REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 753 OF 2008

REPUBLIC……....APPLICANT

VERSUS

THE MARAKWET DISTRICT LAND DISPUTES TRIBUNAL…...……1ST RESPONDENT

THE RESIDENT MAGISTRATES COURT AT ITEN……..…..……2ND RESPONDENT

THE MARAKWET DISTRICT COMMISSIONER……..…….3RD RESPONDENT

THE PROVINCIAL ADMINISTRATION &

INTERNAL SECURITY……4TH RESPONDENT

AND

KAKIBARAS CLAN,

JACON KISANG &

REUBEN CHELANGA……...……INTERESTED PARTIES

AND

SHABAN CLAN,

CHEPKONGA CHESOMOI,

KITAUN ALIMARIS &

JOEL K. LIMO……..……..……*EX-PARTE* APPLICANTS

JUDGMENT

1. The *exparte* applicants are members of the *Shaban clan*. The clan has staked a claim to unregistered communal land known as *Kakisiyet land* or *Chemet land* (hereafter *the suit land*). The Marakwet District Land Disputes Tribunal awarded the suit land to *Kakibaras clan* (the interested parties). The *exparte* applicants are aggrieved by that decision; and, the ensuing decree of the subordinate court at Iten.
2. The *exparte* applicants were granted leave to bring proceedings in judicial review seeking four

reliefs: first, for a writ of *certiorari* to remove into the High Court and quash the proceedings and award of the Marakwet District Land Disputes Tribunal in L.D.T No. 15 of 2008 dated 30th July 2008; and, the proceedings, judgment and the subsequent order of the Iten Resident Magistrate's Court in Land Dispute Tribunal Case No. 35 of 2008. Secondly, for an order of *prohibition* against the 1st to 4th respondents relating to the award and the suit land; thirdly, for an order of *mandamus* to compel the 1st respondent to hear the contested claims over the suit land afresh; and, fourthly, for costs of the suit.

3. The substantive notice of motion is dated 18th February 2009. It is supported by an earlier statement of facts dated 29th December 2008 filed together with the application for leave. There are also four separate verifying affidavits sworn by each of the *exparte* applicants. The gravamen of the motion can be broken into six points. First, that the land is communal and accordingly, the interested parties are not its owners; secondly, that the respondents lacked jurisdiction to hear and determine the dispute as it revolved around clan land; thirdly, that the proceedings in the Land Disputes Tribunal were illegal and void *ab initio*; fourthly, that the *ex-parte* applicants and their witnesses were denied an opportunity to present all relevant evidence; fifthly, that the respondents were biased; and, sixthly, that the respondents acted contrary to local customary laws and written law.
4. The application is contested by the respondents and interested parties. There is a replying affidavit sworn by Jacob Kisang on 26th June 2009 on behalf of the interested parties. The case for the interested parties is that the *ex-parte* applicants lack *locus standi;* and, that the application is incompetent for want of a certified decree of the Iten Resident Magistrates Court. The interested parties also contend that the proceedings before the Land Disputes Tribunal were fair as the *exparte* applicants participated in the proceedings. Learned counsel for the interested parties submitted that it is preposterous for the applicants to seek to quash the award for want of jurisdiction and at the same time pray that the matter be heard afresh by the same tribunal. The interested parties depose that the respondents have developed the disputed land; and, that the customs cited are repugnant to justice and the written law.
5. The 1st to 4th respondents did not file a formal answer to the motion; but learned State Counsel filed written submissions on their behalf.
6. All the parties filed written submissions. Those by the *ex parte* applicants were filed on 13th February 2015; those by the respondents on 22nd July 2015; and, those by the interested parties on 25th February 2015. I have considered the pleadings, depositions, documentary evidence and rival submissions.
7. I am satisfied that the applicants were granted leave on 28th January 2009 to apply for judicial review in terms of the substantive notice of motion dated 18th February 2009. The notice of motion is thus properly before the court.
8. Like I pointed out, these proceedings are by way of *judicial review*. As a general proposition judicial review proceedings are not concerned with the *merits* but with the decision making process. In order to succeed in an application for judicial review, the applicant has to show that the impugned decision is tainted with *illegality, irrationality or procedural impropriety.* Those terms were explained well by Odunga J recently in *Republic v Inspector General of Police Ex-parte Patrick Nderitu* Nairobi, High Court Judicial Review 130 of 2013 [2015] eKLR-

> *"Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or* ultra vires, *or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative*

instrument by which such authority exercises jurisdiction to make a decision."

