REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC CIVIL APPLICATION NO. 11 OF 2019

KAKISEGEI CLAN.....APPLICANT

VERSES

KATEMUGE.....1ST RESPONDENT

KAPCHEPKOSIR CLAN.....2ND RESPONDENT

THE HON ATTORNEY GENERAL.....INTERESTED PARTY

RULING

This ruling is in respect of an application dated 16th April 2019 by the applicant seeking for the following orders:

a) That the Honourable court be pleased to receive and adopt the award of the District Commissioner, Elgeyo Marakwet District of 26th June 1954.

b) The interested party, the Attorney General be required to avail certified copies of the award deposited with the National Archives relating to and concerning the Applicant and the Respondent of 26th June 1954 which settled the land dispute between the two clans.

c) The Honorable court do breathe life into the award of the District Commissioner Elgeyo Marakwet of 26th June 1954 and allow its execution by the Ministry if Lands, Physical Planning and Urban Development under the Community Land Act.

d) Any other court orders the court may deem fit.

Counsel agreed to canvas the application vide written submissions which were duly filed.

APPLICANT'S CASE

Counsel submitted that the Interested Party filed its grounds of opposition stating that firstly, the instant application is dead on arrival as the orders sought cannot be granted without a substantive suit, secondly, that the applicants and the respondents have no locus and or capacity to sue or be sued and finally that the application offends the provisions of Section 4(4) of the Limitation of Actions Act.

Counsel further submitted that the 1st Respondent also opposed the application on the ground that colonial decisions relied on by the Applicants were not made by a competent court of law; the authenticity of the documents relied on by the applicants cannot be verified due to lapse of time. That the respondent further averred that there has never been a boundary dispute between itself and the Applicant from time immemorial.

Mr Ngigi Counsel for the applicant listed the following issues for determination by the court.

a) Whether the application offends the provisions of Section 4(4) of the Limitation of Actions Act.

b) Whether the Applicants have *locus standi.*

c) Whether the orders sought can be granted in the circumstances.

d) Whether the orders sought can be granted without a substantive suit.

On the first issue as to whether the application offends the provisions of Section 4(4) of the Limitation of Actions Act, counsel cited the provision of the said section as:

> *"An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."*

Mr. Ngigi Counsel for the applicant submitted that what the Applicant seeks is to have adopted by this Honourable court as its judgment an award/determination and/or judgment of the District Commissioner Elgeyo Marakwet District of 26th June 1954. That the said award/determination and or judgment of the District Commissioner Elgeyo Marakwet can be correctly termed as a resolution of parties which was achieved through the mechanism of alternative dispute resolution which guaranteed peaceful co-existence between the three clans and their neighbours.

Counsel also submitted that since that resolution is yet to be adopted as a judgment or order of the court, Section 4(4) of the Limitation of Actions Act does not apply to it. Section 4(4) of the Limitation of actions Act deals with judgments and orders of a court and not resolutions of parties.

It was counsel's submission that the applicants did not just approach the court on their own but did so after being asked by the District Land Adjudication and Settlement Officer Marakwet Sub-countries vide a letter dated 28th September 2017 and therefore if time was to run then it would commence on 28th September 2017 and not 1954

On the second issue as to whether the applicants have locus standi to institute this suit, counsel submitted that the suit land is community land which is recognized under Article 63 of the Constitution which provides:

> *"Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Community land consists of land lawfully registered in the name of group representative under the provisions of any law, land lawfully transferred to a specific community by any process of law, any other land declared to be community land by an Act of parliament and land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines, ancestral lands and lands traditionally occupied by hunter gatherer communities or lawfully held as trust land by county governments"*

Counsel relied on the case of **John Peter Mureithi & 2 others v Attorney General & 4 others [2006] eKLR**, where the court held as follows;

> *"the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they alleged was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this court. Moreover, in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan."*

Counsel further cited the case of **James Mwangangi & 64 others v Wote Town Council [2004] eKLR ;**

> *"If the land in issue is trust land then the Applicants who claim to be residents of Kitui doing business on it would have an interest in what the council does with the land and thus, they have locus standi in the matter"*

Mr. Ngigi submitted that the interests of a particular community over ancestral land or community land can be pursued by the community collectively or individually, or through the county government which hold unregistered community land in trust for the community therefore the applicants being a community have the *locus standi* to sue with respect to the suit land.

