



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

CIVIL CASE 151 OF 2000

DAVID CHELUGET.....APPELLANT

-VERSUS-

KIPSANG CHEPKWONY.....RESPONDENT

RULING

This is an appeal filed on 5th May 2000. It was initially filed at Kakamega as Kakamega High Court Civil Appeal No.34 of 2000. It was filed by M/S. Anzangalala & Company Advocates. It was later transferred to the Eldoret High Court and it became Eldoret High Court Civil Appeal No.151 of 2000. The appeal challenged the ruling/decision of F. A. Mabele Esq. Principal Magistrate Kapsabet in Principal Magistrate Land Dispute Tribunal Case No.36 of 1997 dated 24th February 2000. The grounds of appeal were that -

1. The learned Principal Magistrate erred in law in confirming the Mosop Land Disputes Tribunal's decision when the said Tribunal had no jurisdiction to entertain the respondent's claim.
2. The learned Principal Magistrate erred in law in confirming he Mosop Land Disputes Tribunal's decision when the plaintiff's claim was barred by the Limitations of Actions Act Cap.22, Laws of Kenya.
3. The learned principal Magistrate erred n law in confirming the award when the subject matter before the Mosop Land Disputes Tribunal was agricultural land to which the Land Control Act Cap.302 Laws of Kenya applied.
4. The Principal Magistrate erred in law in confirming the award when the subject piece of land was not registered in the name of the Appellant and without reference to the registered proprietor.
5. The learned Principal Magistrate erred in law in confirming the award without observing the Rules of Natural Justice. M/S. Momanyi & Company Advocates are the advocates for the respondent. They filed a declaration under Order 41 Rule 10 of the Civil Procedure Rules that the respondent did not wish to attend the hearing of the appeal, and that they would rely on the written submissions, which they filed with the declaration.

Order 41 rule 10A (3) of the Civil Procedure Rules allows a respondent in an appeal to file such a declaration, and also file two copies of such arguments as he desires to submit. The arguments as filed by the respondent are, in summary, that appellant was dissatisfied with the decision of the Mosop Land Disputes Tribunal. That decision of the Tribunal had been read by the Kapsabet Principal Magistrate inKapsabet Land Disputes case No.36 of 1997. That the appellant being dissatisfied, filed Judicial Review proceedings in Eldoret High Court Misc. Application No. 206 of 1997 to quash the decision of the

Tribunal, which was dismissed. Thereafter, the Principal Magistrate at Kapsabet adopted the Tribunal's decision.

The arguments further state that no appeal can lie to the High Court from the decision of the Land Disputes Tribunal. For an appeal to lie to the High Court there must first of all be an appeal to the Provincial Appeals Committee. Thereafter an appeal can only be filed in the High Court within sixty (60) days from the date of the decision of the Provincial Appeals Committee.

At the hearing of the appeal on 10th May 2005, Mr. Momanyi for the respondent raised preliminary points of law, based on the written arguments already filed. He submitted that in terms of section 8 (9) of the Land Disputes Tribunals Act No.18 of 1990, an appeal to the High Court can only lie from the decision of the Provincial Appeals Committee. An appeal from a Land Disputes Tribunal to the Provincial Appeals Committee was required to be filed within 30 days in terms of section 8 (1) of the Lands Disputes Tribunal No.18 of 1990 (the Act). No appeal was filed to the Provincial Appeals Committee, therefore there was no right of appeal to the High Court. Therefore, this appeal to the High Court from the adoption of the Mosop Land Disputes Tribunal's decision by the Kapsabet Principal Magistrate was not sustainable in law. Secondly he submitted that the appellant chose to file Judicial Review proceedings in Eldoret High Court Misc. Application No.206 of 1997. That application was struck out as being incompetent. Then he filed an appeal in the Kakamega High Court, which was www.kenyalawreports.or.ke David Cheluget Kipsang Chepkwony [2005] eKLR 4 later transferred to Eldoret. This was the appeal before this court. This appeal was in fact an appeal against the Land Disputes Tribunal's decision, not an appeal from the magistrate's court decision. Such an appeal from the Land Disputes Tribunal's decision did not lie to the High Court. The appeal should therefore be dismissed with costs. Mr. Muyendo for the appellant opposed the objections. He submitted that the appeal was competent and should be heard urgently. The respondent had not pointed out to court how he had been prejudiced by the appeal. He also submitted that the competency of the appeal was provided for under section 8(1) of the Act. The dispute did not fall under section 8(3) of the Act.

