REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

E&L CASE NO.794 OF 2012

SALLY JEMELI KORIR.....1ST PLAINTIFF

EDWIN KIPROP KORIR.....2ND PLAINTIFF

(Suing as the Administrators of the Estate of Yusuf Kipkorir Chepkeitany)

=VERSUS=

WILLIAM SUTER.....1ST DEFENDANT

ATTORNEY GENERAL (Sued on behalf of Elgeyo Marakwet Land

Dispute Tribunal).....2ND DEFENDANT

UASIN GISHU COUNTY LAND REGISTRAR.....3RD DEFENDANT

JUDGMENT

By a plaint dated 20th December, 2011 and amended on 23rd October, 2015 the Plaintiffs sued the Defendants jointly and severally seeking for the following orders:

a. A declaration that the Plaintiff is the absolute owner of the whole of that parcel of land known as Sergoit/Koiwoptaoi Block 12(Katalel)/557 and 542.

b. A permanent injunction restraining the 1st Defendant, his agents, servants and or employees from trespassing or in anyother manner whatsoever interfering with the Plaintiff's quiet possession and enjoyment of the suit land.

c. Damage for wrongful claim.

d. Costs.

e. Interests on (c) and (d) above.

f. A declaration that the deliberation of the 2nd Defendant in Elgeyo Marakwet Land Dispute Tribunal as adopted by Iten Senior or Resident Magistrate Court in award case No.3 of 2005 is illegal, null and void for lack of jurisdiction.

g. An order directing the Uasin Gishu County Land Registrar to cancel the registration of the 1st Defendant as the owner and proprietor of all those parcels of land known as Sergoit/Koitawaptaoi Block 12(Katalel)/557 and 542.

PLAINTIFF'S CASE

PW1 Edwin Kiprop Korir the 2nd plaintiff testified and stated thathe had sued the 1st defendant since he claimed the land belonged to him. It was his evidence that his father was a member of Kipsoen/Kaptere youth group in 1985 who had paid kshs, 48,000/ being purchase price of 26 acres and survey fees of Ksh1500/= and was given a receipt no.350/=,

PW1 testified that his father took possession and built a house on the suit land and further paid Kshs. 83000/= for plot number 184. He stated that in 2002 the 1st defendant claimed the land belonged to him as the tribunal had resolved that their father do surrender 15 acres.

PW1 testified that the proceedings at the tribunal atElgeyo Marakwetwas done in the absence of his father. He also stated that the land in dispute was situated in Uasin Gishu County and the tribunal sat in Elgeyo-Marakwet.On cross examination, he stated that his father owned the land though he did not have a title to the land.

On further cross-examination by counsel for the 2nd and 3rd defendants, he stated that his father was alive when the tribunal heard the case, but he was sick. His father was a member of the tribunal.

In re-examination he stated that members paid to be eligible group members as indicated in the receipts. He only came to know of the tribunal after the death of his father. The case was between Cheberen primary school and Brar farm.

PW2, Selina Jemeli Kiprop testified and stated that the late Kipkorir Cheketany was her husband. On cross-examination, she stated that she did not have the land title deed. The receipt did not show the parcel number and Cheberen was given 85,000/= by her husband since there was a case. They did not owe any money to the youth group. In re-examination she did not know what kind of dispute her husband had with Cheberen primary school.

PW3 Kenneth Korir testified that the land was being used for grazing and their workers lived on it. The defendant had built a house which was demolished. He knew his father had a dispute with Cheberen school and he had paid Ksh75,000/=. When the tribunal was sitting his father was sick.

In re-examination he testified that his father was aware of the tribunal but could not attend since he was sick. The tribunal was in Elgeyo Marakwet yet the land was in Uasin Gishu, he did not know the parties to the tribunal.

PW4 Ernest Kipkorir Chesire testified and stated that he was a brother to the deceased Yusuf. On cross-examination, he stated that he was present when his brother paid Ksh75,000/= to the advocate to be paid to Cheberen primary school.

DEFENCE CASE

DW1 William Kandie Suter testified that he was the owner to the land Sergoit/Koiwaptaoi/Block 12(Katalel) 542 and 557 and had a title deed to plot No. 542 which was produced as evidence of the court, the title to land number 557 was held at Eldoret hospital as surety.

