REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 31 OF 2011

COSTA SOTE KANDIE

(Suing as a legal Representative

of the Estate of the late Cheptum Arap Chesire) …..... PLAINTIFF

VERSUS

LEGETYO KOSYIN

(NOIGAM WOMEN GROUP) …..... 1ST DEFENDANT

THE ATTORNEY GENERAL (ON BEHALF

OF THE CHERANGANY LAND DISPUTE TRIBUNAL) - 2ND DEFENDANT

R U L I N G

1. The Plaintiff is one of the administrators of the estate of the lateCheptum Arap Chesire who was the registered proprietor of Land Parcel No. 6614/3 (originally number 6614/2/2).
2. The first defendant is a women group which was registered under the then Ministry of Culture and Social Services.
3. The third defendant is the legal advisor of the Government of Kenya.
4. On 01/04/2011 the plaintiff filed a suit against the defendants in which she sought for a declaration that the proceedings and the award made on 6th July, 2010 and the subsequent judgement and decree given pursuant to th said award in ***Kitale CMCC Land case No. 14 of 2010*** between the plaintiff and the first defendant are illegal, null and void and without jurisdiction.

5. In the year 2010, the first defendant filed proceedings against the family of the late Cheptum Arap Chesire before Cherangani Land Disputes Tribunal claiming one acre which the group bought from the deceased.
6. The Tribunal ruled in favour of the claimants holding that the claimants should get one acre which they bought from the late Cheptum Arap Chesire.
7. The verdict of the Tribunal was adopted as judgement of the court on 28/9/2010 vide Kitale Chief Magistrate's court Land case no. 14 of 2010.
8. The first defendant attempted to execute the decree against the administrators of the estate of Cheptum Arap Chesire prompting the plaintiff to move to court where she filed the present suit.
9. Before the hearing of the suit, counsel representing the parties herein agreed that the preliminary objections filed on 7/6/2011 and 17/6/2013 by the first and second defendants

respectively be heard first.

10. The first defendant raised the following grounds;-

(a) That no leave was sought and granted to the plaintiff to file the suit against the first defendant.

(b) That the suit and the application are fatally defective and non starter for the plaintiff has no authority to sue the first defendant in its own name.

(c) That the plaintiff lacked authority from the other administrators of the estate of the late Cheptum Arap Chesire to institute proceedings herein.

(d) That the suit is res-judicata.

(e) That the suit is a back door appeal against the Tribunal's award which was read and adopted as judgement of the court in Kitale CM Land Case No. 14 of 2010.

(f) That the Honourable court lacks jurisdiction to entertain the suit.

11. The second defendant raised the following grounds;-

(a) The issues raised in the present suit ought to have been raised in an application for judicial review.

(b) That the plaintiff has no capacity to sue on behalf of the estate of the late Cheptum Arap Chesire.

(c) That the suit herein is an abuse of the due process of this Honourable court

12. Counsel for the parties agreed that they file written submissions in respect of the two preliminary objections . All the three counsel for the parties filed their respective submissions and cited authorities in support of their respective positions.

13. I will start with the grounds of objection which are common to both the first and second defendants. Both defendants contend that the plaintiff's suit is not sustainable on the ground that she is seeking to quash the proceedings of the Cherangany Land Disputes Tribunal which was subsequently adopted as judgement of the court in ***Kitale Chief Magistrate's court Land Case No. 14 of 2010***. The two defendants contend that under the provisions of the Land Disputes Tribunal Act which is now repealed, the plaintiff ought to have preferred an appeal to the Provincial Land Disputes Appeals Committee or alternatively moved to the High Court to file an application for Judicial Review seeking to quash the Tribunal verdict and its adoption. The two defendants contend that the plaintiff's move is a back door appeal against the decision of the Tribunal which has already been adopted as judgement of the court and a decree issued. In support of this submission, both defendants ***cited High Court Civil Case No. 26 of 2001 Emily Jepkemoi Ngeyoni and Julius Randich -Vs- Nicholas Kipchumba Kogo and Chairman Kabiyet Land Disputes Tribunal.*** The first defendant also relied in ***Kitale High Court Civil case No. 200 of 1996 George Jumba -Vs- Joseph Retto.***

14. In answer to the defendants submissions on the point that the plaintiff ought to have followed the procedure laid down under the defunct Land Tribunal Act, Mr Bundi for the plaintiff submitted that this court (Environment and Land court) has the status of the High Court which is vested with supervisory jurisdiction over the magistrate's courts and other Tribunals. Mr Bundi argued that in view of the constitutional provisions, this court can hear a matter notwithstanding the procedure followed to seek the relief. Mr Bundi further contends that the plaintiff is seeking two major reliefs namely that of declaration and a permanent injunction. He contends that even if the relief of declaration was to fail, still the relief of permanent injunction is available to the

plaintiff and therefore theplaintiff's suit should not be struck out.

