



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

JUDICIAL REVIEW NO. 32 OF 2010

KABIRONG' CLAN

JOHN NG'ENO.....APPLICANT

VERSUS

THE ATTORNEY GENERAL (ON BEHALF OF MARAKWET

DISTRICT LAND DISPUTES TRIBUNAL AND THE SENIOR RESIDENT

MAGISTRATE'S COURT AT ITEN).....1ST RESPONDENT

AND

KAPSIBONGE CLAN

JOHN K. CHEROP

NICHOLAS KOIMUR

WILLIAM S. CHEMURKWO.....2ND RESPONDENT

JUDGMENT

The Applicants filed this judicial review seeking, in a nutshell, orders of certiorari to remove into the High Court proceedings of Marakwet District land Tribunal land Dispute Case No. 16 of 2018 for the orders including that of 27-3-2009, 27-4-2009 and 12-6-2009 and of the senior resident magistrates' court LDT case no. 15 of 2009 including 7-4-2010 between the interested party/second respondent and the ex-parte applicants over disputed land at Kaptalian Aror location for purpose of their being quashed forthwith on their removal into the high court.

The Grounds for judicial review in a nutshell are;

- The cause of action arose from purchase/sale of land at some consideration that is time barred and which the tribunal has no jurisdiction to entertain.
- The clans have no capacity to sue or be sued and there is no leave for the parties shown as the complainants and defendants to sue or be sued in representative capacities for the members and families of the Kapsibonge and Kabirong clan.
- The tribunal has no jurisdiction to deal with Magistrates relating to the estate of Mzee Kabirong deceased and his children.
- The provincial administration had no authority to lock out the beneficiaries/dependants of the estate of the late Mzee Kabirong.
- The property has been owned by the clan of the ex parte applicant for 200 years without any dispute.

- The evidence of the 2nd respondent during the hearings was full of inconsistencies.
- The tribunal elders, chief and assistant chief were biased in their award.
- The proceedings violate the land Disputes Tribunal Act No. 18 of 1990.

APPLICANT'S CASE

Land Dispute case no. 16 of 2008 was between the clans and the defendant as per the minutes of 27th March 2009. Service by way of written invitation letters was given to the clans. The dispute was between the clans and not the people listed as complainants and defendants.

The 6th or 7th meeting of 27th April 2009 was between the clans. The people in attendance were listed as complainants and defendants. The case meeting was asked through the elders to award the Kapsibonge clan the disputed land. The case meetings of 27th March and April 2009 were not served on the clans.

Further, the applicant submits that the persons who gave and those who received the Kshs. 2000/- as consideration for the land were not parties to the dispute before the tribunal.

The resolution and the awarding witnessed by Benjamin Kapsilei, Gabriel Cheptoo and Kaino Yego on 12-6-09 and 13-6-09 were biased and null. They were not based on the evidence of 27-3-09 and 27-4-09 before the same being forwarded to the resident magistrates' court by the Marakwet District Commissioner's letter.

The award in the Marakwet Land Dispute Tribunal Case number 16 of 2008 between the Kapsibonge clan and the Kabirong Clan was read on 7th April 2010 and adopted in ITEN SRMCC land Dispute tribunal case number 15 of 2009 in which the court gave and issued the decree given and issued on 7th April 2010 and 11th May 2010 in which the disputed land was awarded to the Kapsibonge Clan and the clan was advised to pay Kshs. 2,000 as compensation.

In a letter dated 28th April 2009, Joseph Tenoi wrote to the Marakwet district minister of lands at Kapsowar expressing his and other clan members' refusal to accept the resolution of the tribunal of the meeting held on 27th April 2009.

The applicant submitted that the meetings were between clans which had no capacity to sue or be sued, receive service of invitation letters or attend such meetings or be present in representative capacities on behalf of such clans thus the tribunal had no jurisdiction to hear such disputes whose parties had no capacity and were not present in the meetings.

Parties on both sides were only in attendance on 27th March 2009 and 27th April 2009 with no capacity to sue or be sued. There was no service of invitation letters to the beneficiaries and dependants of Mzee Kabirong who were locked out from being heard. Further, the applicant submitted that the proceedings and the award of the tribunal were not under Act No. 8 of 1990 as there were no parties in the meeting and the dispute involved deceased persons whose beneficiaries were not parties.

The Marakwet District Commissioner only featured in the letter to the resident magistrate's court at Iten. The issue of the kshs. 2,000 compensation involved parties who were deceased. The decree issued and given on 7th April 2010 was in violation of the Act and customary law.

The cause of action was between parties who were deceased and the issue of purchase of land is an issue of contract whose parties are neither the clans or the applicant. The parties to the contract are deceased and such parties are time barred under Marakwet customary law.

1st & 2ND RESPONDENTS' CASE

The ex parte applicants failed to prove that they were beneficiaries through a succession cause and as such were denied an opportunity to be heard. They never raised the issue of not all clan members being present on the date of 27th April 2009. The ex parte applicant has also failed to institute the said suit and thus the application is improper. Further the property in question is community land and thus the law of succession is inapplicable.