On cross-examination he stated that he did not have any document to show he bought the land but he stated that he bought the land from a white settler. He further testified that the landmeasures 20 acres and was not aware of the tribunal case.

DW2 Cosmas Kandie Kiptum testified that he lived at Kipsoen and he was the chairman of Kapsoen Youth group, which was a land buying company. That a person would be issued with a receipt upon purchase whereby the 1st defendant bought 10 acres and he was issued with a receipt in 1985-1986.The receipt was given to Cheberer primary school. The plots were sold till 1986. The plaintiff was allocated 10 acres which the plaintiff's family is using. The 1st defendant does not use the land since his house was demolished.

DW3 Christopher Tuitoek Kiptagat stated that he was the overall chairman of many youth groups and that the 1st defendant had exchanged the land with Cheberer primary school. The school had bought land from the youth group.

DW4 Sarah Cherono, the Land Registrar Uasin Gishu testified that there was a land buying company which bought property under RTA title and sought authority to subdivide and issue titles under RLA. They prepared the members register which indicated the name. I.D number, the acreage they are entitled to, and the parcel number. She stated that themembers' register is kept at the land registry and once the land registry clears a member, they go to the registry where a transfer would be prepared.

The 1st owner would be the government the 2nd would be the member and the title deed would be issued. In this instant case they had 542 and 557. She had the extract that showed William was the beneficiary of parcel number 542 and 557. She produced the green card which showed William had been registered as the owner.

On cross-examination, she testified that the members register would be prepared by the farm officials, if they committed a fraud, she would not know. She did not have the last page so she could not tell when the register was forwarded, though it was possible the register was forwarded in 2012. The transfer for 542 and 557 was never forwarded. There was no complaints as per the records. The 1st registration was done on 9th February 2012. She did not have any evidence of clearance from the officials before the title was issued.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff filed written submissions and listed the following issues for determination:

a. Whether the Plaintiffs have been residing on parcel Nos. SERGOIT/ KOIWAPTAOI BLOCK 12(KATALEL)/557 and 542(Formerly Plot No.184 in L.R.No.9130) since it was issued to members.

b. Whether the 1st and 3rd Defendants fraudulently and in collusion had the 1st Defendant registered as the proprietor of parcels No. SERGOIT/KOIWAPTAOI BLOCK 12(KATALEL)/557 and 542 without due process.

c. Whether the deliberations of the 2nd Defendant in Elgeyo Marakwet Land Disputes Tribunal as Adopted by Iten Senior Resident Magistrate's Court in Award Case No.3 of 2005 is Illegal for Lack of Jurisdiction.

On the first issue counsel submitted that the Plaintiffs are the Administrators of the Estate of Yusuf Kipkorir Chepkeitany who died on 11th March, 2005 vide Grant of Letters of Administration issued on 13th May, 2009 produced as Plaintiff's Exhibit 1.

That there is uncontroverted evidence that the Plaintiffs and the entire family of the late Yusuf Chepkeitany have been in occupation of the suit parcel since 1980's and have therefore acquired prescriptive rights over the said parcels of land and the Defendants' claim if any has been extinguished by operations of the law as he never took any step to take back possession of the land.

On the second issue as to whether the1st and 3rd Defendants fraudulently and in collusion had the 1st Defendant registered as the proprietor of parcel Nos. SERGOIT/KOIWAPTAOI BLOCK 12(KATALEL)/557 and 542 without due process, counsel submitted that the defendant committed fraud.

It was counsel's submission that the witnesses demonstrated that the title was originally L.R.No.9130 also known as Brar Farm. It was purchased by members through purchase of shares through a youth group known as Kapsoen Kapteren Youth Group.

Counsel stated that DW3, the Land Registrar explained the process of issuance of titles and despite titles being issued to the 1st Defendant, there was no clearance from the officials and there was no transfer that was on record transferring the parcel to the 1st Defendant. It was counsel's submission that this was an indication of fraudulent acquisition of the title.

On the issue as to whether the deliberations of the 2nd Defendant in Elgeyo Marakwet Land Disputes Tribunal as adopted by Iten Senior Resident Magistrate's Court in Award Case No.3 of 2005 is illegal for lack of jurisdiction counsel submitted in the affirmative that the same was devoid of jurisdiction.