15. I have considered the submission of both parties herein. The plaintiff is seeking to have the proceedings and the award made on 6/7/2010 and the subsequent judgement and decree given in ***Kitale CMC Land Case No. 14 of 2010*** declared null and void for want of jurisdiction. The proceedings which the plaintiff is seeking to have declared null and void were as a result of a procedure provided under the defunct Land Disputes Tribunal Act. The Act provided for a special procedure by which an aggrieved party can proceed. After the verdict of the Cherangany Land Disputes Tribunal was read, the plaintiff was at liberty to file an appeal to the provincial land Disputes Appeals Committee and if she was to be unsuccessful, she had the option of appealing to the High Court against the committees decision on points of law. Alternatively, she had the option of moving to the High Court seeking to quash the decision of the Tribunal as well as the Chief Magistrate's adoption of the award as judgement of the court.

16. The plaintiff had no option of filing a suit by way of plaint seeking to quash the proceedings. The Act provided an elaborate way out for the plaintiff and she had to follow that process. The procedure provided under the Land Disputes Tribunal Act (now repealed) were not procedural technicalities which could be overlooked. The plaintiff cannot therefore invoke provisions of the constitution which vests, the court with supervisory jurisdiction over subordinate courts and Tribunals. The court has to be properly moved under the respective statutes providing procedures on how to go about achievement of certain reliefs. In the present case, the plaintiff had to follow the provisions of the defunct Land Disputes Tribunal Act.

17. The plaintiff's argument that the declaration which she seeks is divorced from the Tribunal proceedings is simply untenable. The relief she is seeking cannot be divorced from the Tribunal proceedings and the subsequent adoption by the chief magistrate's court. There is no way the plaintiff can seek a declaration without mentioning the proceedings of the Tribunal. The plaintiff's plaint is clear. She is attacking the proceedings of the Tribunal. This cannot be done by way of plaint. The prayer for permanent injunction cannot as well be divorced from the Tribunal proceedings for to do so will leave the injunction relief without a base on which it will stand. The plaintiff may have resorted to filing the plaint after she realised that time for appeal to the High Court or filing judicial review had run out. The plaintiff was wrong in approaching the court by way of plaint in the face of a clear procedure which she should follow as provided for in the now defunct Land Disputes Tribunal Act. This is enough to dispose off this suit but I will like to address the other points raised in the notices filed by the defendants.

18. There is another point taken by the first defendant that the suit herein is res judicata. The plaintiff did not address this issue in her submissions. Be that as it may, it is clear that the parties before the Tribunal were the same and were litigating on the same subject matter. There is a judgement which was derived from the tribunal verdict. This judgement has never been appealed against. The filing of this suit was therefore res-judicata.

19. There was also another point taken by the first defendant that no leave was sought by the plaintiff to file the suit against the defendant in its name. In response to this, Mr Bundi for the plaintiff argued that this omission was not fatal to the plaintiff's suit arguing that in any case, the first defendant had sued in the same name in the Land Disputes Tribunal and therefore there was no problem in the plaintiff bringing the suit against the first defendant in its own name. In support of the plaintiff's case, Mr Bundi ***cited Nairobi HCCC No. 672 of 2000 between Salome Wanjiku Miringa -Vs- Kenya Power & Lighting Co. Ltd*** where Justice Mbaluto in dismissing an application filed therein said as follows;-

> ***"There is no suggestion in any of the rules that a representative suit should be defeated by failure to obtain leave before filing suit. Indeed the doctrines of equity point in the other direction ….. for those reasons it will be unfair and unjust to strike out the plaint just because leave of this court to file suit was not obtained prior to the filing of the suit. The application lacks merit and is***

dismissed."

It is clear that the first defendant is a women group consisting of many members. Even though no leave was sought and granted before the plaintiff could sue, I do not think that the omission was fatal. This was just a procedural technicality which should not prevent the court from dispensing substantive justice. I therefore find that this preliminary objection is without merits and the same is rejected.

20. There is another Preliminary Objection taken by the defendants that the plaintiff had no capacity to bring this suit against the defendants. The plaintiff is one of the administrators of the estate of the late Cheptum Arap Chesire. There are other three administrators and ideally they should have been named as parties to this suit but non joinder of the other co-administrators is not fatal to the suit. I therefore overrule this point.
21. As I had already indicated in this ruling that the first point was enough to dispose of this suit , I find that the Preliminary Objection has merits. The same is upheld with the result that the plaintiff's suit is hereby struck out with costs to the defendants.

It is so ordered.

Dated, signed and delivered at Kitale on this 31st day of March, 2014.

E. OBAGA,

JUDGE

In the presence of Mr Kiarie for Mr Bundi for Plaintiff and Mr Chebii for 1st defendant. Court Clerk – Lobolia.

E. OBAGA,

JUDGE

31/3/2014