



**Nyaga v Riimi (Environment & Land Case 282 of 2015)
[2024] KEELC 13270 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 13270 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 282 OF 2015
A KANIARU, J
OCTOBER 30, 2024**

BETWEEN

CHARLES MWANIKI NYAGA PLAINTIFF

AND

JANE RIIMI MBOGO ALIAS JANE RIIMI JONAH DEFENDANT

JUDGMENT

1. By a plaint dated 16.8.2013 and filed on 19.8.2013, the plaintiff – CHARLES MWANIKI NYAGA – impleaded the defendant – JANE RIIMI JONAH a.k.a JANE RIIMI MBOGO – alleging, inter alia, that she had taken him to the area Land Disputes Tribunal for adjudication of a dispute relating to land parcel No Kagaari/Kanja/2218 (“the disputed land” hereafter). The plaintiff is the registered owner of the disputed land and the defendant is his sister. The defendant wanted a portion of the disputed Land and as the plaintiff was not willing to part with the portion, she took him to the Land tribunal. It is clear that the tribunal deliberated on the matter and made a decision that defendant should get one acre. The plaintiff felt and still feels aggrieved, hence this suit.
2. The plaint that initiated the suit was later amended, re-dated 8.12.2021, and re-filed on 9.12.2021. The plaintiffs beef with the tribunals decision is that it was made in excess of tribunal’s jurisdiction. According to the plaintiff, the decision amounted “to unlawful deprivation” of his property rights and he therefore wants the decision to be declared “illegal, null and void”. He desires that the decision “be quashed and set aside”. It is apparent that the defendant and her family are on the disputed land. The plaintiff also wishes that they be evicted.
3. More specifically, the plaintiff wants the following orders;
 - a. A declaration that the award/ decision dated 29.5.2002 of the Embu District Land Disputes Tribunal as it then was in case No 1 of 2002 which was adopted as the judgement and a decree issued by the chief magistrates court at Embu in Award number 19 of 2002, to wit that the



title to land parcel No Kagaari/Kanja/ 2218 be cancelled and that the land be subdivided into two and one acre excised and transferred to the defendant, is illegal, null and void and the same be quashed and set aside.

- b. A declaration that land parcel No Kagaari/Kanja?2218 belongs to the plaintiff – CHARLES MWANIKI NYAGA – and an order that the defendant by herself, her family members, servants, agents or anybody acting under the defendants instructions and her properties(?) be evicted from the said land within 30 days from the date of judgment and that they thereafter be permanently restrained from entering upon, occupying working on, living on, or in any other manner interfering with land parcel No Kagari/ kanja/ 2218 or with the plaintiffs use, occupation and exercise of plaintiffs, proprietary rights over the said land.
 - b.A) A declaration that land parcel No Kagaari/ Kanja/2218 belongs to the plaintiff, Charles Mwaniki Nyaga, absolutely and that the defendant has no claim either by way of trust or any other claim whatsoever to the said land.
 - b.B) That the defendant by herself, her family members, servants, agents or anybody acting under the defendants instructions and her properties to remove themselves from land parcel number Kagaari/ Kanja?2218 within 30 days from the date of judgment and in default the defendant by herself, her family members and her properties be evicted land/ or forcefully removed from land parcel number Kagaari/ Kanja/2218 upon expiry of 30 days from the date of judgment and thereafter the defendant by herself, her family members, her agent, servants or anybody acting under her instructions be permanently restrained from entering upon, living on, utilizing and/ or in any other way dealing with land parcel number Kagaari/ kanja/2218 or interfering with the plaintiff's use, occupation and/or exercise of his proprietary right to land parcel No Kagaari/ Kanja/2218.
 - c). Costs of the suit
4. The defendant responded to the suit by way of a defence dated 11.5.2021 and filed on 12.5.2021. She denied the plaintiff's claim. She pleaded that the tribunal's decision was fair and was made with the full participation of the plaintiff. In the defendant's view, the tribunal's decision should be implemented. I think it is necessary to point out that the defendant did not respond to the plaintiffs' amended plaint and therefore, her defence filed to the suit initially as filed still stands.
 5. The court heard the matter on different days – more specifically on 25.1.2024 and 7.3.2024. The plaintiff testified as PW 1. He adopted his written statement as evidence and produced the following as exhibits. Land certificate – PEX No 1 Green card for disputed land – PEX No 2 Land dispute's tribunals proceedings – PEX No 3 Decree from chief magistrates' court relating to tribunals award No 19 of 2002, Embu – PEX No 4 A letter dated 19.6.2013 – PEX No 5 Another letter also dated 19.6.2013 – PEX No 6.
 6. The plaintiff's written statement shows him saying that the defendant is his sister and was at one time married. She however separated from her husband and came home. As she had no place to live in, the plaintiff allowed her to settle on a portion of the disputed land. Later on, the plaintiff started claiming that her father had directed that she gets 1 ½ acres from the disputed land. This was a lie, according to the plaintiff.
 7. The plaintiff further said that the father at one time decided to sell the land to one Peter Nyagah Muchwaguri. The defendant got wind of it and rushed to Kangaru school where the plaintiff was then working. She gave him the information and the plaintiff went to the father to ask about it. The father admitted he was selling the land and explained he was doing so because of hunger. The