Order 1 rule 13 sets out the requirement for representative suits and the applicant has failed to meet the requirements.

The suit property was not titled and fell within the jurisdiction of the tribunal. As per the Act, the tribunal could only entertain matters involving community land. The tribunal was within its jurisdiction as per section 3(1)(a)(b).

The land was granted to the Kabirong founder for him to provide for his family. This can be said to show that the matter before the tribunal was well within its jurisdiction and the case to be decided was whether the land granted to the ex parte applicants for their use and occupation included the descendants.

The 1st respondent further submitted that the tribunal gave a lawful ruling and one could only seek redress from the High Court after one has sought redress from the appeals committee. The Act did not envision a situation where one could automatically move to the High Court.

According to the Act, one can only appeal on matters of law as per section 8(9) and (10). The present appeal expounds on issues of fact and not law.

Based on the attendance of 27-03-09 there were members from both sides of the clan and therefore the claim of non-attendance due to failure to be invited is unfounded. Each party was given an opportunity to address the tribunal and opportunities to question witnesses who testified.

ISSUES FOR DETERMINATION

In judicial review, the courts are concerned with the process and not the merits. Therefore, the issues for determination are;

- a. Whether the tribunal had jurisdiction to hear the matter.
- b. Whether the parties had capacity to appear before the tribunal.
- c. Whether the decision of the tribunal was lawful.

WHETHER THE TRIBUNAL HAD JURISDICTION TO HEAR THIS MATTER

Section 3 of the Land Disputes Tribunals Act states;

3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to—
- (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, shall be heard and determined by a Tribunal established under section 4.

The land is not registered or titled and therefore falls within the jurisdiction of the tribunal.

In **Republic v Marakwet District Land Disputes Tribunal & 6 others Ex-Parte Shaban Clan & 3 others [2016] eKLR** the court held at paragraph 11;

The land in dispute was *unregistered land*. It was held in common. The dispute between the parties before the tribunal was essentially a *civil claim* to determine the right to *possess, occupy or work* on the land. It fell squarely within the ambit of section 3 of the statute.

I find that the tribunal had jurisdiction to deal with the matter before it.

WHETHER THE PARTIES HAD CAPACITY TO APPEAR BEFORE THE TRIBUNAL

Clans are large and usually have very many members therefore it would be unreasonable to expect all members to be present at the hearings. However, from the minutes of the Land Dispute tribunal on 27th March 2009 and 27th April 2009 it is apparent that there were people who represented the clans from both sides. The applicant and some of the respondents were present at the tribunal and testified before the tribunal. If at that point they did not have the authority to represent the clans, where is the authority to appear before the court presently?

Order 1 rule 13 gives the provisions for a representative suit as follows;

13. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

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

In **Republic v Marakwet District Land Disputes Tribunal & 6 others Ex-Parte Shaban Clan & 3 others [2016] eKLR** the court held;

There is a real question whether the interested parties could speak for their clan. But it is a double edged sword because the ex-parte applicants themselves have not fully complied with the requirements of a representative suit. Certainly no authority to act on behalf of other members has been annexed. Quite obviously the clan is a large and fluctuating body. A large number of the members are not even parties to this suit. But that would hoist a technical objection over substantive justice. It flies in the face of article 159(2)(d) of the Constitution; more so in a land matter.

What is material is that the representatives of the conflicting clans were heard by the tribunal. I have studied the minutes of the meeting of L.D.T 15 of 2008 of 13th June 2008. Chepkonga Chesomoi, Joseph Alimaris and Joel Kilimo (the 2nd, 3rd and 5th *ex parte* applicants) were *present* and *testified* before the tribunal. Their statements were recorded at length. They clearly stated they were acting on behalf of the

Shaban clan. I am thus unable to accept that the tribunal condemned the *ex parte* applicants unheard.

WHETHER THE DECISION OF THE TRIBUNAL WAS LAWFUL

Section 7 of the Land Dispute Tribunals Act (repealed) states;

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 judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.

The tribunal was properly constituted and at no point did the issue of the constitution arise. The decision of the tribunal was adopted as a decision of the court in line with the statutory provisions.

There arises the issue of whether the applicant has brought this matter before the court properly. Under section 8 of the Land Disputes Tribunal Act (repealed) it is stated;

8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty 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.

(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.

The application was prematurely filed in the High Court as the applicant never appealed to the appeals committee. Further, the application is based on matters of fact and not law. The applicant has failed to illustrate the procedural flaws in the proceedings of the tribunal and the Resident Magistrates' court. It is therefore dismissed with costs to the respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 8th day of May 2019

In the absence of:

Mr. Cheptarus for the Ex-parte applicant

Mr. Kuria for the 1st respondent

Mr. Komen for the 2nd Respondent

And in the presence Ms. Sarah – Court assistant