of Order 2 Rule 14 and stated that the same bars objections based on technicalities. He averred that the issue raised by the defendants is with the manner the suit was presented. He stated that there was nothing to bar the plaintiff from filing suit through plaint to seek relief from the decision of the Tribunal. He averred that the avenue of judicial review was only available to the plaintiff within a period of 6 months. He stated that if this period lapses, it does not mean that an aggrieved party is bereft of options. He pointed out that the prayers sought in the plaint are not prayers of mandamus, certiorari or prohibition. He further argued that the plaintiff's suit has elicited a counterclaim and argued that this counterclaim cannot be also be permitted if the initial procedure is held to have been flawed. He relied on the cases of ***Daudi Ngetich Kimibei vs Attorney General & Another Eldoret HCCC No. 55 of 1998***, and ***Robert Entwistle & 7 others vs The Registered Trustees of Nairobi Baptist Church & 2 others, Court of Appeal at Nairobi, Civil Application No. NAI 312 of 1999***, to argue that decisions of Tribunals can be quashed either by way of suit or judicial review. In his list of authorities, Mr. Ngigi also listed the cases of ***Asman Maloba Wepukhulu vs Francis Wakwabubi Biketi, Kisumu Court of Appeal, Civil Appeal No. 157 of 2001*** and ***Munyui Kahuha vs Nganga Kahuha, Nairobi High Court Civil Appeal No. 502 of 2000***.

D. DECISION OF COURT

9. I have considered the pleadings herein, the arguments of counsel and the authorities supplied by counsels. It is not in doubt that at some point the plaintiff was the registered owner of the suit land. The 1st defendant sought to have the registration of the plaintiff as owner of the suit land reversed by filing a cause in the Soy Land Disputes Tribunal. The Tribunal listened to the dispute and passed an award in favour of the 1st defendant. I have seen a copy of the award which is annexed to the 1st defendant's list of documents. It is not clear when the award was made, but the verdict was as follows :-

"It is hereby ruled by the Tribunal Elders Soy Division that the plaintiff herein is the right custodian of

the farm in questioned (sic) now and her original Title No. 68 be refunded back by the said defendant herein. Hence eviction order to the villagers currently living illegally within the site in dispute - So as to enable the said plaintiff develop the farm in questioned (sic) with her children"

10. It is this award that was adopted as a judgement of the court and a decree passed in the Chief Magistrates Court in Eldoret Award No.58 of 2002. The award was entered as a judgement of the court on 8th January 2003. The plaintiff did not file an appeal against the award and neither did he file an application for Judicial Review to seek to quash the award and subsequent decree. He instead filed this suit seeking the orders that I set out earlier in this ruling.

11. The gist of the preliminary objections raised by the defendants is that the plaintiff had two avenues to challenge the decision of the Tribunal and the decree. The first was to appeal, and the second was to file an application for Judicial Review to quash the decision by an order of certiorari. Mr. Wabwire cited Section 7 of the Land Dispute Tribunal Act whereas Mr. N'geno cited Section 8. These provisions provide as follows:-

7. (1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.

8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.

(2) The appeal shall be registered in a register of appeals in the same manner as the register of claims under section 3 (3); and a notice thereof shall be served on the other party or parties to the dispute in the same manner as provided in subsection (4) of section 3.

(3) The appeal shall be in documentary form and shall contain a brief statement, to be divided into separate grounds of appeal, of the reasons upon which the party appealing wishes to rely.

(4) The appeal shall then be set down for hearing by the Appeals

Committee at a date, time and place to be notified to the parties thereto.

(5) The appeal shall then be determined by the Appeals Committee, which shall consist of three members appointed under section 9.

(6) At the hearing of the appeal, the party bringing the appeal shall begin.

(7) After giving each party an opportunity to state his case the Appeals Committee shall determine the appeal giving reasons for its decision:

Provided that the Committee may in its discretion permit the party appealing to reply to the other party's submission if that submission contains any new matter not previously introduced at the hearing or on the appeal.

(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.

(10) A question of customary law shall for all purposes under this Act be deemed to be a question of fact.

12. It will be seen that once the Tribunal made a decision, the same was to be filed before the magistrate's court and the court was mandated to enter judgment. Under S.8 if a party was aggrieved, he had the avenue of filing appeal to the Appeals Committee within 30 days. One could appeal a decision of the Appeals Committee on a point of law within 60 days of the decision.

This is the procedure that counsels for the defendant argue that the plaintiff was obliged to follow. Alternatively they argue that the plaintiff could have filed a motion for Certiorari to quash the decision of the Tribunal and the decree.

