REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS APPLICATION NO. 129 OF 2005

IN THE MATTER OF AN APPLICATION BY MARY JEPTARUS MIBEI FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990

AND

IN THE MATTER OF REGISTERED LAND ACT (CAP. 300) LAWS OF KENYA

AND

IN THE MATTER OF PARCEL OF LAND NUMBER NANDI/CHEPTIL/38

AND

IN THE MATTER OF LAND CONTROL ACT (CAP. 302) LAWS OF KENYA

AND

IN THE MATTER OF LIMITATIONS OF ACTIONS ACT (CAP. 22) LAWS OF KENYA AND IN THE MATTER OF KABIYET SENIOR RESIDENT MAGISTRATE'S COURT LAND DISPUTE CASE NO. 7 OF 2005

AND

IN THE MATTER OF CIVIL PROCEDURE ACT AND RULES (CAP. 21) LAWS OF KENYA

AND

IN THE MATTER OF LAW REFORM ACT (CAP. 26) LAWS OF KENYA

BETWEEN

REPUBLIC OF KENYA …..... APPLICANT

VERSUS

KABIYET LAND DISPUTES TRIBUNAL ..... RESPONDENT

AND

WILSON K. KOSGEY …..... INTERESTED PARTY

EX-PARTE …..... MARY JEPTARUS MIBEI

JUDGMENT

Before court for determination is the Ex-parte's Application dated 19th July, 2005 seeking the following Orders:-

(a) The Honourable Court do find it fit to issue ORDERS OF CERTIORARI removing into this Honourable Court for purposes of quashing forthwith the proceedings and decision of Kabiyet Land Disputes Tribunal Case No. 7 of 2005 and removing into this Honourable Court for purposes of quashing forthwith the orders of Kapsabet Senior Resident Magistrate's Court Land Case No. Nandi/Cheptil/38.

(b) The Honourable Court to issue ORDERS OF PROHIBITION to prohibit the Senior Resident Magistrate's Court at Kapsabet from executing application forms for consent to subdivide and transfer forms in respect of Land Parcel No. Nandi/Cheptil/38 and to prohibit the Mosop Land Control Board from consenting to application to sub-divide and transfer the said parcel of land and prohibit the District Surveyor Nandi District from surveying and/or subdividing, demarcating and/or exercising or in any other matter whatsoever all that piece of land known as Nandi/Cheptil/38 and prohibit the land Registrar, Nandi District from registering the parcel in terms of the award file in court on 3rd May, 2005.

The same is premised on the following grounds grounds:-

1. That the Exparte/Applicant is the unlawfully registered proprietor of all that piece of land known as NANDI/CHEPTIL/38.

2. That the Respondent on the 19th and the 21st days of April, 2005 awarded 1.0 Acre to the Interested Party having allegedly bought the same in the year 1981.

3. That the Respondent did not have the jurisdiction to entertain the Interested Party's Claim to title 1.0 Acre of the purported Exparte's piece of land as such claim is ultra vires the provisions of Section 3 (1) of the Land Disputes Tribunal Act as read with Section 159 of the Registered Land Act (Cap. 300 of the Laws of Kenya).

4. That the Respondent did not have the jurisdiction to entertain the Interested Party's claim to title since the cause of action allegedly arose in the year 1981 and as of the 7th day of April, 2005 was time- barred in terms of the provisions of Section 13 (3) of the Land Disputes Tribunals Act (Act No. 18 of 1990) as read with Section 7 of the Limitations of Actions Act (Cap. 22 of the Laws of Kenya).

5. That the alleged sale of land is null and void ab initio for want of the consent of the local Land Control Board in terms of Section 6 of the Land Control Act (Cap. 302 of the Laws of Kenya).

6. That the Exparte Applicant was not served with the Interested Party's Statement of claim so as to enable her file an Answer to the same in terms of Section 3 (5) of the Land Dispute Tribunals Act and consequently the proceedings of the Respondent were a nullity ab initio.

7. That the Decision of the Respondent is unlawful having been made by an unlawful composition of the panel of elders in terms of Section 4 (2) of the Land Disputes Tribunals Act, supra.

8. That the Decision of the Respondent is further unlawful as the same is wrongly dated contrary to O.XX Rule 7 (1) of the Civil Procedure Rules as read with the Land Disputes Tribunals Rules (Forms and Procedure).

