REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC MISC. APPL. NO. 91 OF 2006

REPUBLIC .....APPLICANT

VERSUS

CHEPARERIA LAND DISPUTES TRIBUNAL COMPRISING OF:

1. JOSEPH MILLIONGAR

2. PIUS MERIAKEREN

3. SAMWEL LOMUR

4. KTIO CHEMCHUNG

5. RAEL LOMONYANG.....1ST RESPONDENT

THE SENIOR PRINCIPAL MAGISTRATE, KITALE.....2ND RESPONDENT

AND

LOPUONYANG CHELEKEN.....INTERESTED PARTY

EX PARTE: MATAYO KIDOPUS

JUDGMENT

1. By a Notice of Motion dated **20/7/2006** and filed in court on the same date bought under **Section 8 & 9** of the **Law Reform Act Cap 26 Laws of Kenya** and **Order LIII Rules 3 & 4 of the Civil Procedure Rules** the *ex parte* applicant seeks the following orders:-

> **1. That an order of certiorari be granted to the applicant herein to remove into this honourable court and quash the decision of the Chepareria Land Disputes Tribunal which was read and adopted as a judgment of the court on 15/2/2006 vide Kitale SPMC's Land Case No. 54 of 2005.**

2. The application is supported by the affidavit of the applicant sworn on **20/7/2006.** The application is premised on the grounds that the Chepareria Land Disputes Tribunal had no jurisdiction to entertain, hear and make a decision on a claim concerning land registered under the **Registered Land Act (Cap 300 Laws of Kenya)**; that the Chepareria Land Disputes Tribunal had no jurisdiction to order that the interested party be given a portion of the applicant's land and award them costs and that the Chepareria Land Disputes Tribunal acted in breach of the rules of natural justice by condemning the applicant unheard. It was further sought that leave granted do continue operating as stay of enforcement of the tribunal award while pending the determination of that application and that costs be provided for.

Submissions

3. The *ex-parte* applicant and the respondents filed their written submissions on **15/2/2021.** The interested party filed his submissions on **17/2/2021**. I have considered those submissions.

Determination

4. The issues arising for determination in the instant application are as follows:

> **a. Did the tribunal have jurisdiction to hear and determine the application, order that the interested party be given a portion of the applicant's land and to award costs to the interested party?**
>
> **b. Did the tribunal violate the rules of natural justice with regard to the applicant?**
>
> **c. Is the application defective for failure to exhaust all other legal options available to the applicant?**
>
> **d. Should the decision of the tribunal be quashed?**
>
> **e. Who should bear the costs of these proceedings?**

The issues are discussed as hereunder.

5. The proceedings and award of the land disputes tribunal are attached to the supporting affidavit. A photocopy of the title deed to the suit land is also exhibited. The suit land is referred to as **West Pokot/Chepareria/841** and it measures approximately **4.74 ha.** It is registered in the name of the applicant. The title to the land appears to have been issued on **30/3/2006** as that is the date appearing on the face of the title deed. However the second page of the title deed shows that the register was opened on **1/7/1998.** This is the date of registration. The date on the proceedings reads as **24/8/2005.** The decision of the tribunal was issued on **12/10/2005.** Clearly, the dates of the proceedings and the award are preceded by the date of the registration of the suit land. It is trite now that a tribunal or any other quasi-judicial body must act within its jurisdiction. Jurisdiction is granted by statute or by the constitution. The source of jurisdiction on the part of land disputes tribunals is **Section 3(1) Of the Land Disputes Act No 18 of 1990** (now repealed.) That section only grants a limited jurisdiction to the tribunal as follows:

> **"(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."**

6. The applicant has cited the cases of **M'Marete V Republic & 3 Others 2004 eKLR, Christopher Wafula Mutoro Vs Richard Lordia Lokere 2019 eKLR** and **Jotham Amunavi Vs The Chairman Sabatia Division Land Disputes Tribunal & Another Civil Appeal No 256 Of 2002** as cited in **Republic Vs Kiambu District Land Disputes Tribunal And Another *Ex Parte* Teresiah Wambui Gikuna & Another JR ELC No 13 Of 2011** in respect of whether or not the tribunal had jurisdiction over titled land. There are numerous other decisions stating that the tribunal could not adjudicate over land registered under the **Registered Land Act**. Others are **Asman Maloba Wepukhulu and Another -vs- Francis Wakwabubi Biketi Kisumu CA Civil Appeal No. 157 of 2001** and **Mary Mukhonja -vs- Maxwel Burudi and Joseph Kidemuk Kitale ELC Civil Appeal No. 4 of 2018.**