That the Land Dispute, claim at the Elgeyo Marakwet Tribunal against Brar Farm which proceeded to hear the dispute over the Plaintiff's Land without notifying the Plaintiffs and made an award that Five (5) acres be curved out from the Plaintiffs' land **Plot No.184** and be given to Cheberen Primary School was illegal. That the Tribunals Award as adopted in **Iten P.M.C.Award No.3 of 2005** was illegal for lack of jurisdiction as the land is situate in Uasin Gishu District yet the Award was made in the then Elgeyo Marakwet District and further, a hearing was not accorded to the Plaintiffs.

Counsel cited **Section 26 1(a) and (b) of the Land Registration Act 2012** states that:-

"The Certificate of Title issued by the Registrar upon Registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* ***evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrance, easements, restrictions and conditions contained as endorsed in the certificate and the title of that proprietor shall not be subject to challenge except:-***

a. On ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the Certificate of Title has been acquired illegally, un-procedurally or through a corrupt scheme."

Counsel also relied on the case of **Esther Ndegi Njiru and another v Leornard Gatei [2014]eKLR**Justice Mutungi stated that:-

"Having come to the finding that Plaintiffs did not obtain a valid and/or a good title from the 2nd Defendant, it follows that the title issued to the Plaintiffs is for cancellation and I accordingly Order and direct ***that the title issued to the Plaintiffs on 23rd October, 2008 be cancelled forthwith and the Plaintiffs names be deleted from the register of land and Defendant be issued with title in respect of suit land".***

Counsel therefore submitted that the 1st Defendant's title has no backing on how it was obtained,whereas the Plaintiffs explained how they acquired the title, demonstrated payment of the purchase price and membership fee.

Ms. Tum also cited the case of **Eldoret ELC Case No.29 of 2014 Musa Kiptai Mulwo v Ngobitwa Farmers Co-operative Society Limited and 3 others[2019]eKLR**, where M.A.Odeny J stated that:-

"The Defendants have produced as Defence exhibits 1,2 and 3 original title deeds to the suit property, however, they have failed to prove evidence of how they were allocated the land.

I find that the Plaintiff is the rightful owner of the suit land as the Defendants irregularly acquired title deeds. They did not satisfy the court as to how they acquired titles. They have not provided consent from Land Control Board which allowed them to subdivide the land amongst themselves. Further they have not provided any proof of payment of the parcels of land or payment of survey fees, whereas the Plaintiff has provided proof that he made such payments to the 1st Defendant."

Counsel therefore urged the court to order for cancellationof title number SERGOIT/KOIWAPTAOI BLOCK 12 (KATALEL)557 and 542 registered in the names of Defendant and the same be registered in the name of the Plaintiffs.

1ST DEFENDANT'S SUBMISSIONS

Counsel submitted that the 1st Defendant opposed the suit vide the amended defence dated 3rd December 2015 where he contended that he acquired the parcel of land from Cheberen School who bought the land from Kapsoen/Kiptaren Group for Kshs.75, 000.00. That the School gave him the piece of land in exchange for his land located elsewhere.

Counsel submitted that there arose a dispute between the school and Kapsoen/Kaptaren Group which was heard and determined by the Tribunal and the award was adopted by Iten Resident Magistrate Court Award No.3 of 2005. Pursuant to the decree the school was awarded 15.0 Acres which were repossessed from the Plaintiff. Thereafter upon exchanging the parcel the 1st Defendant got title to the suit land. The 1st Defendant was thereafter registered as the legal owner of the suit parcel of land.

Counsel submitted that the testimony of DW 4 confirmed from the register that the parcel of land belonged to the 1st Defendant who was registered on 16th February 2012 upon verification of the member's register. Further she indicated that the Plaintiff was allocated parcel No.561 by the group as per the member register.

Counsel listed issues for determination by the court as whether this court is a proper forum to adjudicate this matter and whether the plaintiff is entitled to the reliefs sought.

On the issue as to whether this is the proper forum to adjudicate over this matter, counsel submitted that the option of an aggrieved party from a decision of the tribunal is either to appeal to the Appeals Committee and/or to institute Judicial Review proceedings to quash the decision of the tribunal if it is alleged it acted in excess of its jurisdiction.