It was Counsel's submission that Article 63(3) of the Constitution provides that any unregistered community land shall be held in trust by County Governments on behalf of the communities for which it is held. That in the current case what sparked the dispute is the adjudication process prior to registration.

On the third issue as to whether the orders sought can be granted without a substantive suit, counsel submitted that Section 89 Civil Procedure on miscellaneous proceedings allows such cases. That the instant application is a miscellaneous application which can be determined as such hence the orders can be issued without a substantive suit.

Counsel relied on **Order 46, rule 20** of the **Civil Procedure Rules** which deals with alternative dispute resolution and provides as follows:

> *(1) Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and lB of the Act.*
>
> *(2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.*

That the applicants have sought the assistance of the court to determine which of the two decisions should be followed.

On the fourth issue as to whether the orders sought can be granted in the circumstances, counsel submitted that there is still a boundary dispute between the Applicant and the Respondents. That the extent of the lands occupied by the Applicants and Respondents was resolved in 1954 and 1991 of which the Applicants are in possession of uncertified copies of the award/determination and or judgment of 26th June 1954. Counsel also submitted that there have been attempts to acquire certified copies from the National Archives but the Director/Curator of the National Archives has been unresponsive to all requests to avail certified copies of the said award, determination and or judgment of 26 th June 1954.

Counsel finally stated that there is a boundary dispute which the applicants want resolved and that the applicants were not parties to parties to the 1991 decision before the Senior Principal Magistrate's court – Eldoret. Counsel urged the court to allow the application as prayed.

1ST RESPONDENT'S SUBMISSIONS

Counsel for the 1st Respondent listed two issues for determination by the court as follows:

a) Is a colonial decision legitimate that the current regime can adopt?

b) Can the Honourable Court resuscitate obsolete colonial decisions?

On the first issue as to whether a colonial decision is legitimate that can be adopted by the current regime, counsel submitted that Administrative officers took judicial decisions where there was no separation of powers hence they do not meet the threshold of a competent court with jurisdiction. Counsel further submitted that the call by the Respondent to this Honourable Court to breathe life into a colonial decision made 70 years' post-independence is frivolous and fishing expeditions.

On the second issue as to whether the Honourable Court can resuscitate obsolete colonial decisions, counsel submitted that the purported decision made in 1954 cannot be authenticated and breathing life into it will do more harm than good. It was counsel's submission that the parties herein have lived for more than a century together as neighbors without land or boundary dispute.

Mr. Cheruyiot counsel for the 1st respondent submitted that when the 1st and 2nd respondents had boundary dispute in 1991 the Applicants testified in support of the 1st Respondent before Land Dispute Tribunal where its ruling was adopted by Eldoret Magistrate Court and subsequently confirmed by vide High Court in Nakuru Civil Appeal No 78/ 97.

Counsel further submitted that since independence, the Applicants have not raised any land dispute against the 1st Respondent and if they had any land historical injustice claim, then the right forum is at National Land Commission under Art 67(2) (e) which provides that among the functions of the Land Commission is to:

> (*E) "Initiate investigations, on its own initiate or on a complaint into present or historical land injustices, and recommend appropriate redress"*

Counsel relied on the case of **Ledidi Ole Tauta & Others V Attorney General & 2 others (2015) eKLR)** Counsel therefore urged the court to dismiss the application with costs.

INTERESTED PARTY'S WRITTEN SUBMISSIONS

Counsel for the interested party submitted and listed the following issues for determination by the court:

a) Whether the orders granted on 26th June 1954 can be enforced?

b) Whether the applicant has locus to institute these proceedings?

c) Whether the prayers sought can be granted?

