



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 141 OF 2006

JAMES KIPRONO KIMETO.....1ST
PLAINTIFF

DAVID K. KOMEN.....2ND
PLAINTIFF

ANDREW KENEI.....3RD
PLAINTIFF

KIPRUGUT BARTILE.....4TH
PLAINTIFF

VERSUS

THE CHIEF MAGISTRATE, ELDORET.....1ST
DEFENDANT

THE CHAIRMAN KAPSERET LAND DISPUTES TRIBUNAL.....2ND
DEFENDANT

THE DISTRICT LAND REGISTRAR, UASIN GISHU.....3RD

DEFENDANT

**THE DISTRICT SURVEYOR, UASIN GISHU.....4TH
DEFENDANT**

AND

**JACOB KIMETTO.....1ST INTERESTED
PARTY**

**EZEKIEL KOMEN.....2ND INTERESTED
PARTY**

**MUSA CHESANG.....3RD INTERESTED
PARTY**

**JOHN KOITIE.....4TH INTERESTED
PARTY**

**JULIUS CHEMAKILOT.....5TH INTERESTED
PARTY**

RULING

By a plaint dated, 22nd December, 2006 the plaintiffs seek a declaration that the award of Kapseret Land Disputes Tribunal No. 17 of 2003 and adopted by the Chief Magistrate’s Court was ultra vives the provisions of the Land Disputes Tribunal, Act and therefore unenforceable and of no legal consequence. The suit is by four plaintiffs and is against four defendants namely the chief magistrate Eldoret (1st defendant), chairman Kapseret Land Disputes Tribunal (2nd defendant), District Land Registrar, Uasin Gishu (3rd Defendant) and District Surveyor Uasin Gishu (4th defendant). Five other people are named as interested parties. The defendants are sued in their official capacities and service upon them according to the plaint was to be effected through the office of the Attorney General.

It is averred in paragraph 9 of the plaint that the 2nd defendant chaired a Land Disputes Tribunal which adjudicated upon a matter upon which it had no jurisdiction to do so. As against the 1st defendant, it is averred that she adopted an award by the said tribunal which adoption was not in accordance with the award. It is averred against the 3rd and 4th defendants that they were readying themselves to subdivide the land subject matter to the said award into various portions which event will result in the interested parties obtaining portions of the said land to which they have no right.

When served, the interested parties filed a joint statement of defence in which they denied the plaintiffs’ claim. They further averred that the suit against the 1st to 4th defendants is in competent by virtue of the Government Proceedings Act (Cap 40) which, mandates that suits against them be instituted against the Attorney General. They also averred that the 1st defendant enjoys judicial immunity and the suit against

her is a nullity. Finally, so far as material the interested parties averred that the plaintiffs' suit is incompetent for failure to comply with order 1 rule 12, Order VII Rule 1(2) and order 10(Rule 3 of the Civil Procedure Rules.

The interested parties simultaneously with the filing of their defence, filed a Notice of Preliminary Objection on six (6) grounds expressed as follows:-

- 1) ***That the suit is a nullity for want of compliance with order IV Rule 3 of the Civil Procedure Rules.***

- 2) ***That the suit by the 2nd to 4th plaintiffs is a nullity for want of compliance with order VII Rule 1(2) of the Civil Procedure Rules.***

- 3) ***That the suit is a nullity for want of compliance with order 1 Rule 12 of the Civil Procedure Rules.***

- 4) ***That the suit is a nullity for want of compliance with Order 1 Rule 8 and 22 of the Civil Procedure Rules.***

- 5) ***That the suit is a nullity and discloses no cause of action for want of compliance with section 13A and Section 16 of the Government Proceedings Act, Cap 40.***

- 6) ***That the court has no jurisdiction to stay execution of a judgment which is pursuant to an award not filed before it.***

The Preliminary Objection was canvassed before me on 2nd March, 2011, by Mr. Kibowen for the interested parties and Mr. Muiruri for the defendants. Counsel for the plaintiffs though served, did not attend the court to defend the suit. Both counsel for the interested parties and the defendants urged me to uphold the objection on the said grounds.