Section 8(1) and 8(9) of the Lands Disputes Tribunal Act (1990)(Repealed) provides that:

> **'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 in which the land which is the subject matter of the dispute is situated.'**
>
> 8(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 (60) 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."**

Before the Appeal Committee, the Plaintiffs would have been entitled to raise the issue of jurisdiction of the tribunal and if not satisfied with the Appeals Committee decision could appeal to the High Court on issues of law. The Plaintiffs herein, instead of pursuing the dispute resolution mechanisms set out under the Dispute Tribunals Act, chose to file the current suit where they argued that the tribunal lacked jurisdiction to make the award and sought declaratory orders from the Court.

Counsel cited the case of **Paul Muraya Kaguri –vs – Simon Mbaria Muchunu [2015]eKLR** Waithaka J. stated;

> **"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 her rights were denied."**

In the case of **James Njuguna Chui –vs – John Njogu Kimani [2017]eKLR** the Court of Appeal stated as follows:-

> **"The repealed statute at Section 8(a) had clear provisions as to how a party dissatisfied by an award by a provincial land dispute tribunal could challenge it namely by way of an appeal to the High Court within stipulated timelines and on points of law only. In this case the Appellant elected not to do so and it is impermissible that he should relitigate the issue finally determined through the kind of suit he filed before the High Court."**

That the Plaintiffs should have challenged the decision of the tribunal by way of appeal under Section 8(1) of the Act and/or to challenge the decision of tribunal by way of judicial review before the High Court, if they considered that the tribunal lacked the jurisdiction to handle the dispute. .

On the issue as to whether the Plaintiffs are entitled to declaratory orders sought, counsel stated that a declaratory suit is not a remedy available within the framework of the repealed Land Disputes Act. To allow a fresh declaratory suit against a decision and valid judgement made would go against the spirit of finality in litigation and would offend public policy to a party aggrieved by a decision of the District Land Disputes Tribunal.

On the issue as to whether the 1st Defendant obtained the title to Sergoit/Koiwaptoaoi Block 12(Katalele)/557 fraudulently, counsel submitted that the 1st Defendant is the indefeasible owner of the suit land being the 1st Registered owner of the suit property.

Section 24 (a) of the Land Registration Act provides that subject thereto:-

> **"The registration of a person as the proprietor of land shall vest in the person the absolute ownership of that land together with all rights and privileges belonging or appurtent thereto."**

Section 25 of the Land Registration Act states as follows:-

"1) The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

a. To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b. To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

Section 26 states as follows:-

"(1) The Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except:-

a. On the ground of fraud or misrepresentation to which the person is proved to be a party;

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

Section 107 of the Evidence Act Cap 80 of the Laws of Kenya states that:-

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he assents must prove that those facts exist."

Counsel cited the case of **Civil Appeal No.246 of 2013 between Arthi Highway Developers Ltd –vs – West End Butchery Limited and Others** the Court of Appeal expressly stated that the law on fraud and in defeasibility of title has been settled. The Court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok –vs – Justice Moijo Ole Keiwua & 5 Others Civil Appeal No.Nai 60 of 1997** where the Court categorically declared that:-

"Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the Land Registration Act set out below) give an absolute and indefeasible title to the owner of the property. The title of such an owner can only misrepresentation to which the owner is proved to be a party. Such is the sanctity of the title bestowed upon the title holder under the Act. It is our law and takes precedence over all other alleged equitable rights of title. Infact the act is meant to give such sanctity of the title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy."

That for the Plaintiffs to successfully challenge the 1st Defendants title, they must on appropriate standards prove that:-

a. The title to parcel No. Sergoit/Koiwaptaoi Block 12(Katalel)/557 and 542 was obtained or procured by fraud and

b. The Respondent was a party to the fraud.

Counsel further submitted that the Plaintiff pleaded fraud, but the narrative in the pleadings is divergent as the same seems to indicate that the parcel of land was allocated vide an award of a tribunal which was adopted as an order of the Court through a valid judgement and decree. From the pleadings there is no evidence to prove that indeed there was fraud on the part of the 1st Defendant.

Counsel submitted on non-joinder of parties as provided for under Order 1 Rule 10(2) of the Civil Procedure Rules empowers the Court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the Court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit to be added as a party. That the Plaintiff herein seeks to circumvent the principles of natural justice requiring that no party should be condemned unheard by prosecuting this suit without enjoining some of the parties that are likely to be affected by its outcome.