- plaintiff expressed to the father his dissatisfaction with the sale. He agreed with the father to refund the purchaser the money already paid. The amount was 70,000/- but the purchaser wanted the money refunded with interest. Eventually, the purchaser sued to recover his money and the court ordered that he be paid Kshs 215,000. The plaintiff paid the money and the father then transferred the disputed land to him.
8. Then in the year 2002, the defendant sued the plaintiff before the land dispute tribunal and the tribunal ordered that she get one acre from the disputed land. The plaintiff felt aggrieved and even filed judicial review proceedings in court to contest the outcome. He was however unable to proceed with it allegedly because of financial constraints at the time.
 9. Upon cross-examination by counsel for defendant, the plaintiff said the defendant is his sister and that the tribunal had ordered that she get one acre from the disputed land while he himself was to remain with 3 acres. He further said he tried to challenge the tribunal's decision; that he didn't know he could appeal the tribunal's decision; that he also didn't know that he was late in filing his challenge in court; that this case itself is an appeal; and that at one time, the land registrar visited the disputed land intending to subdivide the land but he disallowed it.
 10. Further, he said he would wish to subdivide the land into $\frac{1}{4}$ acre portions and not the way the tribunal directed. He also said he got the land from the clan and it was meant to be his own, not his father's.
 11. When the defendants turn to testify came, she adopted her written statement as her evidence. She also produced the following exhibits Green card (DEX No 1) Letter of consent from Land Control Board DEX No 2 Kenya Gazette Notice (DEX No 3) Court order dated 30.9.2013 (DEX No 4) Decree dated 2.8.2010 (DEX No 5) Certificate of official search (DEX No 6(a)) Application for certificate of official search (DEX No 6(b))
 12. The defendant's statement shows her saying, inter alia, that the plaintiff is her brother and that the disputed land belonged to their father – Wambugu Ruangenyé – who had directed that she be allocated a portion as her inheritance. Then the plaintiff transferred the disputed land to himself and claimed that their father had sold it to him. Further, she and the plaintiff had a case before land disputes Tribunal and the decision made was that she gets one acre. The plaintiff however frustrated the efforts to subdivide the disputed land so that she could get her portion.
 13. During cross-examination by the plaintiff's counsel, the defendant denied that her father had sold the disputed land; said that she didn't go to the plaintiff at Kangaru school to inform him of the alleged sale; denied that her father was alive in 1977 when the plaintiff is shown to have become the registered owner of the disputed land; also denied that the father died in 1987; said that she was unaware of a case filed by her father against the plaintiff; said further that she filed the dispute at Land Dispute Tribunal which ultimately decided she gets one acre; said also that her clan also ordered that she gets one acre; and averred that she has lived on that portion with her husband all along.
 14. Hearing over, submissions were filed. The plaintiff's submissions are dated 4.10.2024. The submissions start with an overview of both the plaintiff's and the defendant's case. The issues for determination are then itemized, with the legal concepts of *ultra vires*, jurisdiction, *res judicata*, declaratory orders, and land ownership mainly forming the thrust of what was submitted on.
 15. On *ultra vires* the plaintiff pointed out that section 3, (1) of the Land Disputed Tribunals Act (now repealed) only mandated the tribunal to handle matters relating to division of land or determination of boundaries, or trespass, or claim to work or occupy land. It didn't, it was submitted, have power to delve into issues of ownership. More specifically, the tribunal couldn't order cancellation of title or transfer of land to another person. That it did so in the matter at hand means that it acted beyond its mandate.