I have carefully considered the suit, the grounds of the Preliminary Objection and the submissions of counsel. Having done so I take the following view of the matter. The substance of the objection, in my view, is in grounds 2 and 5. Ground 2 is predicated upon order VII Rule 1(2) of the Civil procedure Rules which reads as follows:-

VII (1)(2) *“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”*

The plaint herein was verified by an affidavit sworn by the 1st plaintiff who also swore the affidavit on the authority of the 2nd to 4th plaintiffs. The said authority was not in writing as the same was not exhibited. There was therefore failure to comply with order 1 Rule 12(2) of the Civil Procedure Rules which reads as follows:-

“12 (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

Not having been authorised in writing, the 1st plaintiff could not swear the verifying affidavit on behalf of

the 2nd to 4th plaintiffs. In **Research international East Africa Limited -Vs- Julius Arisi & 13 others (Civil Appeal No. 321 of 2003) (UR)**, the court of appeal stated as follows:-

“Rather, the suit is filed by all the 214 persons through their advocate as authorised by Order 1 rule 1 Civil Procedure Rules. In that case, each of the plaintiffs is personally responsible for the conduct of his own suit. In our view, none of the 214 plaintiffs has any right to take any steps in the suit on behalf of any other plaintiff without an express authority in writing. Thus, Julius Arisi cannot take any step in the suit on behalf of all the other plaintiffs including filing a verifying affidavit unless he has been expressly authorised by any of the plaintiffs to so act as provided by order 1 rule 12(1) Civil Procedure Rules.”

In the premises the verifying affidavit of the 1st plaintiff was filed without the authority of the 2nd to 4th plaintiffs. The said plaintiffs did not therefore comply with the mandatory provisions of Rule 1 (2) of order VII of the Civil Procedure Rules. What are the consequences of that finding? The answer is found in sub rule 3 of rule 1 of Order VII of the Civil Procedure Rules which reads as follows:-

“VII

(1)(3) The court may of its own motion or on the application by the defendant order to be struck out any plaint which does not comply with sub-rule (2) of this rule.”

It is plain therefore that under the said sub rule the court has a discretion to strike out the plaint or make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule. The plaintiffs’ counsel did not attend at the canvassing of the Preliminary Objection. I was not therefore not urged to give the 2nd to 4th plaintiffs an opportunity to comply with the sub-rule. Even if I had been urged to do so, I would not have done so given the second important ground of objection which is that the suit is a nullity and discloses no cause of action for want of compliance with Section 13A and Section 16 of the Government Proceedings Act (Cap 40 Laws of Kenya).

The defendants, particularly the 1st, 3rd and 4th defendants are sued in their individual official capacities. They were performing or were to perform their official functions. Being government Officials, they should not have been sued in their individual capacities. The Government Republic/State should have been sued through the Attorney General (see Section 126 of Cap 40). In the premises, the suit as laid is clearly incompetent.

A suit against the Government may only be instituted after a prior notice of thirty (30) days. The interested parties have averred that the plaintiffs’ suit is incompetent for want of compliance with Section 13A of the Government Proceedings Act (Cap 40 Laws of Kenya). The record does not show that the plaintiffs’ replied to that averment. It is plain therefore that the suit was filed without the requisite notice having been served upon the Attorney General.

So even if the plaintiffs had sued the Attorney General the suit would not have survived for failure to serve the statutory Notice aforesaid.

In all those premises, the Preliminary Objection is for allowing. The plaint is struck out. The plaintiffs shall bear the costs of the interested parties. As the defendants did not file any response to the suit they will bear their own costs.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF MARCH 2011

F. AZANGALALA

JUDGE

Read in the presence of Mr. Ngala H/B for Mr. Chepkonga for the Interested Parties.

F. AZANGALALA

JUDGE