



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E&L NO. 413 OF 2012

CHRISTINE J. KIRWA.....PLAINTIFF

VERSUS

PRISCAH JELAGAT.....1ST DEFENDANT

UASIN GISHU LAND DISPUTES TRIBUNAL.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

By a plaint dated 18th March, 2008 and amended on 20th November 2009 the plaintiff herein sued the defendants jointly and severally seeking for the followings orders:

- a) An order of this honorable court that the Uasin Gishu Land Disputes Tribunal the 2nd defendant herein lacked jurisdiction to entertain or make the said award and thus the said award arrived at by the tribunal is null and void.
- b) A declaration that the five acres of land in dispute within all that parcel of land known as L.R No.8406/06 belongs to the plaintiff.
- c) A permanent order of this court restraining the 1st and 6th defendants jointly by themselves or their respective agents from interfering with the plaintiff's ownership and possession of five acres within all that parcel of land known as Kapng'etuny farm L.R no. 8407/06.
- d) An order of the High Court declaring that the Tribunal's decision and subsequent award adopted into a decree of the court in Eldoret CMCC Award No. 17 of 2007 is *ultra vires*, arrived at by the Tribunal without jurisdiction and in breach of the established rules and procedures
- e) Costs of this suit

The plaintiff amended her plaint dated 18th March, 2008 to enjoin the Attorney General and Peter Arap Kogo as the 4th Defendant, Kiptarus Kogo as the 5th Defendant and Kapng'etuny Farm Limited as the 6th Defendant respectively. The plaintiff later withdrew her suit against the 4th to 6th Defendants and proceeded with the case against the 1st 2nd and 3rd Defendants. The 1st Defendant filed a defence and Counter Claim dated 9th March, 2015 and the Attorney General too filed a defence dated 12th July, 2013.

The 1st defendant filed her Amended Statement of defence and counter-claim dated 9th March 2015 seeking for the following orders: -

- a) A declaration that the 1st defendant is the rightful owner of that parcel of land namely L.R NO.8406/06 (KAPNGETUNY FARM) measuring 5 acres and an eviction order do issue against the plaintiff.
- b) A permanent order do issue restraining the plaintiff, 4th, 5th and 6th Defendants either by herself, her agents, assigns from dealing with or interfering with the 1st defendant's ownership and possession of five acres in respect of the suit land.
- c) That the court order issued on the 5th May, 2008 vide ELDORET CMCC AWARD NO.17 OF 2007 be upheld and re-enforced.

d) Costs of the suit.

PLAINTIFF'S CASE

PW1 Christine J. Kirwa testified that she bought 5 acres of the suit land together with Peter Kogo and took possession thereof. It was her evidence that the purchase of the 5 acres was regularized by Kapng'etuny Farm Ltd by entering the name of Peter Kogo in the register who subsequently sold the whole portion to the PW1.

PW1 further stated that at one point the government had compulsorily acquired the parcel of land but was later given back to them in 1999. PW1 also testified that in 2007 the defendant Prisca Jelagat commenced proceedings at the Uasin Gishu Land Disputes Tribunal claiming ownership of the suit land but she was never served with any summons.

PW1 produced a copy of a title deed, a decree from the Chief Magistrates Court Eldoret of Award No. 17/2007 a receipt for compensation from the Military where the Military compensated one **Peter Arap Kogo** for compulsory acquisition of the suit land. PW1 stated that the 1st defendant served her with an eviction order to vacate the suit land and she denied knowledge of the proceedings that gave rise to the order. She urged the court to find that the proceedings before the tribunal were null and void.

On cross-examination by counsel for the 2nd and 3rd defendants, she stated that sub-division had already been done and her piece of land was bought by Peter Kogo who had purchased it from Kabur Mugei who was a member of the farm. PW1 stated that she has been residing on the suit land since 1978 but she did not have a title to it.

PW2 Kiptarus Arap Kogo testified and stated that the 1st defendant is his sister in law and that the late brother sold the land to the plaintiff and that he was buried in Turbo.

On cross-examination by Mr. Omboto counsel for the 1st defendant he stated that the 1st defendant was married between 1978 to 1980 and that he was not aware of the Land Disputes Tribunal case.

On further cross-examination by Miss Lung'u for the 2nd and 3rd defendant he stated that he was the only witness to the sale when his brother Kabur sold the land and the witness to Peter Kogo was his father.

PW3 one Peter Arap Kogo testified that he bought the suit land from one Kaburu Muigei now deceased who was the husband to the 1st Defendant and sold the same to the plaintiff. On cross-examination he stated that the plaintiff was his stepmother who is in occupation of the suit land.