9. That the Exparte Applicant was fraudulently registered on the manipulation on one KITUR ARAP MZEE purporting to be a joint proprietor of the original title to wit NANDI/PETTY-CHEPTIL/6 by unlawfully causing the sub-division thereof and registering himself as the proprietor of ALL THAT piece of land known as NANDI/PETTY-CHEPTIL/39 and M/s. MARTHA JEPKOSGEI KIPKALUM and MARY JEPTARUS MIBEI as joint proprietors of ALL THAT piece of land known as NANDI/PETTY-CHEPTIL/38.

10. That in the premises the Exparte Applicant is not lawful proprietor of NANDI/CHEPTIL/38 as the said KITUR MZEE did not have the legal proprietorship in terms of Section 102 of the Registered Land Act, supra and consequently the Exparte Applicant has no lawful interest to pass to the Interested Party or anybody else or at all.

11. That in the premises herein the Respondent acted ultra vires the provisions of the Land Disputes Tribunals Act and the resultant proceedings and the Decision thereof is in the circumstances null and void ab initio and that same should therefore be removed into his Court by way of an ORDER of CERTIORARI and quashed forthwith.

12. That unless the proceedings of the Lower Court concerning and about the Respondent's Decision are STAYED by this Honourable Court the Exparte Applicant will suffer irreparable, irremediable and irredressible damage on the EXECUTION of the unlawful DECREE by the loss of her 1.0 Acres of Land.

This application arose as a result of the decision made by Kabiyet Land Disputes Tribunal on 19th April, 2005 as follows:-

*"**After a careful consideration of the Plaintiff and the Defendant, the witnesses statements we found that the Plaintiff has given Mary who is the Defendant Ksh. 3,000/= in 1981 for the purchase of land and not for leasing the land. So in that we see to it that the Plaintiff be given one (1) acre from Nandi/Cheptil/38.***

May the Honourable Court award one (1) acre to the Plaintiff. May the Honourable Court sign all subdivisions and transfer in favour of the Plaintiff."

In addition to the application, are a Supporting Affidavit, Statement and Verifying Affidavit, all dated 19th July, 2005.

Both the Respondent and the Interested Party have opposed the application.

The Interested Party Wilson K. Kosgei filed Notice of Preliminary Objection dated 4th October, 2005 raising the following points of law:-

- The court lacks jurisdiction to entertain the matter.
- The application is incompetent having not been supported by the statement.
- The application is incompetent having not been signed by the Applicant's Advocate.
- That the application is incurably defective.
- There is no application filed in separate cause after leave was granted.

The Interested Party also filed a Replying Affidavit sworn by himself on 4th August, 2005 and

expounded on the issues raised in the Preliminary Objection above.

The Respondent through the Hon. Attorney General opposed the application by Grounds of Opposition dated 20th June, 2013. The Grounds of Opposition raise the following points:-

1. The Application is incompetent and fatally defective in substance and form and contrary to the provisions of Order 53 under which it's brought.

2. The application is fatally defective and for striking out, in that the Senior Resident Magistrate's Court Kapsabet against whom the orders of certiorari and prohibition are sought is not a party to the suit, and court cannot issue orders against a person who is not a party to the suit.

3. The Senior Resident Magistrates Court Kapsabet was not a party to the application for leave.

4. That the procedure for challenging an award is laid down under Section 8 of the Land Disputes Tribunal Act.

5. The Application is out rightly misconceived, bad in law and incurably defective.

6. That the application is an abuse to the due process of this Honourable Court.

7. That there is no decision apparent to quash as the tribunal award ceased to exist once it was adopted as the judgment of the court.

8. That the present suit is res judicata the same having been ventilated in miscellaneous civil application number 193 of 2005 and civil suit number 197 of 1999.

9. That the Application dated 19th July, 2005 ought to be dismissed with costs to the Applicant.

The application was canvassed by way of filing written submissions which the court has adequately appraised itself with. I formulate issues for determination to be:-

(a) Whether the instant application is fatally defective.

(b) Whether the Land Disputes Tribunal had jurisdiction to entertain the claim before it.

It is important to note that the Interested Party filed another Notice of Preliminary Objection dated 25th October, 2006. The issues raised in this Preliminary Objection are similar to those raised in the Notice of Preliminary Objection dated 4th October, 2005. And since the counsel for the Interested Party did not alert the court about which Preliminary Objection he wished to rely on, I have, for purposes of this Judgment considered the Preliminary Objection dated 4th October, 2005.

COMPETENCE OF THE APPLICATION

Both the Respondent and the Interested Party have argued that the instant application is fatally defective and hence ought to fail. The Respondent and the Interested Party have advanced various arguments in this line.