It was counsel's submission that the tribunal award which the Plaintiffs are challenging vide this suit was between Cheberen Primary School and Kapsoen Kiptaren Group who are not parties to this suit. The Plaintiffs since 2012 was aware of this position but he opted to prosecute the suit as it is. The effect being that the above stated parties stand to be condemned unheard which is against the rules of natural justice.

In the case of **Mbaki & Others –vs – Macharia & Another [2005]2E.A 206** at Page 210; the Court stated as follows 'the right to be heard is a valued right' It is therefore necessary to hear parties who likely to be adversely affected by a decision before the decision is made."

Counsel therefore urged the court to dismiss the plaintiff's claim with costs to the defendants.

2ND AND 3 RD DEFENDANTS WRIITEN SUBMISSIONS

Counsel listed the following issues for determination

a. Whether this is the proper forum to adjudicate over this matter.

b. Whether the proceedings, award and decree herein were made properly;

c. Whether adverse orders can be made against parties not enjoined herein.

On the issue as to whetherthis is the proper forum for adjudication of the dispute, counsel submitted that the resolution of the dispute by the Land Dispute Tribunal conducted pursuant to the Land Disputes Tribunal Act, 1995 making the award the tribunal forwarded it to Iten court for adoption consequently, the court entered judgment and issued a decree vide Iten Resident Magistrate Award No. 3 of 2005 which decree was implemented accordingly.

That the plaintiffbeing aggrieved by the award and decree the plaintiff had options which the current suit is not one of them. That the pertinent question is whether there were available avenues of challenging the award or decree issued under the Act? Is a declaratory suit contemplated under the Act?

Counsel cited section 8(1) of the Land Disputes Tribunal Act was instructive.Mr. Kuria submitted that there is nothing on record to show that the Plaintiff lodged an appeal to the Appeals Committee constituted under the Act. There being no appeal under the Act it became an irrefutable presumption that the plaintiff was not aggrieved by the award of the tribunal.

Counsel further submitted that assuming that the plaintiff, out of indolence, was unable to file the appeal to the Appeals Committee nothing stopped him from challenging the award and decree in the High Court through Judicial Review proceedings. The Land Disputes Tribunal Act did not contemplate filing of a declaratory suit as a way of challenging the award or decree made under the Act.

Counsel therefore submitted that to the plaintiff who ought to have approached court by way of an appeal under Section 8(1) of the repealed Land Disputes Tribunal Act or Judicial Review against the award or decree now being challenged in this forum this suit is defective in substance and law.

Counsel relied on the case of **Paul Muraya Kaguri -versus- Simon Mbaria Muchunu [2015} eKLR, Waithaka J** opined as follows:

> "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. '

In **Eldoret E&L Pet No. 3 of 2016: Lilian Barng'etuny -versus- Nandi Land Registrar & others, Hon A. Ombwayo** J held that the Land Disputes Tribunal Act does not contemplate constitutional petition in challenging awards made under the Act.

Counsel therefore urged the court to dismiss the plaintiffs' case with costs as they did not use the right forum and that they did not lead any evidence to prove that the land Disputes Tribunal acted in excess of its jurisdiction.

ANALYSIS AND DETERMINATION

I have considered the pleadings, the evidence and the submissions by counsel and find that the issue for determination is whether this is the right forum for adjudication of this matter. If the same is answered in the negative then there would be no need to look at the other issues as to whether the defendant acquired the title to the suit land fraudulently.

It was the plaintiffs' case that a claim was filed at the Elgeyo Marakwet Tribunal against Brar Farm which proceeded to hear the dispute over the Plaintiff's Land without notifying the Plaintiffs and made an award that Five (5) acres were to be curved out from the Plaintiffs' land **Plot No.184** and be given to Cheberen Primary School which the plaintiffs claimed to be illegal. That the Tribunals Award as adopted in **Iten P.M.C.Award No.3 of 2005** was illegal for lack of jurisdiction as the land is situate in Uasin Gishu District yet the Award was made in the then Elgeyo Marakwet District and further, a hearing was not accorded to the Plaintiffs.

The gist of the plaintiff's claim emanates from the decision of the land Disputes tribunal which they now want to impeach. The repealed Land Disputes Tribunal had specific procedures and the mandate of the tribunal.