PW4 Sammy Birech Secretary to Kapnge'tuny farm stated that the plaintiff was the owner of the suit land since she had bought the same from Peter Kogo and produced a master roll where the plaintiff's name was indicated as member no. 68, a book for compensation and minutes allowing survey and allocation of the parcels.

On cross-examination by Mr. Odongo he stated that the master roll did not have the plaintiff's name and that the plots did not have titles yet. It was his evidence that he was not aware of the tribunal case and any decree issued.

DEFENCE CASE

DW1 Prisca Jelegat stated that her late husband bought 5 acres of land from Kibii Keino who was a member from the KAPNGE'TUNY farm. The land was taken over by the Defence Forces and when her husband came back he found the plaintiff had already settled on it. It was her evidence that she lodged a complaint at the Uasin Gishu Land Disputes Tribunal whereby the Tribunal gave a verdict that the land belongs to her which was subsequently adopted as the decree of the court. DW1 produced a sale agreement and the proceedings of the tribunal together with the decree of the court. She urged the court to dismiss the plaintiff's case with costs.

On cross-examination by Mr. Wanyonyi DW1 stated that she had not filed a Succession Cause in respect of the estate of her husband and that there was no agreement to show that her late husband had sold the land to the plaintiff. She admitted that she lived in Kitale and had never lived on the suit land. She also stated that her husband was buried at his brother's plot in Turbo. On re-exam by Ms Kibichiy, DW1 stated that the plaintiff had not filed an appeal to challenge the tribunal's verdict.

DW 2 Kibrgen Maiyo stated that he was the chairman to the farm and the land was owned by Kibii Arap Keino who was a member of the Kapng'etuny farm and owned 22 acres of which he sold 5 acres to Kabur Muigei. DW2 also stated that the land did not belong to Christine Kirwa and further that Peter Arap Kogo was not a member of the farm.

On cross-examination by Mr. Odongo Counsel for the 2nd and 3rd defendants, he stated that he was aware of a tribunal case which he attended and that the plaintiff was also present at the tribunal.

On cross-examination by Mr. Wanyonyi he stated that he did not have proof that he was the chairman of the farm. He stated that he gave the farm documents to the officials but he remained with the shareholders list. It was his testimony that there was an agreement between Kabur Muigei and Keino and he was aware that the officials of the farm were still in office.

The Attorney General did not call any witness and therefore closed their case.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff reiterated the evidence on record by the witnesses and urged the court to find that the plaintiff had proved that she is the rightful owner of the suit land as per the documents produced in court. Counsel further submitted that the 1st defendant has no legal capacity to claim the suit land as she has not taken out letters of administration in respect of the husband's estate.

Mr. Wanyonyi, counsel for the plaintiff relied on section 82(a) of the Law of Succession Act on the issue of legal capacity to institute a suit in respect of the estate of a deceased person and cited the case of **Troustic International Nation and IGRID-VS- Jane Mbuyu and Another Civil Appeal No. 145 of 1990(1993) eKLR**.

It was counsel's submission that the tribunal lacked jurisdiction since the suit land was registered land which already had a title deed. That the mandate of the tribunal was not to deal with disputes on land ownership therefore it acted *ultra vires* thus their decision was null and void.

Counsel therefore urged the court to allow the plaintiff's claim and dismissed the 1st defendant's counterclaim with costs.

1ST DEFENDANT'S SUBMISSIONS

Counsel for the 1st defendant also reiterated the evidence by the parties and the witnesses and listed several issues for determination by the court namely:

- a) Whether the plaintiff challenged the decision of tribunal either by way of Appeal or by Judicial Review proceedings to quash the award of the Uasin Gishu Land dispute tribunal.
- b) Whether the Plaintiff's prayer seeking for discretion court to find that that the tribunal decision and subsequent award adopted as judgement in Eldoret CMCC Award No. 17 of 2017 was null and void for lack of jurisdiction.
- c) Whether this Court has jurisdiction to review the decision of a tribunal through a plaint.
- d) Whether this suit is res-judicata by virtue of the Award adopted as judgement of Chief Magistrate Court at Eldoret Award No. 17/2007.
- e) Whether the 1st defendant is a legitimate beneficiary of all that Parcel of land measuring 5 Acres from Kapngetuny Farm.