The Interested Party has contested as follows;

- That an application for judicial review must be made by Notice of Motion.
- That there is no statement supporting the prerogative orders sought by the Applicant.
- That an application for Judicial Review must be supported by the verifying affidavit and not the

supporting affidavit as is the case herein.

- That the Applicant has sought prayers against parties that are not party to the suit, hence such orders cannot be granted. (See the Interested Party's written submissions)

To this end the Interested Party relied on the following cases; **COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY THROUGH REPUBLIC –VS- SILVANO ONEMA OWAKI T/A MARENGA FILLING STATION [2001] e KLR, C.A. AT KISUMU CIVIL APPEAL NO. 45 OF 2000; REPUBLIC –VS- ELDORET MUNICIPAL COUNCIL EX-PARTE PATRICK NALIANYA WANYONYI & ANOTHER [2005] e KLR, H.C. AT ELDORET MISC. CIVIL APPLICATION NO. 2005 OF 2004.**

In **COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY THROUGH REPUBLIC –VS- SILVANO ONEMA OWAKI T/A MARENGA FILLING STATION,** ibid, the learned Judges Omolo, Lakha and Keiwua JJA. delivered themselves as follows;

"That much is clear from some of the matters in the statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters.

We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:

'The application for leave "By a statement" – the facts relied on should be stated in the affidavit (R. V. Wandsworth JJ., ex p. Read [1942] 1 K. B. 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit."

At page 283 of the report of the case of R. V. Wandsworth Justices, Viscount Caldecote C. J. said:-

"The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a unsurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction."

The court in the WANDSWORTH CASE was considering the provisions of Order 53 of the English Rules of the Supreme Court which are in pari materia with our Order LIII of the Civil Procedure Rules. This appeal must, therefore, succeed and it is allowed with costs with the result that the order of the superior court dated August 18, 1999 is hereby set aside with costs to the appellant."

While in **REPUBLIC –VS- ELDORET MUNICIPAL COUNCIL EX-PARTE PATRICK NALIANYA WANYONYI & ANOTHER,** supra, the learned Judge Gacheche, J. while expounding on the provisions of Order 53 of the Civil Procedure Rules, reiterated as follows:-

"…..It is clear from the above provisions of the law, that the statement and verifying affidavit which accompany the application for leave shall, it being a mandatory requirement, be the ones that were served upon the Registrar, and the same should accompany the substantive application for orders for judicial review.

I am inclined to agree with Mr. Gicheru that a document is given its authenticity by the date when it was sworn, which therefore means that documents which bear separate dates despite the fact that they are otherwise similar amounts to two separate documents, which would contravene the requirements of rule 4 of Order LIII.

The fact that the verifying affidavits accompanying the Notice of Motion bears a date which is different from that which accompanies the application for leave, would in my mind mean that the two, which were made on different dates are different and Mr. Momanyi, cannot be heard to say that they are one and the same.

I have nevertheless taken the above submissions into account and it is important that I point out, that the Notice of Motion was filed in time and the statement which accompanied it, had several exhibits attached to it. The two verifying affidavits one by each applicant, which were similar in material particulars, had four paragraphs… The legal position was well laid down in the case of Commissioner General of Kenya Revenue Authority V. Silvano Onema Owaki T/a Marenga Filing Station CA (Kisumu) No. 45/2000 as '*it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review …….… that appears to be the meaning of rule 1 (2) of Order LIII',* ***and cited paragraph 53/1/7 of Supreme Court Practice Rules 1976 Vol. 1."***

Whereas the Respondent has contested as herebelow:-

- That it is difficult to tell from the face of this application as to whether the purported application is notice of motion or chamber summons.
- That the instant application contravenes the provisions of section 8 of the Land Disputes Tribunal Act.
- That at the time of the filing of this application on 19th day of July, 2005, the award had been filed on 3rd day of May, 2005 for adoption on 2nd day of June, 2005 and no appeal had been preferred by the Applicant. And that there was no decision apparent to quash as the award had been already adopted as the judgment of the court. And hence the Applicant ought to have challenged the judgment of the court and not the award.
- That it was mandatory that the Applicant enjoins the court (Senior Resident Magistrate's Court) that issued and or adopted the decree as a party to this proceedings. (See the Respondents written submissions).

