



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 2083 of 1980

SIAMPEI OLE BUTU & 42 OTHERS.....PLAINTIFFS

VERSUS

OLE MWANIKI FAMILY & 5 OTHERS.....DEFENDANTS

R U L I N G

1. In their **plaint dated 23rd July, 1980**, the Plaintiffs pleaded that from time immemorial they and their ancestors were in open and peaceful possession of parcels of land which subsequently were registered as the suit lands after land adjudication and registration in the area about 1974. They pleaded further that upon the said adjudication and registration the suit parcels of land were wrongly and mistakenly registered in the names of the Defendants as proprietors thereof. It is the Plaintiffs' further case that the Defendants were never in possession of any of the suit parcels of land and that the registration thereof as the properties of the Defendants was clearly wrong.

2. The main reliefs sought in the plaint are:-

(a) **A declaration that the Plaintiffs are entitled to be registered as proprietors of the suit parcels of land.**

(b) **An order that the Defendants do transfer the said parcels of land to the Plaintiffs.**

3. The Defendants filed various statements of defence denying the Plaintiffs' claim and asserting their own rights to the suit parcels of land.

4. On 5th November, 2002 Waki, J (as he then was), adopted as the order of court, the parties' written consent dated 4th November, 2002 and ordered as follows:-

“(a) That the dispute between the parties herein regarding land parcels numbers L.R. Narok/Olchoro/18, Narok/Olchoro/41, Narok/Olchoro/42, Narok/Olchoro/44 and Narok/Olchoro/45 and all matters arising therefrom be and is hereby referred to arbitration by a panel of elders to be appointed by the parties.

(b) **That the District Commissioner, Narok District be the chairperson of the panel of arbitrators.**

(c) **That the award of the elders be filed within ninety (90) days.**

(d) **That there be liberty to apply.”**

5. This was clearly a **reference to arbitration by consent** under **Order XLV** of the then **Civil**

Procedure Rules (the Rules). As it happened, no arbitration under this consent order was ever conducted. There was never any panel of elders appointed by the parties, and the District Commissioner, Narok never chaired any such panel of elders as required by the order of reference. There was never any award filed in this court at in terms of the order of reference.

6. As it happened, about five (5) years after the order of reference to arbitration was some persons who may or may not have been parties in the present suit lodged a claim in respect to the same suit parcels of land with the Narok Land Disputes Tribunal under the Land Disputes Tribunal Act, No. 18 of 1990. This was vide Narok Land Tribunal Dispute Case No. 10 of 2007. The claim was against persons who also may or may not have been parties in the present suit.

7. Subsequently an award was filed in the **Senior Principal Magistrates' Court, Narok** vide **Misc. Land Case No. 25 of 2010** and read to the parties. The court also adopted the award as the judgment of the court.

8. The award was as follows –
“ORDER (DECISION)

1. **The BOUNDARY between OLCHORO and ENESAMPULAI group is Beacon K13 and K10. The same boundary will follow the MELILI-MAU-NAROK road up to beacon K7, which forms the boundary between OLCHORRO 54 and Plot No. OLCHORO/44. The boundary shall then move towards MARMANET springs which is the starting point of MARMANET river.**

2. **The Narok Senior Principal Magistrate to order the DIRECTOR of Land Adjudication and Settlement to immediately Gazette all that area which was neglected by the then Olchorro Demarcation Officers in 1978 and measuring aprox. 400 – 500 Ha and declare the same as an Adjudication Section and issue a fresh NOTICE for both the claimants and objectors in this case.**

3. **The Narok S.P.M to order the District Land Registrar to REVOKE the land title deeds issued to the objectors in this case in 1978 and only issue them afresh to all the claimants and objectors in this case after the director of Land Adjudication and Settlement has acted on the court orders.**

4. **That the claimants and objectors will not move out of Enesampulai group even after this orders have been complied with by the relevant Government departments. The committee which the members will form will decide on how best they shall sub-divide their land to themselves.**

1. **JOEL K KARAREI - CHAIRMAN - SIGNED**

2. **STANLEY S.O. TOME - SECRETARY - SIGNED**

3. **JOHN KAPUTA - MEMBER - SIGNED**

DATED 21ST JULY 2010.”