On the issue as to whether the orders granted on 26th June 1954 can be enforced, counsel submitted that what the applicant wishes to revive and enforce are untenable as they fully offend section 4 (4) of the Limitations of Actions Act. That after the lapse of a 12-year period the orders cannot be revived through the present application as the order was issued in 1954. Counsel submitted that the only avenue available to the applicant was to file an application to extend the limitation period.

Mr. Wabwire counsel for the interested party submitted that the applicants are guilty of laches as they were vested with an award in their favor 65 years ago but elected to sit on their laurels. Counsel also submitted that the issues raised by the applicant are issues that can only be addressed in a substantive suit as only through the production of evidence and testimony would the court be in a position to render a determination.

On the second issue as to whether the applicant has locus to institute these proceedings, counsel submitted that the award revolves around community land as defined under Article 63 of the Constitution of Kenya. That from the documents attached by the respective parties' it is clear that the land in question is ancestral land that it's currently occupied and utilized by the family members of the original land owner.

Counsel relied on the case of **County Government of Meru & another v District Land Adjudication and Settlement Officer Tigania East Sub-County & 18 others [2018] eKLR** where Justice L. N. Mbugua held that that due to the historical use of the suit land for the benefit of the community and that the interested parties claim was anchored on ancestral use which fell under the definition in Article 63(2) (d) and was thus unregistered community land. Counsel therefore urged the court to find that the subject matter is one that solely falls within the category of community and not private as asserted by the petitioner hence the proper party to institute the proceedings is the county government holding the land in trust for the clan until registration of the party's interest over the said land.

As to whether the prayers can be granted, counsel submitted that that the applicant is not entitled to the reliefs sought as the court did not have the opportunity to interrogate the veracity of the claim. Counsel therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

This is an application by the applicant seeking that the court adopts an award by the District Commissioner Elgeyo Marakwet District dated 26th June 1954 as an order of the court. The applicant further seeks an order that the Attorney General to avail certified copies of the award deposited with the National Archives dated 26th June 1954 in respect of the suit land which settled the dispute. The issues for determination are as to whether the applicant has *locus standi* to institute this application and whether the court can grant the orders sought.

On the first issue as to whether the applicant has locus to institute this application, Article 63 of the Constitution provides that:

> **(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.**
>
> **(2) Community land consists of—**
>
> **(a) land lawfully registered in the name of group representatives under the provisions of any law;**
>
> **(b) land lawfully transferred to a specific community by any process of law;**
>
> **(c) any other land declared to be community land by an Act of Parliament; and**
>
> **(d) land that is—**
>
> **(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;**
>
> **(ii) ancestral lands and lands traditionally occupied by hunter gatherer communities; or**
>
> **(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).**

In the case of **Mwangangi & 64 others Vs Wote Town Council; KLR (E & L) 616,** Justice Wendo held as follows:

> "*If the land in issue is trust land then the applicants who claim to be residents of Kitui and doing business on it would have an interest in what the council does with the land and thus, they have locus standi in the matter."*

Further in the case of **Mureithi & 2 others Vs. Attorney General & 4 others KLR (E&L) 707, Justice Nyamu,** as was then, stated as follows:

> "*The clan members and their successors were sufficiently aggrieved since they claimed an interest in the parcels of which they alleged was clan and trust land. It was in order that the applicants represented themselves as individuals and the wider clan and they had the required standing to bring the matter to court."*

In the case of **Bahola Mkalindi Rhigho v. Michael Seth Kaseme & 2 Ors [2012] eKLR** where the court held that:

> "*I agree with the above statements by the two Judges and hold that the Plaintiff, being a member of the Duko family and a resident of Tana River County, has the locus Standi to question the allocation of the suit property to the Defendants. The interests of a particular community over ancestral land can be pursued either collectively or individually. This is a right which has been conferred on the members of the community by the Constitution and it matters not that a particular member of the community is not directly affected. A member of the community can move the court, drawing the attention of the court to a legal wrong in respect of community land as defined under the Constitution".*

The Applicants provided proof that their community and that of the respondents were in occupation of the land. This is buttressed by the fact that there exists a dispute that was the subject of the award in 1954 that they seek to have adopted. I find that they have locus standi to bring the suit.