He submitted further that, in case the court was to be persuaded otherwise, then section 8(9) of the Act was relevant to this appeal. The points raised on appeal were points of law. Both the Land Disputes Tribunal and the Provincial Appeals Committee did not have jurisdiction, therefore appealing to the Provincial Appeals Committee would be futile.

This is a preliminary objection on points of law, to the appeal filed by the appellant on 25th May 2000. The appeal has five (5) grounds under the Memorandum of Appeal. All the grounds attack the Principal Magistrate at Kapsabet for adopting the Mosop Land Disputes Tribunal's decision. The grounds on which the adoption of the Mosop Land Disputes Tribunal by the Principal Magistrate are attacked are, firstly that the Tribunal had no jurisdiction to entertain the respondent's claim. Secondly that the Tribunal entertained the respondent's claim which was statute barred. Thirdly that the learned magistrate should not have adopted the Tribunal's award as the subject land was agricultural land and the provisions of the Land Control Act (Cap.302) applied to it. Fourthly that the learned magistrate erred in confirming the award while the subject land was not registered in the name of the appellant and without reference to the registered proprietor. Fifthly that the learned magistrate erred in confirming the award without observing the principles of natural justice.

In my view, all the above are points of law as indicated by Mr. Muyendo. I agree with him on his assertion that the appeal hinges on points of law. However, Mr. Momanyi has argued that no appeal from the decision of the Land Disputes Tribunal as adopted by the Principal Magistrate lies to the High Court. An appeal from the decision of the Land Disputes Tribunal can only lie to the High Court from the Provincial Appeals Committee. I have perused the record of proceedings before the Principal Magistrate at Kapsabet. The award of the Tribunal was read by the learned magistrate on 26th April 1999. Mr. Murgor was present for the defendant (the appellant herein) and Mr. Momanyi for the plaintiff (the respondent herein). Both parties were absent.

I have also seen the award of the Tribunal. It was dated 13th May 1997. The Tribunal awarded or recommended the award to the plaintiff Kipsang Chepkwony 18 ½ acres of land as against the defendant

David Cheluget, on the ground that the plaintiff had bought the land. The award specifically gave the plaintiff 30 days to appeal to the Provincial Appeals Committee.

The award having been read in court, there followed an application for leave to file Judicial Review proceedings by the defendant, which was Eldoret High Court Misc. Application No.180 of 1997. The court ordered that the leave granted to file the substantive application should operate as a stay. The substantive application appears to have been filed as Eldoret High Court Miscellaneous Application No.206 of 1997. Documents on this application are not in the file. However, according to an affidavit sworn by the plaintiff Kipsang Chepkwony on 22nd October 1999, that application was determined on 26th February 1999, and it was struck out with costs. Subsequent to that, on 24th February 2000, the Mosop Land Disputes Tribunal award of 13th May 1997 was adopted as a judgement of the court by F. M. Mabele Esq. Principal Magistrate Kapsabet. Then this appeal was filed by the appellant, who was initially the defendant, at Kakamega in the year 2000 as Kakamega High Court Civil Appeal No.34 of 2000. It was filed on 25th May 2000. It was thereafter transferred to Eldoret and was given an appeal number as Eldoret High Court Civil Appeal No.151 of 2000.

