REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU

(CORAM: OMOLO, GITHINJI & AGANYANYA, JJ.A.)

CIVIL APPEAL NO. 182 OF 2006

BETWEEN

JOHANA NYOKWOYO BUTI ……..……...……...…….. APPELLANT

AND

WALTER RASUGU OMARIBA (Suing through his Attorney BEUTAH ONSOMU RASUGU ……..……..…… 1ST RESPONDENT
JOSEPH ONDIMU OENDO ……..…….. 2ND RESPONDENT
HON. ATTORNEY GENERAL ……..……..…….. 3RD RESPONDENT

(Appeal from a ruling and order of the High Court of Kenya at Kisii (Kaburu, J.) dated 6th June, 2006

in

H.C.C.C. NO. 15 OF 2006)
****

JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court (Kaburu Bauni, J.) dated 6th June, 2006 dismissing a preliminary objection raised against *Kisii High Court civil Suit No. 15 of 2006* filed on 1st February, 2006.

In that suit, **Daniel Walter Rasugu Omariba** (1st respondent) through his Attorney **Beautah Onsomu Rasugu** sued **Johana Nyokwoyo Buti** (Buti) the appellant herein; **Joseph Ondimu Oendo** (Ondimu), (2nd respondent) and the Attorney General (3rd respondent), in respect of land parcel No. Kitaru Settlement Scheme/55 measuring 1.36 Hectares (suit land). He averred in the plaint, *inter alia*, that he purchased the suit land from **James Ondwoke Nyokwoyo** for Shs.856,220/=; that he was the registered owner of the land; that without his knowledge, Buti commenced proceedings relating to the suit land against Ondimu before Borabu Land Disputes Tribunal and Nyamira Senior Resident Magistrate's Court; that the two tribunals held that the 1st respondent's title to the suit land be revoked, as Buti had allegedly bought the suit land before, and, that the alleged sale of land to Buti was null and void for lack of consent of the Land Control Board. The relief sought in the suit was a declaration that the decision by Borabu Land Disputes Tribunal dated 9th May, 2004 which was adopted by Nyamira Senior Resident Magistrate

in *Miscellaneous Application No. 2 of 2005* was unlawful and improper and a permanent injunction to restrain Buti and Ondimu from interfering with or trespassing on the suit land.

The plaint was accompanied by a chamber application seeking a temporary injunction restraining Buti from evicting or interfering with the 1st respondent's quiet possession of the suit land pending the determination of the suit. The appellant (Buti) filed a defence in which he admitted instituting proceedings before the Borabu Land Disputes Tribunal and in the Magistrate's Court in respect of the suit land.

On 13th February, 2006 the appellant's advocates M/s. Oguttu – Mboya & Co. Advocates filed a notice of preliminary objection in the superior court raising six grounds, thus:

"1. That the decision sought to be impeached, reviewed and/or rescinded, having been made by Borabu Land Disputes Tribunal, on 9th May, 2004, this Honourable Court is devoid of Jurisdiction to entertain the instant suit in terms of Section 8 (9) of the Land Disputes Tribunal Act, No. 18 of 1990.

2. That the instant suit together with all attendant proceedings are Res Judicata, in terms of Section 7 of the Civil Procedure Act.

3. That the decision dated 9th May 2004, was made by Borabu Land Dispute Tribunal and not by the 1st Defendant/Respondent. Consequently, the suit against the 1st Defendant/Respondent is misplaced and legally untenable.

4. That the Plaintiff/Applicant has not established any reasonable cause of action or at all against the 1st Defendant/Respondent or at all. At any rate, the Plaintiff/ Applicant has not alluded to compliance with the mandatory provisions of Section 13 A of the Government Proceedings Act.

5. That the susbstentative suit herein, together with the Chamber Summons Application dated 1st February, 2006 amounts to abuse of the due process of Court insofar as a previous Judicial Review Application in respect of the same subject matter vide KISII MISC. CIVIL APPLICATION NO. 44 OF 2005, had been dismissed.

6. That the Plaintiff/Applicant herein is non-suited, insofar as the decision sought to be impeached can only be varied, rescinded and/or annulled by way of Judicial Review and not otherwise".

Mr. Oguttu, learned counsel for the appellant, submitted in the superior court in support of preliminary objection, among other things, that since the decision of the tribunal was adopted by court, any aggrieved party could either file an appeal to the *Provincial Appeals Tribunal* or prefer a judicial review application; that the appellant opted to file a judicial review application which was dismissed; that the High Court had only appellate jurisdiction over the decision of the *Provincial Appeals Committee* and has no original jurisdiction to entertain a suit, that, as the appellant did not appeal against the dismissal of the judicial review application he is estopped from raising the issue of legality of the decision of the tribunal, and, lastly, that the suit against the appellant was incompetent as he could not vicariously be liable for the decision of the tribunal.

On his part, Mr. Migiro, learned counsel for the appellant opposed the preliminary objection and submitted that the decision of a tribunal was not a bar to a party to go to the normal court; that judicial review application was dismissed on technical ground that it was barred by *Limitation of Actions Act*; that 1st respondent could not have appealed to *Provincial Appeals Committee* as he was not a party to proceedings in the tribunal; that the tribunal had no jurisdiction to decide a matter concerning title to land, and, that the 1st respondent could seek a declaration that what the tribunal did was illegal.