The cases of Mbogo Mwathi Vs John Chege Mbogo; Civil Appeal No 53 of 2000, James Alukoye Were Vs Lurambi Division Land Disputes Tribunal: Misc Appli No 165 of 2005 and M'marete Vs Republic & 3 others (2004)eKLR were cited and quoted to drive the point home.

16. On jurisdiction, the approach was two-pronged. The first approach was whether the magistrates court had jurisdiction to adopt the tribunals decision as its judgment. It was submitted that it couldn't as what was contemplated was that the decision to be adopted was one that the tribunal had the requisite mandate to handle. In this regard, Section 7(2) of the Land Disputes Tribunal's Act was referred to and the decided case of Omega Enterprises (Kenya) Limited Vs Kenya Tourist Development cooperation and others: Civil Appeal No 59 of 1993 (1998) eKLR were proffered for guidance. The second approach related to whether this court itself has jurisdiction to entertain this matter. Section 13(7) of *Environment and Land Court Act* was referred to and it was submitted that this court has power to handle not only an ordinary suit but also a declaratory suit like this one.
17. Then there was the issue of res-judicata. This issue arose because the defendant alleged that the matter is res-judicata as it had been handled allegedly by a competent forum. The plaintiffs submission was that neither the tribunal nor the lower court was competent to handle the matter. The case of the *Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others: CA Appeal No 105 of 2017*, was cited for persuasion and/ or effect.
18. The plaintiff also sought to clarify whether declaratory suits are alternative to judicial review proceedings. He submitted they are. To make the point, he cited cases of *Peter Gicheru Ngige Vs Kiiru Chomba & 3 others: HCC No 41 of 2004*, Nyeri (2004) eKLR, NICHOLAS NJERU VS Attorney General & 8 others (2013) eKLR, PYX Granite Co Ltd Vs Ministry of Housing & Local Government (1995) IQB 554, and, Stephen Kang'ethe Kariuki Vs Samuel Kangere Gatoto: ELC No 222 of 2010 (2015) eKLR.
19. The last issue is whether the plaintiff is the absolute proprietor of the land. It was submitted that he is and arising from that therefore is his entitlement to the interests and benefits conferred by Sections 24, 25, and 26 of the *Land Registration Act*.
20. The defendants submissions are dated 17.5.2024. The submissions contain some prefatory remarks, and a highlight of some salient facts. Focus was then shifted to issues for determination which were delineated as touching on jurisdiction of the tribunal, the lower court, and this court; concept of exhaustion of available avenues; and the doctrine of res-judicata and/or Sub judice.
21. On jurisdiction, the defendants' submission is that the Land tribunal had jurisdiction to handle the matter as what was before it related to defendants claim to work or occupy her space and this was within the mandate given by Section 3(1) of the Land Disputes Tribunal's Act. The tribunal was also said to have conducted its operations legally and it was also properly constituted. The plaintiffs was faulted for not filing an appeal and he was therefore said to have signified satisfaction with the tribunal's decision. The lower court that adopted the tribunal's decision as its judgment was said to have done so properly as the requirement to adopt such decision was coached in mandatory terms. To make the point, the case of *Florence Nyaboke Machani Vs Mogere Amosi Ombus & 2 others: Civil Appeal No 184 of 2011* (2014) eKLR was cited and quoted.
22. On whether this court itself has jurisdiction to handle the matter, it was submitted that it does not. The defendant submitted that the matter before the court is res-judicata as it had been handled in fora with the requisite jurisdiction and competence. The plaintiff was said to be on a fishing expedition intending to delay justice and deprive the defendant of her rights.