9. Some of the parties appealed to the **Rift Valley Provincial Appeals Committee** vide **(RVP) L.D.A.C Appeal No. 45 of 2010**. The appeal was under the relevant provisions of the aforesaid Land Disputes Tribunals Act. The appeal was decided on 30th December 2010. The decision of the Appeal Committee was as follows –

“DECISION/VERDICT

The Respondents of this case are a group of people mushrooming from nowhere in signing people and buying time to destroy the forest around there. Government should take action against them.

There is no Land there claiming this is all private land they have no any single documents for the case.

The right rightful owners of this land are -

- **Ole Mwanik Parcel No. 1266 ID No 108566159**
- **Naija parcel No. 41ID No 6144237**
- **Kilesi Tumbes parcel No. 42 ID No 0100817**
- **William R Ole Ntimama parcel No. 52**

And others are now fully rightful owners of their individual land parcels and fully allowed to utilize their land without further interference from any one or group of people we have also attached a sketch map of the same.

We hereby set aside the ruling read and adopted by the Principal Magistrate in Narok on 14th September 2010.

5. COST/AWARD

Respondents to pay all costs enquired by the applicants for all cases.

DATED 30TH DECEMBER DAY OF 2010

AT PROVINCIAL COMMISSIONER’S BOARD ROOM NAKURU.”

10. On 13th May, 2011 the Plaintiffs applied by amended notice of motion dated 12th May, 2011 (the original application was dated 6th May, 2011) seeking the following main orders-

“(a) That the arbitration award of 21st July, 2010 in Narok District Land Tribunals Case No. 10 of 2007 - Olchoro –vs- Enesampulai - and all proceedings subsequent to the said award; Narok SPM Misc. Land Case No. 25 of 2010; and Land Dispute Appeals Committee (R.V.P) L.D.A.C Appeal No. 45 of 2010, are null and void.

(b) That the arbitration award of 21st July, 2010 in District Land Tribunal Case No. 10 of 2007 - Olchoro –vs- Enesampulai - be set aside *ex debito justitiae*, the arbitration be superseded and the suit proceed to trial.”

11. The application is brought under Order 46, rules 8, 10, 11, 13, 16 and 18 and Order 51, rules 1 and 3 of the new Civil Procedure Rules, 2010. Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Cap 21 (the Act) as also cited.

12. The grounds for the application appearing on the face thereof include -

(a) That contrary to the reference order, the panel of elders failed, refused or neglected to file their award within ninety (90) days of the order, or seek extension of time, thereby rendering the award and the entire arbitration proceedings a nullity.

(b) That the panel of elders’ neglect to comply with the order of the court amounts to misconduct.

(c) That whereas the reference was made on 5th November, 2002, the panel of elders did not embark on the arbitration proceedings until 2007, and the award was not made until 21st July, 2010.

(d) That the panel of elders in blatant disregard of the reference order filed the award in the Senior Principal Magistrates’ Court, Narok “essentially equating the arbitration proceedings to a Land Dispute Tribunals Act matter”.

(e) That the aforesaid subordinate court, despite lack of jurisdiction in the reference, declined to stay the proceedings before it in Misc. Land Case No. 25 of 2010 and adopted the award and the appellate decision as its judgment on 14th September 2010 and 8th March, 2011 respectively.

(f) That the panel of elders' and subordinate courts' treatment of the arbitration proceedings as simply a Land Disputes Tribunal Act matter, has consequently led to a failure of justice to the Plaintiffs' detriment.

(g) That the Plaintiffs are apprehensive that should a decree issue from the "flawed proceedings" they are likely to be evicted from the suit parcels on the basis of null, irregular and un-procedural proceedings.

