



Republic (Through Bramwel Kisach) v Attorney General (For and on Behalf of the Mt. Elgon Land Disputes Tribunal); Morko Naibei Kisach (Interested Party) (Environment and Land Miscellaneous Application E007 of 2023) [2023] KEELC 21599 (KLR) (9 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21599 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2023
EC CHERONO, J
NOVEMBER 9, 2023

BETWEEN

REPUBLIC (THROUGH BRAMWEL KISACH) APPLICANT

AND

HONOURABLE ATTORNEY GENERAL (FOR AND ON BEHALF OF THE MT. ELGON LAND DISPUTES TRIBUNAL) RESPONDENT

AND

MORKO NAIBEI KISACH INTERESTED PARTY

JUDGMENT

1. The Applicant, Bramwel Kisach commenced these proceedings vide a Notice of Motion application dated 8th March, 2023 seeking the following orders;
 1. That this Honourable Court shall be pleased to issue an order of certiorari and prohibition to remove into this Court and quash the decision of the Mt. Elgon Land Disputes Tribunal read and adopted as judgment of the Senior Principal Magistrate’s Court at Kimilili Land Case Number 26 of 2001
 2. That the costs of this application be provided for.
2. The application is premised on grounds apparent on the face of the said application and the supporting affidavit of Bramwel Kisachi, the Applicant herein. The application is further supported a supplementary affidavit and numerous annexures thereto.
3. By way of a response, the Interested party filed a Replying affidavit sworn on 12th April, 2023. The said Replying affidavit also contain numerous annexures in further opposition to the application. The Respondent only filed a Memorandum of appearance.



4. When the application came up for directions on 26/9/2023, the parties agreed to dispose of the same by written submissions. At the time the Court withdrew to write this Judgment, none of the parties had filed their submissions.

Applicant's Summary Of Facts

5. In his supporting affidavit, the applicant stated that the Interested party herein lodged a claim against him at the then Mt. Elgon Land Disputes Tribunal claiming ownership of his land comprised in parcel No. N.malakisi/n.wamono/200. He deposed that he never participated in the proceeding whatsoever and recently during arbitration is when he realized of the existence of the Tribunal Proceedings having awarded his land to the Interested Party.
6. The applicant further deposed that the Interested party caused the suit land to be transferred to himself without his knowledge and now intends to remove him from the same. He stated that he has been advised by his advocate on record that the dispute was taken to a wrong forum since the Land Disputes Tribunal had no jurisdiction to entertain a beneficial claim in respect of a parcel of land that had title, hence it is amenable to a judicial review. In response to the replying affidavit, the applicant deposed that what he knows of his knowledge is that what is in issue for determination by this court is the legality of the award by the Mt. Elgon Land Disputes Tribunal which was later adopted by court.
7. He stated that he has been advised by his advocate on record that the mandate given to the Land Disputes Tribunal during its life time was limited to the boundary dispute and nothing more. He deposed that despite his absence during the Tribunal proceedings, the Tribunal went ahead and ordered him to leave land comprised in N.malakisi/n.wamono/238 which exceeded the Tribunal's jurisdiction/mandate.
8. The applicant further stated that in determination of Sirisia Succession Cause No. 4 of 2010, the court was guided by the said Tribunal findings to rule in favour of the Interested party and apparently the Interested party has caused the registration in the land register and is threatening eviction. He said that a court of law cannot sanction what is illegal, and an illegality once brought to the attention of court, overrides all questions of pleadings including any admission thereof and a court cannot sanction an illegality.
9. The applicant by way of rejoinder also deposed that the issue for determination by this court is wholly on the illegality of the Tribunal award and the illegality will not be saved by time or be sanitized by the subsequent events as the Interested party want this court to believe. In conclusion, the applicant stated that notwithstanding all the anomalies occasioned by the Tribunal, he is still in physical occupation of the land and urged the court to allow the application.

Interested party's summary of facts

10. The Interested party in his replying affidavit deposed that the application is overly an afterthought, frivolous, vexatious and an outright abuse of the due process of law. He stated that the entire application is time barred. He stated that prior to the said Tribunal Proceedings, their late father, Suruali Kuminyim Kisach had already shared out the parcel of land to each holding separate title and that the court adoption advised them to file the succession cause which he did *vide* Sirisia Succession Cause No. 4 Of 2010. He further stated that after he filed an application for confirmation of grant in Succession Cause Sirisia No. 4 OF 2010, the applicant herein raised an objection which was heard and determined. A copy of proceedings and the Ruling was annexed to the replying affidavit and marked MNK-2a b.



Legal analysis and deision.