On the first issue as to whether the plaintiff challenged the decision of tribunal either by way of Appeal or by Judicial Review proceedings to quash the award in favour of the 1st defendant, counsel submitted that the plaintiff is challenging the decision of the tribunal by way of a plaint and not Judicial review or an Appeal

It was counsel's submission that the Land Dispute Tribunal Act provides for an elaborate procedure for resolution of disputes relating to land and the plaintiff having been aggrieved by the decision issued in Uasin Gishu Land Dispute Tribunal No. 4 of 2007 could have challenged the decision of the tribunal in accordance with the said procedure set out in the Act.

Ms. Kibichy relied on the case of **Florence Nyaboke Machavi –vs- Mogere Amsoi & 2 Others (2014) eKLR**, where the court held that ;

'...the said Act provided an elaborate procedure for resolution of disputes relating to the division of, or determination of boundaries to land, a claim to occupy or work land or trespass to land where jurisdiction was donated to a tribunal established under the Act and further established an appeal process for parties dissatisfied with determinations by such a tribunal. The Act limited appeal to the High Court on questions of law only.

The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The Appellant instead chose to file the suit for declaratory orders and compensation. As the learned Judge found in the judgment appealed from, the 1st Defendant had the right to appeal against the award of Borabu Land Disputes Tribunal to the Appeals committee...'

Counsel further relied on the case of **Polymaris Mbithe Mutua –Vs- Peter Mwanzia & 2 Others (2017) EkLR**, where Angote J held that;

'...If the Plaintiff's claim is that he was never served with the pleadings by the Tribunal, the Plaintiff should have challenged the verdict of the Tribunal by way of an appeal or Judicial Review when he became aware of the decision...having failed to file an appeal or a Judicial Review Proceedings, the moment he learnt about the decision of the tribunal, I find that filing of the present suit by the Plaintiff challenging the decision of the tribunal (5) years after the decision was made is an abuse of the court process..'

Counsel submitted that the Plaintiff having failed to file an appeal or a Judicial Review, the moment she learned of the decision and filing of the present suit to challenge the decision of the tribunal is an abuse of court process.

On the second issue counsel submitted that the decision of the tribunal which was later adopted by the Chief Magistrates Court vide **ELDoret CMCC AWARD NO. 17/2007** and became a decision or Judgment of the court and a decree was extracted hence can be

executed. Counsel cited the case of **Gilbert Marua Nhagi –vs- Jane Muthoni Njagi (2014) eKLR**, the Honourable **Ombwayo J.** held that;

“The decision of the Tribunal was subsumed in the decision of the Nyeri Chief Magistrate's Court Award No.62 of 2001 which has never been reviewed or set aside. Judgment entered on 19/10/2001 in terms of the Tribunal/Award and subsequent decree and orders are still valid. This court can only review the decision of the Tribunal and the Chief Magistrate by way of Judicial Review or on appeal from the appeals committee but not by way of a claim brought by plaintiff. Moreover the decision of the Chief Magistrate in Award No 62 of 2001 was reduced into a decree and the same executed and parcel no Mugunda/Nairutia/1051 was excised from No.Mugunda/Nairutia/Block 1/385 pursuant to the decree and the same was registered in the name of the defendant.

The upshot of the above is that the suit lacks merit and is dismissed with no orders as to costs. The order of the Chief Magistrate's Court Award Case No.62 of 2001 dated 19/10/2001 to be enforced and the plaintiff be evicted from Mugunda/Nairutia/1051.”

On the issue as to whether the suit is res judicata, counsel submitted that it is on record that the claim in the Land disputes tribunal case No. 4 of 2007 relates to the 1st Defendant and the Plaintiff herein and that the dispute was in respect of a portion of land namely Kapngetuny Farm L.R No. 8606/6 measuring 5 Acres. That it is further on record that the tribunal heard the matter and the verdict was adopted as a judgment of the court vide **Eldoret CMCC No. 17 of 2007** and execution proceedings commenced by way of eviction making the matter res judicata.

Counsel relied on the case of **John Florence Maritime Services Limited & Another –vs- Cabinet Secretary for Transport & Infrastructure & 3 Others (2015) eKLR** where the court held that;

‘...the rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from repetitive litigations over the same matter. The court further held that res judicata ensures the economic use of the courts' limited resources and timely termination of cases.’

Counsel therefore urged the court to dismiss the plaintiff's case and allow the 1st defendant's counterclaim with costs.

THE 2ND AND 3RD DEFENDANTS' SUBMISSIONS

Counsel for the 2nd and 3rd defendants 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 the orders sought can be granted.