To this the Respondent cited and relied on the case of **SAMMY WYCLIFFE MALESI –VS- REPUBLIC & 2 OTHERS H.C. AT KITALE MISC. CIVIL APPLICATION NO. 55 OF 2007,** where the learned Judge Koome J. (as she then was) observed as follows:-

"The ex-parte applicant's application is brought under the provisions of Order 53 of the Civil Procedure rules which is a special jurisdiction and the rules governing the procedure are set out under the provisions of Section 9 of the Law Reform Act and not the Civil Procedure Rules. By dint of the provisions of Order 53 Rule 3 (2) the order sought to be quashed was by the Chief Magistrate yet the Chief Magistrate was not a named party to the proceedings. In that case there is no way the ex-parte applicant could have complied with the provisions of Order 53 Rule 3 of the Civil Procedure Rules. That is the service upon the Chief Magistrate as that court was named as a party.

It is obvious also that the Applicant did not file a verifying affidavit to verify the statement of facts which is another requirement of Order 53 thus the first issue for determination is whether the above mistakes by the Applicant go into the core of the exparte Applicant's application or they are mere technicalities which can be overlooked in the broader interest of justice. The provisions of Section 1A and 1B of the Civil Procedure Act gives this court jurisdiction to make any order in the interest of justice. The same principle is given under Article 159 (1) (d) of the Constitution which enjoins the court to administer justice without undue regard to technicalities.

In this case the application seeks to quash the decision of the Chief Magistrate and the outcome would be an order directed to quash the decision of that court which is not a party. I am afraid this is fatal mistake that goes to the core of the application and the order sought cannot issue. For that fundamental mistake and with a lot of sympathy to the ex-parte Applicant, I find the application is fatally defective and it is hereby struck out with costs to the Interested Party."

The instant application before the honourable court for determination is brought pursuant to the provisions of section 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya which empowers the High Court to issue the prerogative writs of mandamus, prohibition or certiorari under special procedure as outlined by Order 53 of the Civil Procedure Rules.

The relevant provisions of Order 53 stipulates as follows:-

"1(2) An application for such leave as aforesaid shall be made ex parte to a Judge in Chambers, and shall be accompanied by a statement setting out the name and description of the Applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The Judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.

3(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days by Notice of Motion to the High Court, and there shall, unless the Judge granting leave has otherwise directed, be at least eight clear days between the service of the Notice of Motion and the day named therein for hearing.

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.

(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

4(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavit accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement." (See Order 53 Rules 1(1), 3(1), (2) & (3) and 4(1).)

In view of the foregoing provisions of the law, it is important to note that the instant application commenced vide Chamber Summons dated 23rd of June, 2005 seeking that the Applicant be granted leave to apply for the orders of Certiorari and Prohibition against the Respondent and the Interested Party. The said Chamber Summons was accompanied with the Statement dated 23rd June, 2005, the Veriying Affidavit sworn by Mary Jeptarus Mibei, and dated 23rd June, 2005 and the Affidavit sworn by the said Applicant and dated 23rd June, 2005.

The leave sought was granted on 29th day of June, 2005 by the Honourable learned Judge Lady Justice Jeanne Gacheche. (See the Order of the Court given on 29th June, 2005 and issued on 11th July, 2005). After the Applicant being granted leave she filed the instant Application dated 19th July, 2005 now before the Honourable Court for determination. Apparently the Respondent has contested that this application is neither a Chamber Summons nor a Notice of Motion. The application is titled as follows:-

"FILED PURSUANT TO LEAVE GRANTED ON 29/06/2005 NOTICE UNDER ORDER LIII RULE 3, 4 OF THE CIVIL PROCEDURE RULES SECTION 3A OF THE CIVIL PROCEDURE ACT AND SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

TAKE NOTICE that the Honourable Court shall be moved on 4th day of October, 2005 at ……. O'clock by counsel of the Applicant on hearing of an application which application is based on Annexed Affidavit of MARY JEPTARUS MIBEI annexed statement and the reasons to be adduced at the hearing of the application for orders that;

(a) ..…

(b) ……" (See the instant Application dated 19th July, 2005)

The instant application is accompanied by a Statement dated 19th July, 2005 and Affidavit in Support sworn by Mary Jeptarus Mibei, the Applicant herein on 19th July, 2005. The Applicant has annexed the exhibits on the said so called 'Affidavit in Support'. In addition, there is also the Verifying Affidavit sworn by the Applicant on the 19th July, 2005.

In view of the provisions of Section 8 and 9 of the Law Reform Act, supra, Order 53 of the Civil Procedure Rules, supra and the authorities cited by both the Respondent and the Interested Party, I totally and humbly disagree with the Respondent and the Interested Party that the instant application is incompetent and fatally defective for want of form and hence ought to be struck out. To the contrary, the Ex-parte Applicant complied with the law to the letter.