I have found it necessary to go into the background information in this appeal on how the matter progressed, in order to make the issues clearer; and to consider them in proper perspective.

The objection to this appeal is that the appellant cannot appeal to this court from a decision of the Tribunal, unless there is a first appeal to the Provincial Appeals Committee. Secondly that the appeal, which purports to be an appeal from the learned Principal Magistrate's decision in adopting the Land Tribunal's award, is incompetent, as the decision appealed from is still a decision of the Land Disputes Tribunal and therefore no appeal can lie to the High Court. Counsel for the appellant on the other hand has argued that the appeal is competent. That the Provincial Appeals Committee as well as the Mosop Land Disputes Tribunal did not have any jurisdiction, so an appeal could not be filed to the Provincial Appeals Committee, as that would be a futile exercise. In any event this appeal had already been admitted to hearing, so it could not be dismissed on preliminary points.

The procedure for challenging decisions of Land Disputes Tribunals are laid down in section 8 of the Act. The relevant parts of the section provides— "8(1) Any party to a dispute under section 3, who is aggrieved by the decision of the Tribunal may, within 30 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) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court. (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. Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved. (10) A question of customary law shall for all purposes under this Act be deemed to be a question of fact.

In my view, from the above position of the law, it is clear that an appeal to this court from the decision a Land Disputes Tribunal can only lie from an appeal to the Provincial Appeals Committee. If I understand counsel for the appellant well, he argues that they have appealed to this court because firstly the Provincial Appeals Committee, just like the Mosop Land Disputes Tribunal did not have jurisdiction to determine matters of ownership to land. Secondly, the appeal is from the decision of the court at Kapsabet and not that of the Tribunal. He adds that the appeal was in any event admitted to hearing by the High Court in terms of section 8(9) of the Act, which means that there are points of law to be determined.

The jurisdiction of the Land Disputes Tribunals is provided for under section 3 of the Act. Section 3(1) (a), (b) and (c) provide that –

“3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to –

(a) the decision, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work on land; or

(c) trespass to land shall be heard and determined by a tribunal established under section 4.

In my view, the jurisdiction of the Land Disputes Tribunal is restricted to determining disputes on division and boundaries to land; disputes on occupation and working on land; as well as trespass to land. It does not cover determination of disputes relating to ownership of land. The Mosop Land Disputes Tribunal did in fact, in this case, deal with ownership of land, and made an award. It did not have jurisdiction to adjudicate or deal with ownership to land. However, since that was a decision of the Land Disputes Tribunal, any appeal by any party who felt aggrieved should have been filed in the Provincial Appeals Committee as provided for under section 8(1) of the Act. The argument that the Provincial Appeals Committee did not have jurisdiction is a fallacy. That committee could determine whether or not the Mosop Land Disputes Tribunal was right or had jurisdiction in dealing with ownership to land. The lack of jurisdiction of the Mosop Land Disputes Tribunal to determine or make an award for ownership to land should have been one of the points of law to be taken on appeal to the Provincial Appeals Committee. If the Provincial Appeals Committee did not give a favourable decision, that would be a point of law to be taken in the High Court on appeal as envisaged in section 8 (9) of the Act. Therefore, in my view, the appellant should have appealed first to the Provincial Appeals Committee before filing an appeal to this court.

As it is in this matter, the appellant never appealed to the Provincial Appeals Committee within 30 days as required by law. Therefore the award of the Land Disputes Tribunal was read and adopted by the Principal Magistrate at Kapsabet. The appellant claims that he can appeal to this court from the decision of the magistrate in adopting the Mosop Land Disputes Tribunal's award. The points he has raised are points of law. Is there legal provision for appealing to this court from the decision of the learned magistrate after adopting the Land Disputes Tribunal's award?

