



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO.113 OF 2017**

**KIPKERING ARAP MUZEE.....PLAINTIFF**

**VERSUS**

**KITUR ARAP MUZEE.....1<sup>ST</sup> DEFENDANT**

**WILSON ARAP BETT.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 7th July 2003 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) An order of this court that Kabiye Land Disputes Tribunal lacked jurisdiction to entertain and make the award of two acres to each of the defendants out of the suit property, and thus the said award made is null and void.
- b) Permanent injunction restraining the defendants from interfering with the plaintiff's ownership and possession of all that parcel of land known as NANDI CHEPTIL/194.
- c) An order of this Honorable court for a declaration that the tribunal's decision and subsequent award adopted as the decree of the court in KAPSABET PRINCIPAL MAGISTRATES COURT LAND CASE NO. 11 OF 1998 is ultra vires, arrived at by the Tribunal without jurisdiction and in breach of the established Rules and procedures.
- d) Costs of the suit
- e) Any further relief that the court may deem fit to grant.

The plaintiff filed an application for injunction contemporaneously with the plaint which was heard and granted.

**PLAINTIFF'S CASE**

The plaintiff adopted his statement and stated that he bought the suit land measuring 6.5 acres from Peter Arap Kuto (deceased) in 1966 of which he produced a title deed registered in his name. He further stated that they went to the Land Control Board to transfer the land in his name at Kapsabet in 1996. He produced a copy of the green card which indicates that the late Peter Kuto was registered as an owner in 1962.

The plaintiff also testified that he has a plot that he inherited from his parents which they each got 7.5 acres with the defendants who are his brothers. It was his evidence that he bought the plot from money he saved having worked in a posho mill in Kericho. He disputed that the plot was bought from money from family resources.

It was the plaintiff's further evidence that the defendant sued him at Kabiye Land Disputes Tribunal that gave an award that they share the land equally but he was not satisfied with the verdict hence the current case because the tribunal did not have jurisdiction to grant the award as he already had a title deed to the land. He therefore urged the court to grant the orders as prayed in the plaint.

**DEFENCE CASE**

The defendant adopted his witness statement and stated that the plaintiff bought the suit land with resources from the family and therefore he held the land in trust for them. He also stated that they went to the Land Disputes Tribunal which gave an award that they share the land equally. On cross examination he admitted that the land had a title deed registered in the plaintiff's name and that the plaintiff has been in occupation since 1962. The defendant also confirmed that he inherited 7.8 acres of their ancestral land. The defendant therefore closed his

case.

Counsel for the plaintiff filed submissions and stated that the defendants did not prove that the plaintiff was a trustee in purchasing and/or registering himself as the owner of the subject parcel of land. Further that the defendant did not establish how the subject parcel of land was acquired using the proceeds of sale of family land and property. That the defendants failed to demonstrate why they never used and / or occupied the suit land as a family or attempted individually to occupy it after its purchase in the year 1960's. Further that there was no evidence adduced on which parcel of land was sold and at how much in order to purchase the suit land.

The Defendants acknowledged that there is another parcel of land which they inherited from their parents and they have shared equally with the Plaintiff. Counsel therefore urged the court to declare that the Tribunal's decision and subsequent award as ultra vires, as it was arrived at without jurisdiction. He also urged the court to dismiss the defendants counterclaim with costs to the plaintiff.

Counsel for the defendants submitted on the issue of the plaintiff holding the land in trust for the defendants as the suit land was ancestral land. Counsel submitted that there is no limitation period to file a suit in customary trusts as the defendants became aware of the issue of the trust in 1994 when the plaintiff refused to give them their share. Counsel therefore urged the court to dismiss the plaintiff's claim and grant the orders as per the counterclaim.

### **ANALYSIS AND DETERMINATION**

This is a very old matter which has seen better days in the court corridors. In fact it has been handled by more than 12 Judges I being the 13<sup>th</sup> Judge. Litigants are entitled to expeditious adjudication of cases in order to access justice.

The phrase justice delayed is justice denied is real in this scenario. It is not enough to start apportioning blame on whose fault it was for the delay of this case but all the stakeholders involved in the processing of cases must re-examine themselves to see how best to deal with these cases.

The issue for determination in this case is as to whether the Land Disputes Tribunal had jurisdiction to hear and determine this dispute and whether the adopted award was ultra vires.