Order 53 Rule 1 (2) of the Civil Procedure Rules stipulates as follows:-

"1(2) An application for such leave as aforesaid shall be made ex parte to a Judge in Chambers, and shall be accompanied by a statement setting out the name and description of the Applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The Judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit."

The Applicant herein complied with the above provision of the law as well on filing the Chamber Summons dated 23rd of June, 2005 of which leave was granted on the same date. On leave being granted the Applicant filed the instant application pursuant to rule 3 (1) of Order 53 of the Civil Procedure Rules, supra, which states as follow:-

"***3(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days by Notice of Motion to the High Court, and there shall, unless the Judge granting leave has otherwise directed, be at least eight clear days between the service of the Notice of Motion and the day named therein for hearing."***

And therefore it is my humble view that even though the instant application has not been expressly titled '*Notice of Motion*' as contemplated by the above provisions of the law, it is very clear that this application qualifies to be the one; '*Notice of Motion*' under the said rule and failure to title the same is not fatal. The intent of the instant application by all and sundry is that it is the Notice of Motion pursuant to Rule 3 (1) above. Be that as it may, the Applicant in her title states as follows;

"***NOTICE UNDER ORDER LIII RULE 3, 4 OF THE CIVIL PROCEDURE RULES".*** In my view, this title is sufficient for all purposes and intents. In any case, the defect is curable by Article 159 of the Constitution which urges the courts not to give undue regard to technicalities.

The other contention advanced by the Interested Party is that there is no statement and Verifying Affidavit accompanying the instant application. I once again disagree with this line of argument. Order 53 Rule 4 (1) stipulates that:-

"4(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavit accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."

By dint of the above provision of the law, it is clear that on filing the Notice of Motion after the leave has been granted, the Applicant is required to serve the said Motion in company with the statements relied upon at the time the leave was sought. However, the affidavits accompanying the application for leave may also be supplied on demand. In the instant case it is evident that the Applicant on filing the instant application replicated the statement and the affidavits relied upon on seeking leave and filed/served them together with the instant application (Notice of Motion). There is no law that provides that the Statement and Verifying Affidavit accompanying the Notice of Motion should be disimilar with those accompanying the Chamber Summons. I thus hold that the main Motion is properly before court.

However, I have noted that the Applicant swore an Affidavit of which she named it '*Affidavit in Support*' and attached it to the Statement of facts. This Affidavit in support contains annextures in form of exhibits. According to the provisions of rule 1(2) and 4(1) of Order 53, supra, affidavits are required to accompany the Motion verifying the contents therein or rather the facts to be relied on. And therefore it ought not to be expressly referred to as verifying affidavit as argued by the Interested Party, but whichever name it may be referred to whether it is Affidavit in Support or just Affidavit, as the case herein, it is immaterial. The material aspect of it is that as long as the said affidavit verifies the facts laid down in the statement, then it is the affidavit contemplated by the said rule 1(2) and 4(1) of Order 53, supra.

Another contention with regard to the competence of the instant application is to the effect that the same was signed by the Applicant and not by the advocate. Order 2 Rule 16 state as follows:-

"Every pleading shall be signed by an advocate, or recognized agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person."

In the instant application, the application is signed by the Advocate while both the Statement and the 'Affidavit in Support' are signed by the Applicant Mary Jeptarus Mibei. It is not true therefore that the application was signed by the Applicant herself. It is only the statement and the affidavit in support that were signed by the Applicant. In my view this mistake is not fatal as it is curable under the provisions of Article 159 (1) (d). The foregoing notwithstanding the mistake herein is that of form and by dint of the provisions of Order 2 rule 14, that no technical objection shall be raised for want of form, it is cured.

The Respondent has also contested that the instant application is premature and contravenes the provisions of section 8 of the Land Disputes (LDT) Act, Act No. 18 of 1990. The respondent has argued that at the time of the filing of this application on the 19th day of July, 2005, the award had been filed on 3rd day of May, 2005 for adoption on 2nd day of June, 2005 and no appeal had been preferred by the Applicant. And that there was no decision apparent to quash as the award had been already adopted as the judgment of the court. And hence the Applicant ought to have challenged the judgment of the court and not the award.