7. The counsel for the respondents cites the decision of **Masagu Ole Koitelel Naumo Vs Principal Magistrate Kajiado Courts & Another 2014 eKLR** to controvert this position and he quotes this passage therefrom:

> **"In my view the view that the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land. Otherwise section 3 of the Land Disputes Tribunals Act did not limit the jurisdiction of the Tribunal to lands outside the regime of registered land. I associate myself with the decision of Khamoni, J in Republic vs. Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex Parte Kariuki [2005] 2 KLR 10 to the effect that the Legislature, and definitely, framers of the Land Disputes Tribunals Act, knew the Act was intended to give Land Disputes Tribunals jurisdiction to adjudicate over all land in Kenya, including land registered under the Registered Land Act and therefore in cases where the dispute fell within section 3 aforesaid, it did not matter whether or not the land in question was registered under the Registered Land Act."**

8. In the **M'Marete case (supra)** the Court Of Appeal stated that:

> **"…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."**

9. In this court's view the holding by the Court Of Appeal in the case of **M'Marete (supra)** satisfies this court that the tribunal acted beyond its powers in doing as it did.

10. In the case of **Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR** it was stated as follows by the Court Of Appeal:

> **"Jurisdiction is what clothes a court with the authority to entertain a matter before it and issue appropriate orders. A court either has jurisdiction or doesn't. It cannot be inferred or presumed."**

11. In the case of **The Owners of Motor Vessel 'Lillian "S"' vs Caltex Oil (Kenya) Ltd [1989] KLR 1** the Court Of Appeal stated as follows concerning jurisdiction:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

12. In the case of **R Vs Electricity Commissioners Board 1924 1 KB 171** the court stated as follows:

"Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially acts in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

13. If the tribunal in the instant dispute had examined the facts and known that it was dealing with registered land it would, perchance it was acquainted with the consequences of want of jurisdiction in a determined dispute, have downed its tools. However, that did not happen. The tribunal proceeded to hear evidence and determine the dispute before it, and it is clear that the decision of the tribunal made on **12/10/2005** must be quashed by this court.

14. In the same vein, it is also clear from the provisions of **Section 3(1)** of the **Land Disputes Act** that the tribunal had no jurisdiction to either order the subdivision of the applicant's land or the award of costs against him.

15. As to whether the tribunal violated the rules of natural justice with regard to the applicant, the submits that he was never served with summons as required by **Section 4** of the **Land Disputes Tribunal Act** and that he was therefore not invited to make his defence and the tribunal made its decision without hearing his side of the case. The case of **Republic Vs Chairman Keumbu Land Disputes Tribunal & 2 Others Ex Parte Nicodemus Momanyi 2012 eKLR** was cited in this regard.

16. Article 50 (1) of the **Constitution** provides as follows:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate another independent and impartial tribunal or body."

17. The right under **Article 50** does not apply to claimants alone but to all parties in a dispute. The question arises as to how the constitutional right to have one's dispute resolved as envisaged by **Article 50(1)** can be realised if no service of process is effected.

18. The submission of the interested party on this issue is as follows:

"The applicant was summoned by the elders on several occasions to appear before them and he neglected to do the same despite summons being issued. The applicant was served and a return of service sworn on 3rd February 2006 duly filed in court before the judgment was adopted in court as required by the Civil Procedure Act."

19. With respect, the only service of process that is of consequence in the present proceedings is service of summons to the applicant to attend the proceedings before the tribunal and defend himself and not summons to appear before the magistrate's court to attend the formal adoption of the already made tribunal award. It is clear that if such summons were served even at the magistrate's court level the only manner in which the respondents and the interested parties could have brought them to the notice of this court, and which they never undertook, was through an affidavit to which those summons would be annexed. In the eyes of this court the mere submissions of the parties at the tail end of these proceedings are not to be equated with evidence by affidavit and this court declines to take them as evidence of service.