13. There is a supporting affidavit sworn by one **Lekishon Ole Katangie**. To this affidavit are annexed a number of documents. 14. The Defendants have opposed the application by a **statement of grounds of opposition dated 11th July, 2011**. There is also a **replying affidavit sworn by the 2nd Defendant** and filed on the same date, 11th July, 2011. The grounds of opposition emerging from both documents include -

(a) That the application was amended unilaterally without leave of court and without stating the provisions under which the amendments have been effected.

(b) That the application has been filed under Order 46, a provision that deals with arbitration under order of court, whereas the substratum of this application is a Land Disputes Tribunal matter which occasioned the proceedings and decision and/or award of Narok District Land Dispute Tribunal Case No. 18 of 1990.

(c) That the parties herein are different from those that were in the Land Dispute Tribunal case.

(d) That the prayers in the application are ambiguous and unclear; therefore they offend Order 46, rule 16 because no concise grounds of corruption, fraud or concealment of material facts have been pleaded.

(e) That the application is misconceived and amounts to an abuse of court process.

(f) That the supporting affidavit is fatally defective as it offends the mandatory provisions of Order 19, rule 4 by failing to disclose the deponent's true abode; further, the deponent is a stranger and/or non-party to the original suit, not being one of the 43 Plaintiffs in the original plaint.

(g) That the Plaintiffs have deliberately failed to disclose that the 1st Plaintiff is deceased and has not been duly substituted.

(h) That the issues raised in the application ought to be raised in an appeal under the Land Disputes Tribunal Act.

(i) That the panel of elders who dealt with Narok District Land Tribunal Case No. 10 of 2007 carried out the mandate of elders as prescribed under section 2 of the Land Disputes Tribunals Act.

15. In response to the replying affidavit the Plaintiffs filed a supplementary affidavit on 1st August 2011.

16. I have considered the application, grounds of opposition and replying thereto, the rival submissions of the learned counsels and the authorities that were cited.

17. As already seen, no arbitration at all was conducted in accordance with the order of reference entered by consent on 5th November 2002 under Order XLV of the Rules. In other words, there was no arbitration on reference by court under the said Order. The said order of reference had a strict time-line within which the arbitration had to be conducted and an award filed in **this** court. That had to be done within 90 days of the date the order of reference was made - that is, by 4th February 2003. That period lapsed and it was never extended. So, naturally, the order of reference to arbitration simply abated, and the matter ought to

have proceeded to hearing in court in the normal course of events.

18. As already observed, about 5 years after the order of reference was made, a claim was lodged before the Narok Land Disputes Tribunal. That claim involved the suit lands. From the names appearing in the proceedings before the Tribunal, the parties in those proceedings may or may not have been parties also in the present suit. What is important is that those proceedings were under the Land Disputes Tribunals Act, No 18 of 1990. They were not, and could not have been, under the order of reference to arbitration made in this suit on 5th of November 2002, some five years earlier.

19. The proceedings before the Narok Land Disputes Tribunal proceeded under Act 18 of 1990 aforesaid, and the Tribunal gave its award on 21st July 2010. The award was filed in a subordinate court as required by the said Act, in this case the Senior Principal Magistrate's Court at Narok. That court read the award to the parties as required by the Act. An appeal was lodged against the award to the Provincial Appeals Committee, again under the Act. The appeal was heard and a decision made on 30th December 2010. Under the Act, any party not satisfied with the decision of the Appeals Committee had a limited right of appeal to the High Court (on points on law only). No such appeal was lodged by anyone.

20. It is thus clear that the present application is gravely misconceived. It purports to challenge the decisions of the Land Disputes Tribunal and the Appeals Committee as if those proceedings were an arbitration by order of Court pursuant to the order of reference of 5th November 2002. They were not.

21. That being my view of the matter, the present application is not properly before the court. It is hereby struck out and dismissed with costs to the Defendants. It is so ordered. It is not for this court in this ruling to speculate as to the effect upon the present suit of the proceedings and decisions made under the Land Disputes Tribunal Act, or *vice versa*.

22. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully recovered my health.

DATED AT NAIROBI THIS 16TH DAY OF OCTOBER 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER 2012