



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**MISC. CIVIL APPLICATION NO. 13 OF 2018**

**JULIA CHEPKEMEI SABULE.....APPLICANT**

**VERSUS**

**KABIYET DIVISIONAL LAND DISPUTES.....RESPONDENT**

**AND**

**SILPHANO SONGOK.....INTERESTED PARTY**

**JUDGMENT**

**Julia Chepkemei Sabule** (*hereinafter referred to as the **exparte applicant***) has brought this notice of motion dated 1<sup>st</sup> July, 2005 against Kabiyet Divisional Land Disputes Tribunal (*hereinafter referred to as the **respondent***) and Silphano Songok (*hereinafter referred to as the **interested party***) through the Republic seeking for an order of **Certiorari** to quash the decision of the Kabiyet Land Disputes Tribunal made on the 11.11.2004 and adopted as an order of the court vice KAPS PMCCC LDT No. 12 of 2004 on the 19.5.2005 relating to parcel of land No. NANDI/CHEPTIL/9 which is duly registered in the names of the applicant and an order of **Prohibition** to prohibit the Nandi District Land Registrar from entering in the said lands register any entries pursuant to the said Tribunal findings.

Moreover, an order of **Mandamus** to delete any entries that may have been entered the said lands register pursuant the said tribunal's findings.

Lastly, that the respondent and the interested party be condemned to pay costs of this Notice of Motion together with costs in Eldoret Hccc Misc. Civil Application No. 115 of 2005 in which leave was sought and obtained to bring these proceedings.

The Notice of Motion is based on grounds that land parcel No. NANDI/CHEPTIL/9 was registered under the provision of the Registered Land Act Chapter 300, Laws of Kenya (repealed), the Tribunal had no jurisdiction to adjudicate over the same. That the said interested party's claim is said to be traceable to the estate of the late KIPTEK SIOGINO whom after his death letters of administration were granted to ELIJAH KIPCHUMBA BOR and the Tribunal did not have jurisdiction to deal with the matter as the same could have been dealt with pursuant to the provisions of the law of Succession Act Chapter 160, Laws of Kenya.

The interested parties claim is time barred by statute, the same relating to an alleged agreement entered into in 1961 between the interested party and KIPTEK SIOGINO – DECEASED. The interested party's claim relates to a breach of contract and the Tribunal had no jurisdiction to purport to enforce an alleged contract between parties. The mandatory procedural requirements for institution of the claim before the Tribunal were flouted and that Principles and rules of natural justice were contravened. The interested party's claim fell outside the ambit of Section 3 of the Land Disputes Tribunals Act No. 18 of 1990.

The facts of the case as per the verifying affidavit are that the **exparte applicant** is a farmer and housewife. Further, she is the registered proprietor of parcel No. NANDI/CHEPTIL/9. That she bought the said land in the year 1980 from Elijah Kipchumba Bor who is the son and administrator of the Estate of the late KIPTEK SIOGINO whom after obtaining the requisite letters of administration had had himself registered as the owner in the year 1977.

The interested party filed a replying affidavit stating that the Tribunal verdict was proper, procedural and for all intent and purposes reflected the right and wishes of his witness and himself. That the said Tribunal had the right and jurisdiction to entertain this claim as provided for in the act. That the Tribunal did not breach any rules of the natural justice. That he has been informed by his counsel on record, which information he verily believes to be true that the application herein is fatally defective for want of compliance with Order LIII of the Civil Procedure Rules and the same ought to be dismissed.

The respondent filed grounds of opposition stating that the application is fatally defective, incompetent, malapropism and not tenable under order 53 of the Civil Procedure Rules as leave was granted out of time and that the principal magistrates court Kapsabet was not made a party to the notice of motion and that the decision sought to be quashed ceased to exist upon adoption by the court as a judgment.

The *gravamen* of the exparte applicant's submissions is that the subject parcel is registered under the Registered Land Act Cap 300, Laws of Kenya (repealed) in her name and therefore, the panel of elders lacked jurisdiction to entertain the dispute and that the land in dispute belonged to a deceased person. Moreover, that the dispute was based on a contract. Moreover, that the claim before the Tribunal was time barred. Furthermore, the applicant submits that she was not given an opportunity to be heard contrary to rules of natural justice. The applicant further submits that the application for leave was filed in time and therefore, leave was obtained within the required time.

The honorable Attorney General for the respondent submits that the application for leave was filed out of time contrary to the provisions of Order 53 Rule 2, Laws of Kenya. Further, that by the time of filing the application for leave, the decision of the Tribunal had been adopted as an order of the court. Upon adoption as an order of the court, the decision ceased to exist on its own. Moreover, that the presiding officer of Kapsabet Law Courts was not served personally. The Attorney General argues that it was imperative for the Kapsabet Principal Magistrate's Court to be enjoined as a party and that the decree of the Tribunal to be quashed is not annexed to the application contrary to Order 53 Rule 7.