23. Finally, the plaintiff was faulted for not exhausting all the avenues provided for in law before coming to the court. It was submitted that the plaintiff did not appeal, which is what he should have done in the first place. According to the defendant, it was not open to the plaintiff to come to this court direct without first exhausting the other avenues. The cases of Catherine C. Kitony Vs Jonathan Muindi Dome & 2 others (2019) eKLR and Florence Nyaboke Machani Vs Mogere Amosi Ombui & 2 others Civil Appeal No 184 of 2011 (2014) eKLR were proffered and quoted for tenor and effect.
24. I have considered the case as filed, the evidence tendered by both sides, and the rival submissions. Before me is a declaratory suit filed to challenge the decision of Land Disputes Tribunal and the subsequent adoption of that decision as judgment of the lower court. It is a decision from which a decree dated 19.8.2010 was raised. The plaintiff is of the considered view that he is entitled to come to court via a declaratory suit as he has done. The defendant is of the view that the plaintiff can not do so as his recourse should be in accordance with what the Land Dispute's Tribunal Act provided.
25. Section 8(1) of the Land Disputes Tribunal Act provided as follows:

891) "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".

Further, section 9 of the same Act provided

(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".

26. From the foregoing, it appears clear that the Law anticipated that a party aggrieved by the decision of the Land Disputes Tribunal could appeal to a higher forum called Appeals committee and dissatisfaction with the decision of the committee entitled the dissatisfied party to go to the Superior court on points of law only.
27. A question then arises where an aggrieved party fails or neglect to follow that procedure and opts, as in this case, to come to court by way of a declaratory suit. The judicial approach to such a situation has not been unanimous. The plaintiff himself cited the case Stephen kangethe Kariuki Vs Samuel Kangere Gatoto; ELC Division case no 222 of 2010 (2015) eKLR where Njage J (as he then was) concurred with the opinion of DULUJ in Emily Chepkemoi Ngeyoni & Another: Eldoret HCC No 270 of 2005 where the Learned judge said thus:

"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 of the view that these are not the sole avenues for relief... I am of the stand that the plaintiff is perfectly entitled to file the suit seeking inter alia a declaration that the decision of the tribunal was made without jurisdiction"



28. But the above position seems to run counter to the position taken in Catherine C. Kittony Vs Jonathan Mwinde Dome & 2 others (2019) eKLR where the court held thus:

“The Land Dispute Tribunal had mechanisms to deal with outcomes such as the one rendered by the 2nd respondent. The award by the 2nd respondent ceased to exist upon adoption by the court as it judgement and a decree issued. The award can not be challenged by filing a fresh suit as it is trite Law that where a statute establishes a dispute resolution mechanism that mechanism, must be followed and exhausted and where a party fails to do so he can not be heard to say that his rights were denied”.

29. Before I state my position, I need to revisit some jurisprudence of historical relevance. In Barnard Vs National Dock Labour Board (1953) & QB 18, Lord Denning (as he then was) was faced with an argument by counsel, which was to the effect that courts have no right to interfere with the decision of statutory tribunals except by the historical method of certiorari. While respectfully disagreeing with counsel, the learned law LORD had this to say:

“...there is power to do so, not only by certiorari, but also by way of declaration, I do not doubt. I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself and the court should not, I think, tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament so clearly intended. If the tribunal does not observe the law, what is to be done? The remedy of certiorari is hedged round by limitations and may not be available. Why then should not the court intervene by declaration, and injunction? If it can not so intervene, it would mean that the tribunal could disregard the law, which is a thing no one can do in this country”.

30. The above position as expressed by Lord Denning received endorsement by Lord Goddard in the case of PYX Granite Co Ltd Vs Ministry of Housing and Local Government (1958) IQB 554 where it was observed thus:

“I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive”.

31. From all this, it is clear that a declaratory suit is deemed suitable particularly where judicial review proceedings may not adequately cover the situation under consideration and/ or (as per Lord Denning) the judicial review remedy sought “is hedged round by limitations and may not be available”.

32. One may then ask: what is the position in Kenya? As I have already pointed out, the position on the issue is not unanimous. But there is a case – SPEAKER OF National Assembly Vs Karume (1992) KLR 21, which captured well the legal position in Kenya as follows:

“Where there is a clear procedure for redress of any particular grievance prescribed by *the constitution* or an Act of parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must strictly be adhered to since there are good reasons for such special procedures”.

This decision was rendered in the old constitutional dispensation but it has continued to find favour in the new or current constitutional dispensation because of the sound reasoning clearly noticeable in the substance of the decision.