The other issue is whether the plaintiff is the absolute owner of the suit land having been registered as such. Finally the other issue is as to whether the plaintiff held the suit land in trust for the defendants.

On the first issue on whether the Land Disputes Tribunal had jurisdiction to hear and determine the ownership dispute of registered land, **Section 3(1)** of the Land Disputes Tribunal Act provides as follows:

**“3 (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.”**

It is clear from the provisions of section 3 of the Act (now Repealed ) that it does not confer on the Tribunal jurisdiction to deal with issues of determination of title to or ownership of registered land. The plaintiff gave evidence which was confirmed by the defendant that he is the registered owner of the suit land. The plaintiff produced a copy of the title deed registered in his name and a green card which had previously been registered in the name of the seller one Peter Kuto. This alone removes the claim from the purview of the Land Disputes Tribunal. The plaintiff also explained the process how he acquired the land.

In the case of **Joseph Malakwen Lelei & Another V. Rift Valley Land Dispute Appeals Committee & 2 others** the court reinforced the holding that the import of Section 3 of the Land Disputes Tribunal Act(now repealed) is that it does not clothe it with the jurisdiction to handle matters of title to or ownership of land.

It should be noted that in a ruling of an application in this matter by Etyang J (as he then was) dated 31<sup>st</sup> May 2003, the court held that the plaintiff had proved that he has a prima facie case against the defendants with a probability of success on the ground that the Tribunal did not have jurisdiction to deal with any dispute relating to ownership of registered land. I am also persuaded that at the time the defendants filed the suit at the Tribunal the plaintiff already had a title to the suit land and therefore the Tribunal acted without jurisdiction. Procedurally it is prudent before you file a claim, it is important to establish the issues of jurisdiction of the forum that you chose, be it subject matter, geographical or pecuniary. It is like presenting an accused person charged with a criminal offence before a Land and Environment Court.

When a court or a Tribunal realizes that it lacks the requisite jurisdiction, then the best thing to do is to down its tools and move no further. This can assist in stemming the unnecessary costs being incurred by litigants in the wrong forums and counter applications on jurisdictional issues. This will also help in reducing time taken in resolving a matter.

The defendants filed a counterclaim on the grounds that the plaintiff used resources from the family to buy the suit land therefore he held it in

trust for them. The defendants did not state the land reference Number that they purport to have been sold and they did not provide any documentary proof of the sale agreement, the identity of the purchaser, the date of sale and the purchase price of the land.

The defendants further did not prove that there was a trust or that the plaintiff held the land in trust for them and himself. The plaintiff produced a title deed and a green card which did not indicate in the proprietorship section that the suit land was held by the plaintiff as a trustee on his behalf and on behalf of the defendants or that they held the land in common.

The defendants confirmed that the plaintiff has been occupying the suit land since 1962 and they did not explain why they have never taken their rightful shares if any since that time. This is an indicator that they do not have any share or proprietary interest in the suit land. I find that the defendants counterclaim is an afterthought and is therefore dismissed with costs. There is no evidence that they are entitled to the land as they had stated to the court that they had gotten their share of the ancestral land which belonged to their mother.

I have considered the pleadings, the evidence of the parties, the submission by Counsel and come to the conclusion that the plaintiff has proved his case against the defendants on a balance of probabilities and enter judgment in the following terms.

- a) An order is hereby issued that Kabiye Land Disputes Tribunal lacked jurisdiction to entertain and make the award of two acres to each of the defendants out of the suit property, and thus the said award made is null and void.
- b) Permanent injunction is hereby issued restraining the defendants from interfering with the plaintiff's ownership and possession of all that parcel of land known as NANDI CHEPTIL/194.
- c) An order is hereby issued that the Tribunal's decision and subsequent award adopted as the decree of the court in KAPSABET PRINCIPAL MAGISTRATES COURT LAND CASE NO. 11 OF 1998 is ultra vires.
- d) Defendant to pay costs of the suit to the plaintiff.

**Dated and delivered at Eldoret on this 7<sup>th</sup> day of August, 2019.**

**M.A. ODENY**

**JUDGE**

**JUDGMENT IS READ IN OPEN COURT in the presence of**

**Mr.Kipkirui holding brief for Mr.Momanyi for Defendant and Miss.khandambi holding brief for Mr.songok for Plaintiff.**

**Mr.Koech – Court Assistant**