Lastly, that the applicant has not demonstrated that the decision of the Tribunal is tainted with illegality, procedural impropriety or irrationality.

The interested party argues in the detailed written submissions that the application for leave was made outside the 6 months stipulated in law and therefore, the application was fatally defective.

I have considered the application, the replying affidavit and grounds of opposition and do find the following issues ripe for determination:

1. **Whether the application for leave made within time stipulated by law.**
2. **Whether failure to serve the SRMC was a breach of the law.**
3. **Whether failure to make the SPMC a party was a breach of the law hence the application is defective.**
4. **Whether failure to annex the decree made to application fatally defective.**
5. **Whether the respondent's decision is tainted with illegally, irrationally and procedural impropriety.**

**On whether leave was obtained out of time, this court observes that: -**

Section 9(3) of the Law Reform Act provides: -

**In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.**

Order 53 Rule 2 provides for time for applying for an order of certiorari in certain cases, thus;

**"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."**

On the 20<sup>th</sup> June 2005, the High Court granted the exparte applicant leave to commence judicial review proceedings and apply for orders of Certiorari, Prohibition, Mandamus. Carefully looking at the order, the applicant obtained leave to apply for certiorari to quash the order of the of the lower court made on the 19.5.2005 in PMCC LDT No. 12 of 2004 and therefore, time begins running from 19<sup>th</sup> May 2005 when the final order was made, thus the date the decision of the Tribunal was adopted. I do find that leave was obtained within the prescribed period of time.

**On whether the failure to enjoin and serve the SPMC is fatal to the application**, this court finds that the decision of the Tribunal having been adopted on the 19.5.2005, the right party to be sued was the Senior Principal Magistrate's Court as the decision having been adopted as a judgment of court could only be challenged by way of judicial review against the decree and proceedings. However, I do find that failure to enjoin and serve the SPMC was not fatal as the court merely adopted the decision of the tribunal.

The decree to be quashed is not annexed in the supporting affidavit. It was necessary for the exparte applicant to annex the decree and proceedings before the honorable court, however the proceedings before the tribunal are annexed and are sufficient to assist the court in making an informed decision. Failure to annex the decree was not fatal to the notice of motion and equally failure to the enjoin the senior4

principal magistrates court Kapsabet was not fatal to the notice of motion as the proceedings of the tribunal and the ultimate award adopted by the court was annexed to the application.

I have looked at the annexed the proceedings and verdict of the Tribunal and do find that the tribunal determined ownership of the property and therefore fell into error as it had no jurisdiction to determine ownership of land. Section 3(1) of the Land Disputes Act provided;

**(1) Subject to this Act, all cases of a civil nature involving a dispute as to— (a) the division of, or the determination of boundaries to land, including land held in common;(b) a claim to occupy or work land; or(c) trespass to land, shall be heard and determined by a Tribunal established under section 4.**

In the dispute before the Tribunal, there was no issue of boundary, trespass or right to occupy land. The dispute revolved on ownership.

Moreover, the Tribunal was comprised of the 4 members as opposed to 3 members contrary to Section 4 that provides;

**4. (1) There shall be established a tribunal, to be called the Land Disputes Tribunal, for every registration district. (2) Each Tribunal shall consist of— (a) a chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 5; and(b) either two or four elders selected by the District Commissioner from a panel of elders appointed under section 5. 5. (1).**

For the above reasons, I do find that the decision of the Tribunal was tainted with illegality as the Tribunal was illegally constituted and that it deliberated on matters where it lacked jurisdiction and therefore what was adopted by the Magistrate's Court was a nullity in law.

I do grant the following orders namely; an order of *Certiorari* to quash the decision of the Kabiyet Land Disputes Tribunal made on the 11.11.2004 and adopted as an order of the court vice KAPS PMCCC LDT No. 12 OF 2004 on the 19.5.2005 relating to parcel of land No. NANDI/CHEPTIL/9 which is made duly registered in the names of the applicant, an order of *Prohibition* to prohibit the Nandi District Land Registrar from entering in the said lands register any entries pursuant to the said Tribunal findings, an order of *mandamus* to delete any entries that may have been entered the said lands register pursuant the said tribunal's findings. No order as to costs as the illegalities were occasioned by the tribunal that has been abolished. Orders accordingly.

**Dated and delivered at Eldoret this 27<sup>th</sup> day of June, 2019.**

**A. OMBWAYO**

**JUDGE**