The appellant contends that he is entitled to appeal to this court from the decision of the magistrate at Kapsabet adopting and executing the decision of the Land Disputes Tribunal. I find no provision in law for appealing against the magistrate's order in adopting a decision of the Land Disputes Tribunal. In my view, the adoption by the magistrate does not change the status of the Land Disputes Tribunal's decision. The adoption does not make the Land Disputes Tribunal's decision a decision of the court. The adoption only facilitates making it a decree by the court for purposes of execution, as the Land Disputes Tribunal does not have execution powers. In this regard, I fully agree with the reasoning of Justice Etyang in the case of Fredrick Inyangu Chandanya –vs- The Chairman Kapsabet Land Disputes Tribunal and Another Eldoret High Court Miscellaneous Application No.150 of 1999 (unreported). The learned Judge in a ruling dated 1st October 2002 at page 3 held –

“A decision of the Tribunal is not expunged or obliterated from the court record just because it is adopted by the court as its judgement. The issue is not that the Tribunal's decision is no longer on record, for it is on record.” The appellant herein seems to attack the decision of the magistrate in adopting the Mosop Land Disputes Tribunal's award. He raises several points of law, as listed in the ground of appeal, which I have reproduced at the beginning of this ruling. I do not think that he was right in challenging the learned magistrate on those points of law. The legal provisions regarding the adoption and execution of an award from the Land Disputes Tribunals are found in section 7 of the Act, which provides – “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 judgment 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.

It is clear from the foregoing that a magistrate has no discretion to question whether the Land Disputes Tribunal had or had no jurisdiction to grant the award that it awarded. The function of the magistrate's court is to adopt the decision and enter judgement, issue a decree and enforce the decision of the Land Disputes Tribunal. It follows therefore that the magistrate's court has to adopt and enforce the Land Disputes Tribunal's decision as it is. The magistrate's court does not have jurisdiction to question the Land Disputes Tribunal's decision. That is left to the parties to question the decision of the Land Disputes

Tribunal, through the procedures allowed by the law.

Once the Land Disputes Tribunal's award has been adopted by the magistrate's court, the only avenue available to the parties is to apply for the judicial review under Order 53 Civil Procedure Act (Cap.21) and section 8 and 9 of the Law Reform Act (Cap.26). There is no avenue for filing an appeal to the High Court, the way the appellant has done in this case. It does not matter even if the appeal is on technical points of law as raised by the appellant herein. In any case those technical legal points do not arise against the magistrate, as the learned magistrate did not have powers to check and/or review the decision of the Land Disputes Tribunal. Appellant's counsel also argues that, in any event, this appeal was admitted to hearing under section 8(9) of the Act. Therefore, in his view, the appeal cannot be struck out or dismissed on preliminary objections.

I have perused the record in the file. I have seen a written communication from the Deputy Registrar Kakamega, dated 20th September 2000, to David Cheluget the appellant stating that the appeal had been admitted to hearing. I have not seen any endorsement or certificate from a Judge that the appeal was indeed admitted to hearing, as required by section 8(9) of the Act. I am doubtful whether the appeal was properly admitted to hearing as required by law. The deputy Registrar does not have powers to certify and admit an appeal to hearing under section 8(9) of the Act.

Even if the appeal was properly admitted to hearing, my view is that, as it is clear that the appeal is incompetent in law, the matter can still be dealt with by the court and determined through a preliminary objection. The points of objection raised by the respondent were not an ambush. They were filed way back on 4th October 2002. In my view, it will serve no purpose to let the appeal proceed to full hearing when it is abundantly clear that the appeal is incompetent. That will not be in the best interests of justice. That would only result in spending more time of the court and possibly adding to costs. In any event, in this appeal, I find no evidence that the appeal was actually certified by a judge that an issue of law is involved, as required by section 8(9) of the Act. For the above reasons I find that this appeal is incompetent and dismiss the same. I award costs of appeal to the respondent.

Dated and Delivered at Eldoret this 7th Day of June 2005

George Dulu

Ag. Judge

In the Presence of: Mr. Keter for appellant Mr. Chumo for respondent