11. I have considered the Notice of Motion application, the supporting and supplementary/rejoinder affidavits, the replying affidavit and the relevant law.
12. What the applicant is seeking in this application is an order of certiorari and prohibition to remove into this Honourable Court for purposes of quashing the decision of the Mt. Elgon Land Disputes Tribunal read and adopted as the judgment of the Senior Principal Magistrate's Court at Kimilili Land Case No.26 of 2001.
13. It is not in dispute that when Environment and Land Court was enacted, it repealed the *Land Disputes Tribunal Act* No.18 of 1990.
14. Section 30 of the *Environment and Land Court Act* Cap 12A provides for the transitional clause and states that all proceedings relating to the environment, planning or to the use and occupation and title to land pending before any court or local Tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and land court is established under the *Act* comes into operation or as may be directed by the Chief Justice or the Chief Registrar.
15. Pursuant to Section 30 of the said *Environment and Land Court Act*, and upon the establishment of the *Environment and Land Court Act*, the then Chief Justice Hon. Dr. Willy Mutunga vide Gazette Notice No. 16268 issued practice directions in particular practice direction No.6 which states as follows;
“ all proceedings which were pending before the Magistrates Courts having been transferred thereto from the now defunct District Land Disputes Tribunal shall continue to be heard and determined by the same courts.”
16. Section 13 of the said *Environment and Land Court Act* gives the court original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other written law relating to the Environment, planning and land. Section 13(4) of the same *Act* further provides that in addition to the matters referred to in subsection (1) and (2), the court shall exercise Appellate jurisdiction over the decisions of subordinate courts or local Tribunals in respect of the matters within the jurisdiction of the Court.
17. From my reading of Section 23(3) of the *Interpretation and General Provisions Act*, it is clear that the Repeal of the District *Land Disputes Tribunal Act* did not affect any rights, privileges, or obligations acquired, accrued or incurred under it, unless a contrary opinion was indicated.
18. Since the *Environment and Land Court Act* granted the Environment and Land Court both original and Appellate jurisdiction, it followed that the proceedings which were pending before the defunct District Land Disputes Tribunal were transferred to the Magistrates court and as any appeal from the Defunct District Land Disputes Tribunal lied in the Provincial Land Appeals Committee, it became natural that all the Appeals that were pending before the Provincial Land Appeals Committee are deemed to be assumed by the Environment and Land under its Appellate jurisdiction.
19. The applicant in this case seeks an order of certiorari and prohibition to remove into this Court for purposes of quashing the decision of the Senior Principal Magistrate's Court at Kimilili Land Case no. 26 of 2001. The applicant is challenging the adoption of the award by the learned Magistrate arguing that the Tribunal was not seized with jurisdiction to handle the matter. The applicant is also challenging the award on grounds that he never participated in the proceedings whatsoever. He annexed a copy of the decree where the award by Mt. Elgon District Land Disputes Tribunal was adopted by the Kimilili Senior Resident Magistrate Hon F.K Gitonga on 23/10/2007.



20. It is clear from Section 3(1) of the repealed *Land Disputes Tribunal* No.18 of 1990 that Tribunals had limited jurisdiction to claims to occupy and work on land, division or determination of boundaries and trespass to land.
21. Section 8(1) of the same *Act* provided for any party to the dispute dissatisfied by the decision/award of the Tribunal to appeal to the Provincial Appeals Committee within 30 days of the decision and where a party was not satisfied with the decision of the Provincial Appeals Committee had a right to appeal to the High Court for review within sixty (60) days of the decision on points of law.
22. It is clear from the evidence by the applicant that after the award of the Tribunal was adopted by the Kimilili Senior Resident Magistrate's Court on 23/10/2007, the award became the judgment of the court that would only be challenged by way of an appeal to the Provincial Appeals Committee and subsequently to the High Court by way of judicial review. There is no evidence that the applicant exercised his right of appeal against the award by Mt. Elgon Land Disputes to the Provincial Appeals Committee within thirty days (30) days from the date of the said decision. There is also no iota of evidence that the applicant filed an appeal before the High Court challenging any decision by the provincials Appeals Committee within sixty days (60) days from the date of such decision. Equally, there is no evidence that there were any proceedings relating to the dispute herein pending before any court or local Tribunal of competent jurisdiction at the time the defunct District *Land Disputes Tribunal Act* No.18 of 1990 was repealed to usher in the *Environment and Land Court Act* Cap12A. Since the applicant did not challenge the decision of Mt Elgon District Land Disputes Tribunal and its adoption by the Kimilili Senior Resident Magistrate Court in accordance with the *Land Disputes Tribunal Act* No.18 of 1990 or by way of judicial Review within the stipulated period under the repealed *Act*, the present application in my respective view is an afterthought and one that is brought without leave of the court as that is the only known procedure for challenging the said decision.
23. In view of the foregoing, the applicant's failure to appeal against the decision by the Tribunal which was adopted by the Magistrate's court at Kimilili Court on 23/10/2007 or seek leave to file the suit out of time deals a blow to this application and this court need not go into other issues.
24. The upshot of my finding is that this suit commenced by way of a Notice of Motion dated 8th March 2023 and filed in Court on 9th March, 2023 is hereby dismissed and since the applicant and the Respondent are close relations, I order each party to bear his own costs.

DATED, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 9TH NOVEMBER, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

PARA 1.

Applicant-present

PARA 2.

Interested party-present

PARA 3.

Respondent-absent

PARA 4.



