



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. 21 OF 2009

REPUBLICAPPELLANT

VERSUS

MARAKWET LAND DISPUTES TRIBUNAL.....1ST RESPONDENT
RESIDENT MAGISTRATE'S COURT AT ITEN.....2ND RESPONDENT
MARAKWET DISTRICT COMMISSIONER.....3RD RESPONDENT

AND

JOHN CHEBOI KIMOSOP.....INTERESTED PARTY

THOMAS KIPSANG EX PARTE APPLICANT

JUDGMENT

Before this court for determination is the Ex-Parte Applicant's Notice of Motion dated 8th June, 2009 seeking an order of certiorari to quash the decision and award made by the Marakwet Land Disputes Tribunal on 8th April, 2008 and later adopted by the Resident Magistrate's Court at Iten.

The Award made was in the following words:-

"After perusing over the above statements from both warring parties and that of the neutral party the chairman and his members of the Tribunal had nothing to add or change but to support the decision of the majority by ruling and awarding land to the clan through the Defendant. Therefore the land in question is awarded to Kachebukus Clan. Each party to meet his own cost"

Being dissatisfied with the above award the Ex-parte Applicant filed the Notice of Motion seeking the orders as follows:

- 1. Certiorari to remove into the High Court and quash forthwith the proceedings and Award of the Respondents as contained in the letter Ref. No. LND 16/7/VOL.IV dated 10th June, 2008 and the proceedings together with the ruling contained in the Respondents ' minutes of 13th March, 2008 at the Respondents offices at Tirap Division and signed by the witnesses namely BARNABA Y. KIBOR, ELIAS KANDA and WILLIAM Y KIPKEU on 8th April, 2008 in the Respondents' Tribunal Case LDT No.1 of 2008 as on 28th January, 2009 read and adopted as the judgment of the 2nd respondent in ITEN SRMCC LDT NO.7 OF 2008 with the support of all the Respondents at the detriment of the Ex-Parte Applicant**

and/or in favour of the Interested Party.

2. Prohibition to prohibit the Respondents in respect of the proceedings, Award and ruling as contained in the respondents I letter Ref. No. LND 16/7/VOL.IV dated 10th June, 2008 and the proceedings together with the ruling/award contained in the Respondent's minutes of 13th March, 2008 at the Respondent's offices at Tirap Division and signed by witnesses namely Barnaba Y. Kibor, Elias Kanda and William Y Kipkeu on 28th April, 2008 in the Respondents' Tribunal case namely LDT NO. 1 OF 2008 as on 28th January, 2009 read and adopted as the judgment of the court in ITEN SRMCC LDT NO.7 OF 2008 with the support of all the Respondents at the detriment of the Ex-Parte Applicant and/or in favour of the Interested Party.

3. Costs to the Ex-parte Applicant.

It is based on the grounds that:-

(a) The Tribunal and Magistrate's Court have no jurisdiction to entertain the dispute over the disputed land contrary to the law of natural justice and in a manner that is fraudulent, deceptive, illegal, unlawful and otherwise an abuse of the process of the court

(b) The proceedings and decisions of the Tribunal in its case LDT N0.1 OF 2008 at Marakwet District and in the ITEN SRMCC LDT NO. 7 OF 2008 are unlawful, illegal, null and void ab initio.

It is further supported by the statement and Verifying Affidavit of Thomas Kipsang the Applicant herein.

The following pertinent issues have been raised in the statement and Verifying Affidavit in support of the application:-

1. That the proceedings, orders, judgment and Decree of the 2nd Respondent on the 13th August 2008, 18th August 2008, 1st October 2008, 21st November, 2008 and 28th January, 2009 are fraudulent, deceptive, illegal, unlawful and abuse of the court process.

2. That the ex-parte applicant did not participate in the aforestated proceedings.

3. That the decree is due for execution as the aforesaid proceedings have been read and adopted by the Iten RMCC, vide LDT No.7 of 2008.

4. That the Ex-Parte Applicant was not granted a fair hearing as his witnesses were locked out and that his evidence was doctored.

5. That the proceedings and ruling/award/decision of the 1st and 3rd Respondent are yet to be read and adopted by the 2nd Respondent in the presence of all the parties and/or in accordance with the laws of Natural justice and the other laws of the land. (*underlining is mine, as we shall revisit the emphasis thereof later*).

6. That the Ex-Parte applicant had no notice of reading and adoption of the ward by the 2nd Respondent.

7. That the respondents did not have the jurisdiction to entertain the matter and alternatively they were biased and infringed the rules of Natural Justice.

8. That the Ex-Parte Applicant was not given an opportunity to be heard as there existed bad relationship between himself and the witnesses of the Interested Party.

The application was opposed by the Interested Party vide his Replying Affidavit sworn on 7th May, 2012. The gist of this affidavit is that the Applicant got a share of the sub-divided land, that he was present during all the proceedings before the Tribunal and that he should not therefore contest the award of the elders.

Miss Wanjiru Mbiyu, learned state counsel filed grounds of opposition dated 13th February, 2012 on behalf of the Respondents. They are as follows:-

- 1. The Motion is bad in law, misconceived and incompetent and lacks merit.**
- 2. The verifying Affidavit does not verify any evidence as required by Order 53 Rule 1 (2).**
- 3. Alternatively, the application is not supported by any Verifying Affidavit.**
- 4. The 1st Respondent acted in accordance with the law.**
- 5. The order of certiorari sought is time barred, the decision having been made on 8th April 2008.**
- 6. There was/is no decision made on 10th June, 2008 which is capable of being quashed by grant of the order of certiorari.**
- 7. The Ex-parte Applicant who seeks the equitable remedies of Judicial review is before the Honourable Court with unclean hands having participated fully in the proceedings then before the 1st Respondent.**
- 8. The Ex-parte Applicant had the remedy of an appeal against the decision of the 1st Respondent which he failed to utilize.**
- 9. The balance of convenience tilts in favour of the Respondents.**
- 10. There is no evidence whatsoever exhibited by the Ex-parte Applicant to prove/show the alleged bias, fraud, illegality or unprocedural defects.**
- 11. The 1st Respondent had by dint of Section 3 (2) of the Land Disputes Tribunal Act No. 18/90 (now repealed) the Jurisdiction to adjudicate on the subject land being untitled land.**

The parties filed their respective submissions which have expounded on each party's case as summarized above and I therefore need not duplicate them in this judgment save to say that I have carefully considered them take the following view in arriving at my decision.

Section 7 of the then Land Disputes Tribunal Act, Act No. 18 of 1990 which empowered the Magistrate's Court to deal with the Tribunal's award provided as follows:-

"7(1) The Chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the Magistrate's Court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act"

This provision clearly stipulates that the Tribunal's award can only be acted upon and/or executed once it is filed. In effect, the award is not legal, or binding, unless it is filed before the Magistrate's Court. What this means is that it cannot also be challenged before a court unless it is filed and thereafter endorsed as a judgment of the Magistrate's Court. For this reason, this Judicial review application is premature.

The Applicant's pleadings are also self-contradictory. This is so because, at one time (*see ground (d) of the statement under the reliefs sought*) he states that the proceedings and ruling/award of the 1st and 3rd Respondents are yet to be read and adopted by the 2nd Respondent. Yet again, in ground (a) under the same head in the statement he pleads that:-

"The proceedings, orders, judgment and decree of the 2nd Respondent on 13th August, 2008, 18th August, 2008, 1st October, 2008, 21st November, 2008 and 28th January, 2009 are fraudulent, deceptive, illegal, unlawful and otherwise an abuse of the process of the court....."

Again, he had not attached and or exhibited the proceedings -before the Magistrate's court including the judgment and decree he says are/were fraudulent and/or illegal.

Essentially therefore, a judicial review under Order 53 of the Civil Procedure Rules can only be filed once the Tribunal's award has been adopted by the Magistrate's Court. As at now, there is no judgment and/or decree that would be the basis of a judicial review.

Further under Section 7(1) of the Land Disputes Tribunal Act, **"the chairman of the Tribunal, shall cause the decisions of the Tribunal to be filed in the Magistrate's Court together with any depositions or documents which have been taken or proved before the Tribunal."** This implies that there is no time limit within which the award shall be filed with the Magistrate's Court. Clearly, the Applicant jumped the cart before the horse. He ought to have waited until the award was filed so that he could challenge it in the Judicial Review as provided by Order 53 Rule 2 of the Civil Procedure Rules.

And in any event, if the Applicant was dissatisfied with the award, he ought to have appealed before the Provincial Appeals Committee within 30 days of the making of the award as was provided by Section 8 of the Land Disputes Tribunal Act. The relevant parts of the Section are as follows:-

(1) 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.

(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

(9) Either party to the appeal may appeal from the decision of within sixty days from the date of the decision complained of."

The Applicant has also argued that he was condemned unheard by the Tribunal. The contrary speaks. The proceedings before the Tribunal clearly shows that he is the one who lodged the complaint with the Tribunal. The same proceedings show that he was given an opportunity to present his case and he even called witnesses. His contention in this regard is thus baseless. Even if he were to contend that the Magistrate's Court did not give him an opportunity to be heard, I have already said herein above that there is no evidence the award was filed with the Magistrate's Court. In effect, the Magistrate had no case to deliberate upon. And even if the award was filed the Magistrate's duty is , administrative and procedural strictly so to speak. The Magistrate cannot challenge either the composition of the Tribunal or the legality of its decision. His duty rests with adopting the award as a judgment and no more.

Finally, the Applicant has challenged the jurisdiction of the Tribunal to deliberate on the dispute. Its jurisdiction was conferred to it by Section 3 (1) of the Land Disputes Tribunal Act which provided 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. "

The proceedings before the Tribunal show that the dispute revolved around sub-division of land that was/is held in common by Kachebukus clan. The Applicant complained against one John Kimosop (Interested Party) who stood on behalf of the clan. The proceedings all round addressed to the sub-division of the land. This court would only take issue with the outcome of the decision if it deviated from the provisions of Section 3 (1) of the Act, but this did not happen. For this reason, I hold that the Tribunal had jurisdiction to deliberate upon the dispute. And in any event, the land was awarded to the clan through the Interested Party. It is also the Applicant who lodged the complaint and so he is estopped from questioning the jurisdiction of the Tribunal. I reiterate that the Tribunal exercised its jurisdiction appropriately and in accordance with Section 3 (1) of the Land Disputes Tribunal Act.

In the result, this application must fail. I dismiss it with costs to Interested Party.

DATED and DELIVERED at ELDORET this 27th day of February, 2014.

G. W. NGENYE MACHARIA

JUDGE

In the presence of:

Magut holding brief Cheptarus for the Ex-Parte Applicant

Mr. Ngumbi for the Respondents

Miss Tum holding brief for Mutai for the Interested Party