On the second issue as to whether the orders sought can be granted by the court, the applicant seeks to have the award delivered in 1954 adopted as an order of the court. The award was issued 65 years ago. Section 4(4) of the Limitation of Actions act provides;

An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

The award that the applicant seeks to be adopted as an order of the court was given on 26th June 1954 before Kenya got her independence. There is no reason advanced as to why the applicants did not assert or enforce their rights. The award was a determination of the dispute and they seek the courts intervention to give effect to the decision. The question is why now after 65 years. What has changed and why have they woken up from the deep slumber. This doctrine of laches is applicable in this case to the detriment of the applicant.

In the case of **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR** the Court of Appeal described laches as:

> *"Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it. This equitable defense is based upon grounds of public policy, which requires the discouragement of stale claims for the peace of society. (See* ***Republic of Phillipines vs. Court of Appeals, G.R. No. 116111, January 21, 1999, 301 SCRA 366, 378-379)'".***

This is a stale claim, to be precise one brought after 65 years is untenable. Tracing of witnesses and the documents to be relied upon would be an uphill task. Some documents might also suffer from the procedures of disposal of public archives records and documents.

It should be noted that this is a miscellaneous application not a substantive claim or a petition to enforce rights. If it was a constitutional petition to enforce fundamental violation of rights then the court would have held otherwise in respect of limitation of actions as was held in the case of **Peter N. Kariuki vs. Attorney General [2014] eKLR, Civil Appeal No. 79 of 2012**, that there is no time limit within which a party can file a claim for violation of constitutional rights.

Further in the case of **Kariuki Kiboi vs. Attorney General [2017] eKLR, Nairobi Civil Appeal No. 90 of 2015,** the Court of Appeal heard and determined a claim which arose in the mid-1980s and was lodged by a petition dated 26th August 2010. The court observed that :

> *"Kariuki Kiboi (the appellant) was among six other persons who filed Constitutional petitions against the Attorney General (the respondent), who was sued on behalf of the Government of Kenya at the Constitutional and Human Rights Division of the High Court at Milimani Law Courts in Nairobi. The petitions were based on events that took place in this country in the mid-1980s and 90s, a period which some historians like to refer to as the dark days of the Moi era.*
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> *The appellants were claiming in the main petition that some of their Constitutional rights, guaranteed them by the retired, and not so robust Constitution of Kenya, had been violated. It is not evident, why they did not sue earlier, but one can only surmise that they felt encouraged by the promulgation of the new Constitution on 27th August, 2010, which came with broader democratic space, an expanded Bill of rights, and a more vibrant and seemingly impartial judiciary."*

If this was the case where the applicants are seeking for enforcement of their fundamental rights to property, then the court would have found that the doctrine of laches does not apply. But in this particular case there is no petition but a mere application to adopt a stale award which is more than 65 years old. Having said that even the provisions of Order 46 Rule 20 of the Civil Procedure Rules which was relied upon by the applicant cannot save the situation. The Order provides;

> **(1) Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.**

The applicants should have looked for alternative from the Adjudication officer who advised them to approach the court for assistance as this is unregistered and unadjudicated land. Furthermore, there is no substantive suit for the claim to be hinged on.

The Community Land Act also provides for ascertainment and recognition of community land. It lays down procedures of ascertainment and such recognition. Section 5 of the Community Land Act provides for the protection of community land rights and states that:

> **Customary land rights shall be recognized, adjudicated and documented for purposes of registration in accordance with this Act and any other written law.**

I therefore find that the application lacks merit and is therefore dismissed with costs to the respondents.

DATED and **DELIVERED** at **ELDORET** this **26th** DAY OF **MAY, 2020**

M. A. ODENY

JUDGE