Section 8(1) and 8(9) of the Lands Disputes Tribunal Act (1990)(Repealed) provides that

> **'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 in which the land which is the subject matter of the dispute is situated.'**
>
> 8(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 (60) 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.**

There is no evidence that the plaintiffs followed this procedure that was stipulated when parties are aggrieved. The plaintiffs were aggrieved with the decision of the tribunal which gave an award that was adopted as the judgment of the court. The said judgment has not been set

aside or appealed against.

The plaintiffs' instead of following the laid down procedures of appeal opted to file a declaratory suit to circumvent the laid down appeals system. In the case of **Republic -versus-Marakwet District Land Disputes Tribunal & 6 others Ex-Parte Shaban Clan & 3 others [20161 eKLR** the court rightly held that the Land Disputes Tribunals Act did not contemplate filing of declaratory suits. It does also not contemplate filing of constitutional petitions as was held in the case of **Eldoret E&L Pet No. 3 of 2016: Lilian Barng'etuny -versus-Nandi Land Registrar & others, by . Ombwayo J.**

In the**Court of Appeal in the Case of Florence Nyaboke Machani –vs- Mogere Amosi Ombui & 2 Others Civil Appeal No.184 of 2011** In this particular Appeal, a party who was aggrieved by a verdict of the Borabu Land Disputes Tribunal did not challenge the decision of the Tribunal in accordance with the procedure set out in the repealed Act. Neither were judicial review proceedings taken to quash the award. He instead chose to file suit for declaratory orders and compensation. The Court of Appeal entirely agreed with the trial Judge's decision to dismiss the suit. The Court of Appeal endorsed the following legal reasoning by Makhandia J (as he then was)

> "The 1st defendant had the right to appeal against the award of Borabu Land Disputes Tribunal to the appeals committee constituted for the province in which the land which was the subject matter of the dispute is situate. This is vide Section 8(1) of the Land Disputes Tribunals Act. He chose not to do so. Indeed he was even advised by the SRM's court at Keroka to do so. He never took up the challenge. Incidentally, the plaintiff had counsel on record then. He also had a right to commence judicial review proceedings in the nature of certiorari to quash the award. Again he did not do so. I do not for once buy his excuse for the failure to do so on account of the ruling on the application to adopt the award as a judgment of the court being delivered on a date unknown to him and in his absence. And that by the time he became aware six months presumably in which he should have commenced judicial review proceedings in the nature of certiorari aforesaid had by then elapsed. I have looked at the proceedings of the Senior Resident Magistrate's court at Keroka and in particular the order adopting the award as a judgment of the court dated 23rd May, 2008. It is apparent that the plaintiff had an advocate and though he was not present on that day, I doubt that the court would have allowed the application unless it was satisfied that the respondent's counsel was duly served with the application and or a hearing notice and had failed to turn up.
>
> It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime the 1st defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree."

It follows from the above stated decision that even if the Court were to grant the declaratory orders the same would have no effect in the face of the Judgment of the lower court that remains undisturbed.

What is the legal status of decisions made by the Land Disputes Tribunals established under the repealed Land Disputes Act? The answer to the above question is contained in Section 23(3) of the Interpretation and General Provisions Act (Cap 2) which provides as follows:-

> "Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not-
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law repealed; or
>
> (c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or
>
> (d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or
>
> (e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

Section 23(3) (e) of the Interpretation and General Provisions Act preserves and protects decisions and awards made by the defunct Land Disputes Tribunals. Similarly, it preserves and protects judgments adopted and pronounced by Magistrates' Courts within the framework of the repealed Land Disputes Act. They remain valid judgments of the courts. The resultant decrees remain valid binding instruments capable of execution.

Having considered the issue whether this is the right forum to adjudicate this matter, and having found in the negative, I am persuaded by the decision above that the plaintiffs slept on their right to appeal in the correct forum as they cannot challenge the award of the Land Disputes Tribunal vide a declaratory suit. On that note the court can only empathize with plaintiffs as the court's hands are tied with the law and the laid down procedures which in this case does not amount to technicality. Even if the court were to invoke the provisions article 159, the same would not save the plaintiff's case.

I therefore dismiss the plaintiff's case with costs to the defendants.

DATED and **DELIVERED** at **ELDORET** this 6**TH** **DAY** OF **MARCH,2020**

M. A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Miss.Tum for the Plaintiffs and in the absence of Gicheru & Co. for 1st defendant and Attorney General for 2nd and 3rd defendants.

Mr. Yator - Court Assistant