13. These avenues were of course open to the plaintiff but he did not pursue them. The time for filing

appeal to the Appeals Committee lapsed and so too the 6 months required to file an application for judicial review. Does it then mean that if the plaintiff did not avail himself these avenues he is forever precluded from challenging the decision of the Tribunal ? Counsel for the plaintiff has argued that the avenue of filing a declaratory suit was still available to the plaintiff.

14. I have not seen much significance in the case of **Rebo Karari** because in that case, the decision of the Tribunal was being challenged by way of Judicial Review. So too the decision in **Asman Maloba Wepukhulu** where the court of appeal upheld the decision of the High Court in quashing a decision of the Tribunal as the Tribunal did not have jurisdiction. The case of **Munyui Kahuha** was an appeal to the High Court. There is no contention that the avenue of judicial review could be availed to the plaintiff. Neither is there contention that the avenue of appeal was available. The issue at hand is whether the plaintiff could file a suit to declare the decision of the Tribunal illegal.

15. My assessment of the authorities tabled before me on this point is that there are two schools of thought. One school of thought is of the view that the only avenues available are appeal to the Appeals Committee or Judicial Review and no more. The second school of thought is that one can still file a Declaratory Suit. These two schools of thought are indeed revealed in the authorities tabled by counsels. In the case of **Emily Jepkemei Ngeyoni** the plaintiff filed suit seeking declaratory orders on a decision of the Land Disputes Tribunal. A preliminary objection similar to that raised in this case was raised. Justice Dulu upheld the preliminary objection. It was his view that the only options available were either to follow the appeal process in the Land Dispute Tribunal Act or to file a motion for judicial review. A contrary position had earlier been taken by Nambuye J (as she then was) in the case of **Daudi Ngetich Kimibei vs The Attorney General & Another** cited by Mr. Ngigi. The decision presented before me was the decision on an application for injunction. Arguments similar to those raised in this case were presented. The learned judge held that as the avenue for judicial review had closed due to effluxion of time, the only recourse that the plaintiff had was to file a declaratory suit. The court was of the view that it was properly seized with the matter and proceeded to hold that the plaintiff had demonstrated a prima facie case to entitle him to an injunction. In the case of **Robert Entwistle**, the appellants had instituted suit inter alia seeking orders of declaration. The suit revolved around a change of user granted to the 1st respondent. The applicants inter alia sought a declaration that they were entitled to quiet enjoyment of their residential property. They also filed an application for injunction. The High Court, dismissed the application for injunction inter alia holding that the avenue of the appellants ought to have been by way of judicial review to quash the decision of the Commissioner of Lands in allowing the change of user. They appealed. It was the view of the Court of Appeal that just because the decision of the Commissioner of Lands could be challenged by way of judicial review, did not prevent the same being challenged in a suit seeking a declaration that such decision was null and void.

16. My own opinion of the matter is that there is no bar to filing a suit to declare the decision of a Land Disputes Tribunal null and void. True, the avenues of appeal and judicial review are available, but I am not of the view that these are the sole avenues for relief. I am more inclined to associate myself with the decision of Nambuye J in the **Daudi Ngetich Kimibei** case and that of the court of appeal in the **Robert Entwistle** case. With respect, I decline to follow the decision in **Emily Jepkemei Ngeyoni**. I am of the stand that the plaintiff is perfectly entitled to file this suit seeking inter alia a declaration that the decision of the Tribunal was made without jurisdiction. I do not at this stage wish to go into the issue of whether or not the Tribunal had jurisdiction to determine the matter. That of course is the subject matter of the dispute and it will not be wise for me to delve into it. But I see nothing to bar me from making a declaration as to whether or not that decision was one that the Tribunal had jurisdiction to make. If it had no jurisdiction to make the decision, I see no reason why such decision ought to be let to stand. Just because the avenue of judicial review and appeal were closed by effluxion of time does not mean that the plaintiff no longer has any remedy. He can, as he has sought to do, seek to have the decision of the tribunal declared null and void. If such declaration is granted, then the decision will no longer stand.

17. Mr. N'geno argued that the award of the tribunal ceased to exist once it was adopted by the subordinate court. Merely because it was adopted does not mean that it ceased to exist. It was never extinguished by the adoption by the subordinate court. The foundation of the decree is the award itself, and the award can be declared void. If it is so declared, then it follows that all other subsequent decisions

made or administrative actions taken will also be null and void for their foundation will have been nullified.

18. For the above reasons, I am inclined to reject the preliminary objections. I dismiss the same with costs to the plaintiff.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JULY 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. A.M. Ngigi of M/s Ngigi Mibugua & Co. Advocates for the Plaintiff.

Mr. M.J. Omusundi of M/s Gicheru & Co. Advocates for 1st defendant.

Mr. D.O. Wabwire of the State Law Office, for the 2nd defendant.