9. There are a plethora of precedents on that subject. See generally *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300, (A persuasive but non-binding Ugandan decision), *Council of Civil Unions v Minister for the Civil Service* [1985] AC 2, *An Application by Bukoba Gymkhana Club* [1963] EA 478 at 479 and *The Commissioner of Lands v Kunste Hotel Limited*, Nairobi, Court of Appeal, Civil Appeal 234 of 1995 [1997] eKLR.
10. The key question for determination is whether the tribunal's decision was illegal or irregular. Paraphrased, whether it had jurisdiction to entertain the dispute; or, whether the *exparte* applicants were condemned unheard; and, whether the present motion is premature or incompetent. The operative law was the Land Disputes Tribunal Act (now repealed). Section 3 of the Act stipulated 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."*

11. The land in dispute was *unregistered land*. It was held in common. The dispute between the parties before the tribunal was essentially a *civil claim* to determine the right to *possess, occupy or work* on the land. It fell squarely within the ambit of section 3 of the statute. I readily find that the tribunal *had* jurisdiction to deal with the matter before it. It would have been another matter if the tribunal had sought to deal with matters of registered land, contract or rights under the Law of Succession Act for example. The tribunal in all the latter cases would have meandered beyond its boundaries of jurisdiction. In *M'Marete v Republic & 3 others*, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 [2004] eKLR the court held-

> *"In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under [the] Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction."*

12. See also *Republic v Chairman Kajiado Central Land Disputes Tribunal Exparte Timaiyo Kirtari*, Machakos, High Court Misc. Appl. 4 of 2012 [2012] eKLR, *Republic v Chairman Matungu Land Disputes Tribunal Exparte Electina Wang'ona* High Court, Bungoma, Misc. Appl. Io7 of 2010 [2012] eKLR, *Samuel Kibara Wainaina v Land Disputes Tribunal Kieni West Division & Another*,High Court, Nairobi, Misc. Appl. 1409 of 2005 [2006] eKLR, *Republic vs Chairman Bumula Land Disputes Exparte Chhrisostim Barasa Sangura & 4 Others*, High Court, Bungoma, Misc. Cause 174 of 2005 [2006] eKLR.
13. I find the submissions by the *exparte* applicants that the tribunal lacked jurisdiction to be self-serving: on the one hand, they ask that the proceedings be quashed; and, on the other hand that the matter be heard *de novo* by the very tribunal they seek to impeach.
14. The dispute before the tribunal was a contest between two rival clans. The *exparte* applicants averred that a man known as *Katilowo* from the *Shaban* clan acquired the suit land for consideration of 30 or 38 goats as compensation for the *murder* of a man from the *Kartur* clan. The *Kartur* clan is said to have a claim against the *Kakibaras* clan for the suit land and 38 goats. Learned counsel for the *exparte* applicants submitted that the dispute can only be fairly resolved using Marakwet customary laws *"so that all the persons from the three clans are heard without bias, bribery, favouritism, corruption and in accordance with natural justice"*. Although general

allegations of bribery, corruption, bias or favouritism are made against the tribunal, no evidence of such shenanigans has been presented to court. They are to me bare allegations without factual or evidential basis.