33. Does this then mean that a declaratory suit has no place where a clear procedure for redress of grievance is provided for by law. Not at all, in my view. A declaratory suit has its own place in our judicial processes but it is not in my view an automatic choice for a litigant where the law has clearly spelt out what procedure is to be followed. Even in the decisions I have already referred to, it is clear that declaratory suit serves to fill the void or shortcomings that the applicable procedure has not addressed.
34. So where a litigant comes to court by way of a declaratory suit in a situation where he has not followed the procedure prescribed by law, such litigant is duty-bound to explain to the satisfaction of the court why he didn't follow the procedure. An ideal way of doing this is filing an application seeking leave of court to be allowed to file a declaratory suit. That way, the court then would hear and exercise its discretion accordingly. But given also the liberal nature of our court's approach to procedural issues, it would also be acceptable in my view if such litigant offers satisfactory explanation during trial of the declaratory suit itself.
35. In the matter at hand, the plaintiff had the option of going on appeal after losing before the tribunal and further still come to court by way of judicial review if dissatisfied with the outcome of the appeal. He failed to utilize this option and has not made available to the court a convincing explanation why he didn't do it. True, he mentioned that he commenced a judicial review process. But he didn't demonstrate that he actually filed it. One would have expected that the existence of such filing should actually have been shown. And this is where the problem is in my view. You can not ignore or neglect a clear procedure provided for by law and then come to court in a fresh suit as if it is your automatic right to do so. There is no such right. In absence of a convincing explanation why the procedure prescribed was not followed, a declaratory suit must be rejected.
36. The court is duty-bound to consider the interests of both sides. Where the law has prescribed a procedure for handling a decision, the person in whose favour the decision has been given is entitled to assume that the decision given is complete, conclusive, and executable where the time given to the aggrieved party for taking action expires. The rights and interests appurtenant to the decision made are also assumed to crystalize where such time expires. That is why it reasonable to take the position that a person who much later takes upon himself to disturb or overturn such rights or interests should give good reasons for failure to comply with the law in the first place. The plaintiff in this matter failed this test.
37. I have focused on this issue at length because the other issues raised by the other side are secondary to this primary issue. I have not focused much on the evidence as the issue is not whether the defendant merited the decision made by the Land Disputes Tribunal. The issue rather is whether that decision should be overturned or disturbed at this stage. According to the defendant, it shouldn't, the plaintiff having failed to follow the procedure prescribed by the Land Disputes Tribunals Act.
38. The issue of jurisdiction was raised by both sides. From the perspective of the plaintiff, the tribunal lacked jurisdiction to deal with the issue of ownership and couldn't therefore award land to the defendant. According to the defendant however, the tribunal dealt with the issue of working and/ or occupying land, which it had jurisdiction to do. I would agree with the plaintiff that the tribunal actually dealt with ownership. It expressly awarded one acre to the defendant. But there is a catch: Though the tribunal lacked legal mandate to deal with the issue of ownership, its decision assumed legality when it was adopted as the decision of the court. I say this because all pronouncements of the court are deemed legal unless overturned and set aside. And most of the times the law provides the manner or procedure of doing so. The timelines for doing so are also usually provided. In the matter at hand, the way forward for the plaintiff was to file an appeal and/ or move to court appropriately if



dissatisfied with the outcome of the appeal. He didn't do so and he slept on his rights only to surprise the defendant with this fresh suit much later.

39. As I have already pointed out elsewhere in this judgment, in absence of a good explanation as to why the prescribed procedure was not followed, the court must exercise its discretion to refuse to entertain this belated contestation by the plaintiff brought by way of a declaratory suit. I have not declined to entertain the suit because of lack of jurisdiction. This court of course has power to entertain declaratory suits. The reason, I emphasize, is that the procedure prescribed by law was by passed and no convincing explanation was given as to why this fresh suit had to be filed several years later.
40. The upshot, in light of the foregoing, is that the plaintiff's suit herein is for dismissal. The plaintiff is not entitled to the prayers he is seeking. The suit is hereby dismissed. As the parties are siblings, I make no order as to costs.

JUDGEMENT DATED, SIGNED and DELIVERED in open Court at EMBU this 30th day of OCTOBER, 2024.

In the presence of Okwaro for plaintiff, Ms Muthoni Mboi for defendant.

Court Assistant – Leadys

A. KANIARU

JUDGE – ELC, EMBU

30. 10.2024