On the first issue as to whether this is the proper forum for adjudication of this dispute, counsel submitted that the proceedings of the Land Disputes Tribunal were governed by the now repealed the Land Disputes Tribunal Act, 1995 whereby upon making the award the tribunal was expected to forward the award for adoption by a Magistrate.

Mr. Odongo submitted that in this case the plaintiff and 1st defendant confirmed that the award of the Uasin Gishu Land Disputes Tribunal was adopted vide Eldoret CMCC Award No. 17 of 2007 as a judgment of the court and a decree was accordingly extracted and implemented through issuance of eviction orders.

Counsel further submitted that the pertinent question is whether the instant proceedings are proper or contemplated under the Land Disputes Tribunals Act and if not then what were the available avenues of challenging the award or decree issued under the Act? Is a declaratory suit contemplated under the Act? Counsel relied on section 8(1) of the retired Land Disputes Tribunal Act which provided as follows:

‘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.’

Mr. Odongo submitted that there is nothing on record to show that the Plaintiff who was all aware of and participated in the proceedings lodged at Uasin Gishu District Land Disputes Tribunal filed an appeal against the award of the tribunal to the Appeals Committee constituted under the Act or a Judicial Review to the High Court. It was therefore counsel's submission that 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 cited the case of **Paul Muraya Kaguri -versus- Simon Mbaria Muchunu (2015) eKLR**, where Hon. Waithaka J held 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.”

Further in the case of **Emily Jepkemei Ngeyoni & another -versus- Nicholas Kipchumba Kogo & another Eldoret HCCC No. 26 of 2001** Hon. Dulu J held that:

“In my view, that is not legally possible. The two options for challenging a Land Disputes Tribunal's award are through an appeal to

the Provincial Appeals Committee, within 30 days, and before the award was registered in the Magistrate's court. The other option was to file proceedings for judicial review in the High Court under Order LIII Civil Procedure Rules, after the decision of the Tribunal was registered with the Magistrate's court. Therefore, it is my finding that the decision of the Land Disputes Tribunal cannot be challenged through a suit. As the decision of the Tribunal was registered in the subordinate court, filing suit would, in any event, be fresh proceedings, in a matter in which a decree of the subordinate court has already been issued. Filing multiplicity of cases in court on the same matter is not acceptable in law.

Mr. Odongo further relied on the case of *O'Reilly -versus- Mackman 1983 3All ER 680* where the plaintiffs were aggrieved by an award made by the Board of Visitors and sought a declaration that the finding and award of the Board of Visitors was void and of no effect for breach of rules of natural justice. The court found the suit which was brought four years after the cause of action arose was an abuse of process of court, as the action ought to have been brought by way of judicial review under Order LIII. Lord Denning M.R. held as follows:

".....It would to my mind be an abuse of the process of the court for him to start afresh an action at law for a declaration thereby avoiding the need for leave. It is an abuse for him to try and avoid the safeguards of Order 53 by resulting to an action at law so also if he deliberately omits to apply under Order 53 so as to avoid the necessity of obtaining leave. Where a good and appropriate remedy is given by the procedure of the court, with safeguards against abuse, it is an abuse for a person to go by another procedure so as to avoid the safeguards."

Counsel therefore urged the court to find that the suit is incompetent as the Land Dispute Tribunal Act does not contemplate challenging award of the tribunal by way of a declaratory suit.

On the issue on what orders can be made by the court, counsel submitted the plaintiff seeks for a declaration that the judgment and decree issued in the Eldoret court are null and void, however the Eldoret court is not a party to this suit therefore adverse orders cannot be made against an entity that is not a party to a suit.

Counsel relied on the case of **Republic -versus- Registrar of Societies, Safina Lungazo Aluse, Mathias Abwotho & Joel Onono [2014] eKLR** where the court declined to make orders against an entity that was not a party to the proceedings in court.

The second issue is that upon adoption of the award it ceased to exist as an award but as a judgment of the court and therefore the procedure adopted by the plaintiff is not tenable. Counsel urged the court to dismiss the plaintiff's case with costs.

ANALYSIS AND DETERMINATION

It is unfortunate that this matter took a long time to be resolved as it was filed in the High Court in 2008 and later transferred to the Environment and Land Court and given a new number in 2012.

The issues for determination in this case is as to whether the suit is proper as filed before the court. Once this is determined, then the court will not go further into the evidence as to whether the proceedings before the Tribunal were valid or null and void.