20. As I have stated before, evidence of service of summons should be in the record of the proceedings, which should be further supported by production by way of an affidavit of the copies of summons served upon the *ex parte* applicant. There was no appearance recorded on the part of the applicant and no replying affidavit exhibiting the served summons, or indeed indicating that summons had been effected in any other manner, was filed in these proceedings. For that reason I am persuaded that the rules of natural justice were violated with regard to the applicant who was therefore not able to present his defence to the claim before the tribunal.

21. The last issue is that of alternative remedies. Is the application before court defective for failure to exhaust, as urged by the respondents, all other legal options available to the applicant? The respondents aver as much. I have considered their opinion. They seem to state that the applicant should have appealed to the provincial appeals committee as provided for in **Section 8 (9)** of the Act and that he could only access this court on a point of law. They cite the case of **Paul Muraya Kaguri Vs Simon Mbaria Muchunu 2015 eKLR** and quote the following passage in that case:

"17. It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say that their rights were denied."

22. There are other decisions that state as much such as **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** in which it was stated as follows:

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and

statutory provisions."

23. In the case of **Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR** the Court Of Appeal observed as follows:

> **"[35] As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this Court in Cortec Mining Kenya Limited vs. Cabinet Secretary Ministrv of Mining & 9 others [2017] eKLR and Kenya Revenue Authority & 5 others vs. Keroche Industries Limited -Civil Appeal No. 2 of2008. Perhaps, that is the reason why the legislator under Section 9(4) of the Fair Administrative Action Act stipulated that:-**
>
> > **"Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedv if the court considers such exemption to be in the interest of justice."[Emphasis added]**
>
> **Our reading of the above provision reveals that contrary to the appellants contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy."**

24. In the **Kenya Revenue Authority case (**supra) the Court Of Appeal cited the decision in **Republic vs. National Environmental Management Authority- Civil Appeal No. 84 of 2010** (hereinafter **"NEMA case")** where it had earlier observed that

> **"…it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular caseand ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ..."**.

25. In the **Kenya Revenue Authority case (supra)** the Court Of Appeal while dealing with what was to be deemed more appropriate between a statutory appeal and a judicial review application observed that.

> **"…to us, the dispute rightly fell within the scope of judicial review which is concerned with the decision making process rather than the merit consideration of the decision in issue. As respondent was alleging arbitrariness on the part of the appellants, on the face of it, it would seem the High Court could not have declined to hear the matter, but once you excavate further as it happened in the course of the hearing; that the refusal by the appellants to clear the sugar was due to failure on the part of the respondent to produce evidence to show that the subject sugar was exempt from duty, that is when matters begin to look like perhaps the judicial review forum was not the most efficacious in the circumstances. This is because judicial review does not avail parties' court room processes to thrash out disputed matters."**

26. A test akin to that applied by the Kenya Court Of Appeal in the **Kenya Revenue Authority Case (supra)** and the **NEMA case (supra,)** when applied to the instant case also brings this court to a conclusion that this is a matter in which the applicant raised by his judicial review motion matters of jurisdiction and procedure and which were more appropriate to be handled by this court and not in the statutory appeal suggested by the respondents. In any event a decision asserting that the tribunal had jurisdiction, perchance it would have been arrived at in the statutory appeal in the event it had been filed, would not have precluded the applicant herein from approaching this court for a possible different interpretation.

27. For the above reasons it is clear that the availability of alternative remedies in this dispute is not a bar to the hearing and determination of the dispute by this court.

28. The upshot of the foregoing is that this court finds that the judicial review notice of motion dated **20/7/2006** has merit and the same is hereby granted in terms of **prayer no 1** thereof. I hereby issue an order of *certiorari* removing into this court and quashing the decision of the Chepareria Land Disputes Tribunal which was read and adopted as the judgment of the court in **Kitale SPMC's Land Case No 54 of 2005.**

29. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI VIA ELECTRONIC MAIL ON THIS 31ST DAY OF MARCH, 2021

MWANGI NJOROGE

JUDGE, ELC, KITALE.