The superior court said regarding the appeals procedure to *Provincial Appeals Tribunal*:

"I find this case peculiar to that procedure. The plaintiff herein who claims to have been the registered owner of the land when the dispute was adjudicated upon was never a party. He was not any time informed that the Tribunal was distinguishing (sic) his rights of ownership. If he was not aware how then was he expected to make any appeal in the Provincial Tribunal; I believe even if he did having not been a party in District Tribunal most probably the Provincial Tribunal would not have entertained his appeal. Equally, he could not appeal to the High Court straight as he was not a party to that suit. I find facts in the case peculiar and it would be unjust to shut out the plaintiff on a preliminary stage before hearing him out".

On the issue of *res judicata* the superior court ruled that the suit was not *res judicata* as judicial review proceedings are different from a declaratory suit.

There are seven grounds of the appeal, the main one being ground 3 which states:

"The learned judge of the superior court erred in law in holding that the Decision of a quasi-judicial body, in this case Borabu Land Dispute Tribunal was amenable to the ordinary jurisdiction of the superior court contrary to established principles of public law".

There is no dispute that Omariba, the 1st respondent is the registered proprietor of land parcel No. Kitaru/Settlement Scheme/55. The copy of the certificate of title shows that he was registered as proprietor on 22nd December, 2003 and that the suit land is a sub-division of plot No. 5. There is also no dispute that the appellant instituted proceedings before the tribunal against Ondimu claiming the whole of plot No. Kitaru/Settlement Scheme/5 comprising of 6.08 acres which he claimed to have bought from Ondimu in 1979 for Shs.36,500/=. It is apparent from the proceedings of the tribunal that the appellant settled his two sons on the land and later Ondimu gave the suit land to James Ondwoke Nyokwoyo a son of the appellant who sold the land to the 1st respondent. It is clear from the proceedings that the tribunal revoked the 1st respondent's title and that subsequently the decision of the tribunal was filed in the magistrate's court and adopted as judgment of the court on 16th February, 2005 in S.R.M.'s court *Nyamira Misc. Application No. 2 of 2005*.

Lastly, there is no dispute that the 1st respondent was not made a party both in the proceedings in the Tribunal and in the Magistrate's court. It is also apparent from the proceedings of the tribunal that the attention of the tribunal was drawn to the fact that the suit land had been sold to the 1st respondent and that the 1st respondent had been issued with a title deed.

Mr. Oguttu, the appellant's counsel has made submissions in support of the appeal similar to the ones he made in the superior court in support of the preliminary objection. Likewise, Mr. Migiro, learned counsel for the 1st respondent has made submissions in reply similar to the one he made in opposition of the preliminary objection.

The important legal issue raised in this appeal is whether the decision of the superior court that the superior court had jurisdiction to entertain the 1st respondent's suit was correct in law.

The starting point is the provisions of **Order II Rule 7** of the 1948 *Civil Procedure Act* (now **Order III Rule 9**) of *Civil Procedure Act 2010* which provides:

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

A declaration or declaratory judgment 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 judgment 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.

In the present case, the 1st respondent sought a declaration in essence that the decision of the tribunal was unlawful as it was made without jurisdiction. If such a declaration is granted, the result will be that the decision of the tribunal would be a nullity. The 1st respondent was not a party to the tribunal proceedings. The decision of the tribunal came to his notice long after the 30 days stipulated by **Section 8 (1)** of the *Land Disputes Tribunal Act* for appealing to the *Provincial Appeals Committee* had elapsed, and, also long after the six months stipulated for seeking a judicial review remedy of order of certiorari had expired. It is true that the 1st respondent filed a judicial review application but it was dismissed on the ground that the application for leave was made outside the stipulated six months. Since the application for judicial review was not determined on the merits, the doctrine of *res judicata* does not apply.

Moreover, although the Resident Magistrate's court entered judgment in accordance with the decision of the tribunal such a judgment could be challenged in fresh proceedings if obtained by fraud or mistake etc – see paragraph 1210 *of Halsbury's Laws of England, 4th Edition – Re-Issue* page 353). In **Jonesco vs. Beard** [1930] AC 293 the House of Lords held that the proper method of impeaching a complete judgment on the ground of fraud is by action which decision was followed in **Kuwait Airways Corporation vs. Araqi Airways Co. & Another (No. 2)** [2001] 1 WLR 429. The decision of the Tribunal has of course been merged in the judgment of the magistrate's court.

It seems to us that the 1st respondent had no other remedy. Since the superior court had jurisdiction to entertain both a declaratory suit and an ordinary suit impeaching the judgment of the magistrate'S court the preliminary objection was not maintainable. It is after the hearing of the suit that the superior court can determine whether or not to grant a declaration in the circumstances of the case.

Accordingly, the appeal is dismissed with costs to the respondents.

Dated and delivered at Kisumu this 13th day of April, 2011.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI
…….……
JUDGE OF APPEAL

D. K. S. AGANYANYA
……..……..…….
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR