



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**MISCELLANEOUS CIVIL APPLICATION NO. 736 OF 2008**

**REPUBLIC..... APPELLANT**

**VERSUS**

**THE MARAKWET DISTRICT LAND DISPUTES TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT**

**THE RESIDENT MAGISTRATE'S COURT AT ITEN..... 2<sup>ND</sup> RESPONDENT**

**THE KEIYO/MARAKWET LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JOSEPH CHEPKWONY ..... INTERESTED PARTY**

**EXPARTE SUSANA CHEPKURUI**

**JUDGMENT**

1. Pursuant to leave granted on 10<sup>th</sup> December, 2008, *Susan Chepkurui*, the Ex-parte Applicant (hereinafter the applicant) approached this court by way of a Notice of Motion dated 17<sup>th</sup> December, 2008 seeking two substantive prayers namely;

i. An order of certiorari to remove into the High Court and quash forthwith the proceedings and award of the Marakwet District Land Disputes Tribunal the first Respondent dated 5<sup>th</sup> August, 2008 and the proceedings, judgment, order and Decree of the 2<sup>nd</sup> Respondent in Iten Resident Magistrate's court Land Disputes Tribunal case No. 25 of 2008.

ii. An order of prohibition prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from implementing the Award of the Marakwet District Land Disputes Tribunal dated 5<sup>th</sup> August, 2008 and the judgment, Decree and or order of the Iten Resident Magistrate's Court Land Disputes Tribunal case No. 25 of 2008 in respect of parcel of land known as E/MARAKWET/KAPSOWAR/434 (1.3HA) registered in the name of the ex-parte applicant. She also prayed for costs of the application.

2. The motion is premised on grounds stated in the statutory statement of facts dated 4<sup>th</sup> December, 2008. The applicant contends that she is the registered proprietor of land known as E/Marakwet/Kapsowar/434 and that the 1<sup>st</sup> respondent had no jurisdiction to entertain and determine a dispute lodged over her parcel of land (hereinafter the suit land); that the interested party's claim over the suit land was statute barred and that in the hearing of the dispute, the rules of natural justice were violated.

3. The application is opposed. There is a replying affidavit sworn by *Joseph Chepkwony*, the interested party who deposed that the 1<sup>st</sup> respondent had jurisdiction to entertain his claim which in his view was a boundary dispute; that the application is defective as the verifying affidavit was improper and that when determining the dispute, the 1<sup>st</sup> respondent observed the rules of natural justice. The 1<sup>st</sup> respondent also opposed the motion through grounds of opposition filed on 11<sup>th</sup> March 2014. The 1<sup>st</sup> respondent supported the interested party's claim that it had jurisdiction to arbitrate over the dispute lodged with it by the interested party. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file any responses to the motion.

4. The Notice of Motion was heard initially by *Hon. Azangalala J* (as he then was). He delivered his judgment on 2<sup>nd</sup> May, 2014. That judgment was however set aside by *Hon. Ngenye – Macharia J* in a ruling delivered on 22<sup>nd</sup> July, 2014 following an application made by the interested party who had not participated in the hearing of the motion. The Hon. Judge directed that the Notice of Motion be heard afresh.

5. Following the above order, the motion was canvassed before me on 3<sup>rd</sup> November, 2015 and on 9<sup>th</sup> May, 2017. Learned counsel *Mr. Cheptarus* appeared for the applicant while learned counsel *Mr. Wambwire* represented the respondents. The interested party was represented by learned counsel *Miss Bett*. Counsel for each party made elaborate oral submissions buttressing his or her client's respective positions.

6. I have carefully considered the application, the responses filed by the 1<sup>st</sup> respondent and the interested party, the submissions made by counsel on record and the authorities cited.

Having done so, I find that though the applicant had prayed for the remedies of certiorari and prohibition in the Motion, she abandoned the prayer for an order of prohibition during the hearing. I also find that only two key issues emerge for my determination which are;

- i. Whether the application is competent or fatally defective;
- ii. Whether the 1<sup>st</sup> respondent had jurisdiction to determine the dispute subject matter of the proceedings.

7. Starting with the first issue, the interested party submitted that the application was fatally defective allegedly because it was supported by an improper verifying affidavit and that the statement of facts was defective in substance. *Miss Bett* relied on the authorities of **Commissioner General V Silvano Oneme Owaki Civil appeal No. 45 of 2000 and Peter Gitahi Kamaitha V Secretary Public Service Commission & 2 others Civil Application No. 22 of 2009 (2010) eKLR** for the proposition that it is the verifying affidavit which should contain the facts supporting the application and not the statutory statement and that the statement of facts should contain only the name and description of the applicant, the relief sought and the grounds on which the reliefs are sought. Counsel claimed that the statement of facts in this case contained the facts supporting the motion instead of the verifying affidavit.

8. Having perused the statutory statement dated 4<sup>th</sup> December, 2008 and the verifying affidavit sworn by the applicant on even date, I find the interested party's submissions that the two do not comply with the mandatory provisions of *Order 53 Rule 2 and 4 of the Civil Procedure Rules* misconceived. The statement fully complies with the law as it contains the name and description of the applicant herein, the reliefs sought and the grounds on which the reliefs are sought. The brief verifying affidavit contains the main facts supporting the substantive motion and verifies the contents of the statement of facts. Secondly, the proceedings of the 1<sup>st</sup> respondent and its impugned award as well as the order of the 2<sup>nd</sup> respondent which are challenged in these proceedings are annexed to the verifying affidavit and not to the statutory statement. In the circumstances, I am satisfied that the evidentiary facts supporting the motion are contained in the verifying affidavit and consequently, the motion is not fatally defective as alleged. It is competent and properly before the court.

9. On the issue of jurisdiction, the 1<sup>st</sup> respondent and the interested party have claimed that the 1<sup>st</sup> respondent was clothed with jurisdiction to determine the dispute as the same was a boundary dispute and the 1<sup>st</sup> respondent's award only had the effect of aligning the boundary between the party's respective parcels of land.

On her part, the applicant has maintained that the dispute concerned ownership of registered land and that therefore the 1<sup>st</sup> respondent had no jurisdiction to adjudicate on the same.

10. In determining the issue of jurisdiction, I think the starting point should be a consideration of the law that mandated land disputes tribunals to arbitrate over certain disputes involving land. That law was promulgated in *Section 3(1) of the Land Disputes Tribunals Act* (now repealed) which stated as follows:-

***“ 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.***

11. In this case, after considering the proceedings before the 1<sup>st</sup> respondent, I find that the interested party's main complaint was that the applicant had altered their boundary and had encroached on his parcel of land. After deliberating on the dispute, the tribunal made its award on the following terms:-

***“ After perusing keenly on the above statements, the chairman and his members reached the decision that the boundary be followed along the stream, Kerelwa tree, Simotwo tree – Morutich tree -Tilak. The surveyor to amend the registry indexing map to tally with the actual grounds. Costs to each party”.***

12. Given the interested party's complaint, though on the face of it the 1<sup>st</sup> respondent appeared to be considering a boundary dispute, its final decision directing the surveyor to amend the registry index map to align it to the position on the ground as had been shown by the boundary features allegedly removed by the applicant took the decision out of the scope of a determination on a boundary dispute and converted it into one that touched on ownership of registered land.

13. The decision had the effect of awarding a portion of what the applicant claimed was part of her registered land to the interested party. Given the provisions of *Section 3(1) of the Land Disputes Tribunals Act*, it is my finding that the 1<sup>st</sup> respondent had no jurisdiction to entertain a claim of ownership to any part of the applicant's parcel of land or any other registered land for that matter or to order a change in the registry index map and the relevant register.

14. In view of the foregoing, I am satisfied that the decision of the 1<sup>st</sup> respondent was ultra vires *Section 3(1) of the Land Disputes Tribunal Act* and was therefore a nullity in law. It had no legal effect. The same applies to the decision of the 2<sup>nd</sup> respondent. I thus find that the Notice of Motion dated 17<sup>th</sup> December, 2008 is merited and it is hereby allowed. An order of certiorari is accordingly issued in terms of prayer 1 of the motion.

15. As costs follow the event, the applicant is awarded costs of the application. The costs to be paid by the interested party.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED** at **ELDORET** this 20<sup>th</sup> day of June, 2017

In the presence of:

Mr. Oribo for Ms Masinde for the interested party

Mr. Cheptarus for the Exparte applicant

Ms Chelashaw for the respondents

Mr. Lobolia court clerk