15. According to the proceedings of the tribunal, the *Kakibaras* clan represented by the interested parties lodged a complaint against the *Shaban* clan. The latter was represented by Chepkonga Chesomoi and Kitaun Alimaris, the *ex-parte* applicants. After hearing the matter, the tribunal awarded the land in question to the *Kakibaras* clan. I have already found the tribunal had jurisdiction. One clear difficulty encountered by the tribunal was that the dispute had raged for nearly *200 years*. The tribunal correctly found that the witnesses (who were on the average aged 60) were ill placed to verify the matters in issue. Furthermore, since the person murdered was from *Kartur* clan, it would have been the latter claiming the land and not *Shaban* clan. The *Osis* (neutral party at the tribunal session) found the value of the three pieces of land surrendered to *Kartur* clan to be reasonable compensation for their murdered kin. The tribunal awarded the land to the complainant, *Kakibaras* clan.
16. I stated that as a general proposition, judicial review is *not* concerned with the merits of the impugned decision. For example, the customs referred to may *seem* repugnant to morality or justice. But the legal system in Kenya today was inapplicable 200 years ago when the clans settled the crime of murder. What the *exparte* applicants needed to show is that the impugned decision is tainted with *illegality, irrationality or procedural impropriety.*
17. There is a real question whether the interested parties could speak for their clan. But it is a double edged sword because the *exparte* applicants themselves have not fully complied with the requirements of a representative suit. Certainly no authority to act on behalf of other members has been annexed. Quite obviously the clan is a large and fluctuating body. A large number of the members are not even parties to this suit. But that would hoist a technical objection over substantive justice. It flies in the face of article 159(2)(d) of the Constitution; more so in a land matter.
18. What is material is that the representatives of the conflicting clans were *heard* by the tribunal. I have studied the minutes of the meeting of L.D.T 15 of 2008 of 13th June 2008. Chepkonga Chesomoi, Joseph Alimaris and Joel Kilimo (the 2nd, 3rd and 5th *ex parte* applicants) were *present* and *testified* before the tribunal. Their statements were recorded at length. They clearly stated they were acting on behalf of the *Shaban* clan. I am thus unable to accept that the tribunal condemned the *exparte* applicants unheard.
19. I have already stated that the allegations of bias, bribery or corruption are bare. Fundamentally, there is no cogent evidence before me showing the failure of the rules of natural justice. The *exparte* applicants also contend that they were not given an opportunity to tender additional evidence. However, the record of the tribunal does not show that they requested; or, were denied time to present more witnesses or tender additional evidence. The onus to prove failure of natural justice fell squarely upon the shoulders of the *exparte* applicants. Sadly, they failed to discharge the burden.
20. The decision of the tribunal has since been adopted as a decree of the Iten Resident Magistrate Court in Land Dispute Tribunal Case No. 35 of 2008. The decree is not annexed but it is common ground that it was issued in favour of the interested parties. Although the *exparte* applicants contend that the decree was issued in their absence, their learned counsel, in his written submissions at paragraph 4, conceded that summons were issued to Kitum Alimaris (the 3rd *ex parte* applicant) to attend court on 10th December 2008. The summons was delivered on 25th November 2008 through the Chief, Endo Location. I got the impression that the *exparte* applicants were saying that the subordinate court did not hear them before issuing the decree. It is important to keep in mind that the subordinate court was performing a *ministerial* function. It was only to receive the decision of the tribunal for purposes of adoption. It had no power to alter any aspect of the report. See *Harrison Ndungu Kungu v Nakuru Chief Magistrate's Court & Another* Nakuru, High Court, Misc. Appl.47 of 2004 [2005] eKLR.
21. The *exparte* applicants never lodged an appeal to the Provincial Appeals Committee before the decree was issued. The *exparte* applicants' answer is that the decree was made in their absence. I have already found that submission to be prosaic and ill-founded. There is no plausible explanation tendered why an appeal was never lodged to the Provincial Appeals Committee. By failing to do so, the *exparte* applicants became the authors of their own misfortune.

22. The relevant sections 8(1) and (8) of the Act had provided as follows-

> *"8. (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.(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.……..……..*
>
> *"8(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of"*

23. In the absence of an appeal, the Resident Magistrates Court performed its ministerial task of adopting the award and issuing the decree. Section 7 of the Land Disputes Tribunal Act (now repealed) 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 judgement 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."*

24. The decree issued by the subordinate court has never been set aside. The decision of the tribunal having been adopted by the court, there is no *award* capable of being transmitted to the High Court for quashing. These proceedings in judicial review were never meant to be the *appeal* against the ministerial action of the subordinate court.
25. I do not agree with the interested party or respondents' submissions that these proceedings are premature. The High Court, under the repealed Constitution, had residual power to supervise land dispute tribunals. However, the *exparte* applicants failed to take advantage of their rights and the procedures provided in sections 8(1), (8) and (9) of the repealed Land Disputes Tribunal Act. See *Wamalwa v Catholic Diocese of Muranga Registered Trustees* [2003] KLR 389, *Republic v Chairman Kajiado Central Land Disputes Tribunal Exparte Timaiyo Kirtari*, Machakos, High Court Misc. Appl.4 of 2012 [2012]eKLR, *Republic v The Marakwet Land Disputes Tribunal ex parte Joseph Chepkurui*, Eldoret, High Court Misc. Appl. 36 of 2009 (unreported).
26. In the end, I am not satisfied that the impugned decision of the tribunal, or, the subordinate court that adopted it, was tainted with *illegality, irrationality or procedural impropriety.* In the premises, the present motion is on a legal quicksand. Furthermore I have found a paucity of evidence to fully back up the claims by the *ex parte* applicants. It has not been lost on me either that the claims date back *two hundred* years; and, there are conflicting positions on possession or developments over the land. I am particularly alive to the fact that the Land Disputes Tribunal Act was *repealed*; and, that the Marakwet District Land Disputes Tribunal *no* longer exists. The prayer for a fresh hearing before that tribunal has obviously been overtaken by events.
27. For all those reasons, the writs of certiorari, prohibition and mandamus cannot issue. The upshot is that the notice of motion dated 18th February 2009 is dismissed. In the interests of justice, and considering the predicament the *exparte* applicants now face, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 19th day of January 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. J. Cheptarus for the *exparte* applicants instructed by Joseph C. K. Cheptarus & Company Advocates.

Mr. P. Kuria for the respondents instructed by the Hon. Attorney General.

Mr. Isidi for Mr. Chebii for the interested parties instructed by Chebii & Company Advocates.

Mr. Lesinge, Court clerk.