The plaintiff's claim is for an order that the Uasin Gishu Land Disputes Tribunal lacked jurisdiction to entertain and make an award in the dispute in respect of the suit land. The plaintiff further wants the court to declare that the adoption of the award by the Eldoret Chief Magistrates Court was *ultra vires*.

The Land Disputes Act (now Repealed) had mechanisms on how to file disputes, hear and determine the disputes, procedures on how the outcome of the disputes are processed and finally how to register displeasure when a party was aggrieved by the outcome of the dispute.

One of such procedures was that the award would be forwarded to the Magistrate's court for adoption as a judgment of the court. The other was that if a party is aggrieved by the award then he/she would file an appeal to the Provincial Appeals Committee within 30 days of the award. A party could further file a Judicial review in the High Court.

Once an award is adopted as a judgment of the court and unless it is overturned by the appellate court it remains a valid judgment capable of being executed. In the case of **Florence Nyaboke Machani Vs Mogere Amosi Ombui & 2 Others [2014] eKLR**. The court held that;

"It is trite law that a valid judgement of a court unless overturned by an appellate court remains a judgement of the court and enforceable, the issue of jurisdiction notwithstanding. The Plaintiff had all the avenues to impugn the award as well as the judgment. He did nothing."

There is no record that the plaintiff even attempted to seek for redress after the award was pronounced by the tribunal. The plaintiff went to slumber and woke up and file this declaratory suit. There is also no evidence that the plaintiff filed an appeal to the Provincial Appeals Committee which was the next forum to file her grievance.

In the **Civil Appeal case No. 66 of 2017, Catherine C. Kittony -vs- Jonathan Muindi Dome & 2 Others (2019) eKLR** it was held that;

'...The Land Dispute Tribunal had mechanisms to deal with the outcome such as the one rendered by the 2nd Respondent. The award by the 2nd Respondent ceased to exist upon adoption by the court as its Judgment and Decree. The award cannot be challenged by filing a fresh suit as it is trite law that where a statute establishes a dispute mechanism, that mechanism must be followed and exhausted, where a party fails to do so, he cannot be heard to say that his rights were denied...'

The Court further noted that;

“...in the instant appeal, it is not in dispute that the appellant was aggrieved by the decision of the 2nd respondent. However, instead of lodging an appeal before the Provincial Appeals Committee constituted for the province in which the land which was the subject matter of the dispute was situated and if still dissatisfied to appeal to the High Court on a point of law (see: Section 8(1) and (9) of the Land disputes Tribunal Act) or institute judicial review proceedings to quash the decision by the 2nd respondent as it was alleged that it acted in excess of its jurisdiction in making the award, the appellant opted to file a fresh suit before the ELC which was not in order.

The above is exactly what the plaintiff did, she opted to file a fresh suit in this court which was not in order. Further the plaintiff wants the court to issue an order against a party that was not enjoined in this suit that is the Eldoret Chief Magistrates Court which is not tenable.

In the case of **Republic -versus- Marakwet District Land Disputes Tribunal & 6 others Ex-Parte Shaban Clan & 3 others (2016) eKLR** the court rightly held that the Land Disputes Tribunals Act did not contemplate filing of declaratory suits to challenge awards of the tribunal.

In the case of **Tetu Ole Naborru -versus- Attorney General & 4 Others (2010) eKLR**, Okwengu J. (as she then was) considered the place of declaratory suit within purview of the Land Disputes Tribunal and observed that it is a strategy being employed by parties to circumvent statutory limitation. She opined as follows:

“It should be noted that the plaintiff filed his action for a declaratory suit on 5th December, 2003 which was about one year after the Tribunal award was adopted as judgment of the court. The plaintiff’s suit directly challenged the Tribunal proceedings and award. Should the plaintiff be allowed to circumvent the appellate procedure provided under the Land Disputes Tribunal Act which required him to lodge his appeal against the Tribunal award within 30 days? Or should the plaintiff be allowed to escape the requirements of Judicial Review which required him to obtain leave to institute judicial proceedings to quash the questioned proceedings? In my view, the answer is in the negative as to do so, would be an abuse of the process of the court.”

The plaintiff having seen that the window of redress through the right procedure had been shut opted to circumvent and try her luck through a declaratory suit. This has hit a brick wall and the court cannot turn a blind eye to this anomaly. This does not fall within the purview of procedural technicalities that is abhorred.

Having said that I find that the plaintiff’s suit is an abuse of the court process and is therefore dismissed with costs to the 1st defendant.

DATED and DELIVERED at ELDORET this 5TH DAY OF AUGUST 2020

M. A. ODENY

JUDGE