In determining the foregoing argument we should consider the provisions of Section 7 and 8 of the LDT Act, Supra. Section 7 of the Act states as follows:-

"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 judgment in accordance with the decision of the Tribunal and upon judgment being entered, a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act" (See Section 7 (1) & (2) of the Land Disputes Tribunal Act, Cap 303 A, Laws of Kenya).

While Section 8 of the Act stipulates as herebelow:-

"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.

…….(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

(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: (See section 8(1), (8) & (9) of the LDT Act, ibid).

Under S. 7 of the Act, an award becomes a Judgment only after it has been filed with the Magistrate's. The avenue for an appeal against the award as provided by Section 8 is optional and does not bar a party from proceeding to the High Court for a judicial review remedy.

In this case, this judicial review application having been instituted after the filing of the award with the Magistrate's court is properly before the court.

And as was rightly held in the case of **HARRISON NDUNGU KUNGU –VS- NAKURU CHIEF MAGISTRATE'S COURT & ANOTHER (2005) e KLR,** the learned Judge L. Kimaru, J. noted that:-

"The court will also not question the composition of the Tribunal neither will it make inquiries to establish whether or not rules of natural justice were followed when the said award was arrived at. The Subordinate Court's role as it were is procedural and clerical in nature. The said court is legally bound to adopt an award of the Tribunal and enter judgment in accordance with the said award without making any inquiry as to the legality or otherwise of the said award. When so acting, the subordinate court is not conducting proceedings in a legal sense where parties to the award are required to be heard. Rules of natural justice cannot therefore be said to be breached when a Magistrate is adopting an award made by the Land Disputes Tribunal ."

In view of the above holding it is apparently clear that the Magistrate's Court's role in the adoption of the award is more administrative and or clerical in nature and hence it is not essentially the judgment (adopted award) that is being challenged but the decision that leads to the said adoption.

I therefore once again disagree with the Respondent's contention that the instant application now before the court for determination is premature.

The Respondent has also argued that it was mandatory that the Applicant enjoins the court (Senior Resident Magistrate's Court) that issued and or adopted the decree as a party to these proceedings.

(See the Respondent's written submissions). To this end the Respondent's counsel relied heavily and cited the decision by Jeanne Gacheche, J. in the case of **REPUBLIC –VS- ELDORET MUNICIPAL COUNCIL EX-PARTE PATRICK NALIANYA WANYONYI & ANOTHER**, Supra. This decision is not binding to this Honourable Court but only persuasive. It is my humble opinion that the reasoning in the foregoing decision is not persuasive enough due to the following reasons:-

One, in the instant case the Applicant as much as he has sought prohibitory orders against other entities such the Senior Resident Magistrate's Court at Kapsabet, Land Control Board and District Surveyor Nandi District; the main substantive prayer is to quash the decision of the Respondent, Kabiyet Land Disputes Tribunal. The second limb of the prayers on the face of the application is immaterial in the sense that once the decision of the Kabiyet Land Disputes Tribunal is quashed the other prayers will stand dispensed with.

Two, although no award was annexed to the application, there is no dispute that the same was adopted by the Magistrate's Court.

And as the Magistrate's Court work is purely administrative, it means that the liability heavily lay on the Tribunal. As such, the failure to enjoin the Magistrate's Court as a party cannot in any way render the application fatally defective.

JURISDICTION OF THE TRIBUNAL

The dispute under this head is that the matter revolved around sale of the suit land and failure to do specific performance (See submissions of the Applicant). The Interested Party and the Respondent on the other hand contend that the Tribunal had jurisdiction to deal with the matter. The Interested Party cited the case of **MUHIA -VS- MUHIA (1999) 1 E.A. 209 – 212** stating that since the land was agricultural the Tribunal could entertain the claim. Learned Judges Gicheru, Shah, and Awuor, JJA stated:-

"How to consider substantive point: did the learned Magistrate have the jurisdiction to deal with the claim before her? The Land Disputes Tribunal Act of 1990 (18 of 1990) came into operation on July 1993 by way of Legal Notice No. 91 of 1993. The intention of the legislature was stated as *'to limit the jurisdiction of Magistrate's court in certain cases relating to land, to establish Land Disputes Tribunal and give their jurisdiction and powers and for corrected purposes'.*

By land is meant agricultural land, as defined in Section 2 of the Land Control Act (Chapter 302) whether or not registered under the Registered Land Act (Chapter 300)."

Section 3 (1) of the Land Disputes Tribunal Act, Act No. 18 of 1990 spells the jurisdiction of the Tribunal in the following words:-

"3(1) Subject to this Act, all cases of a civil nature involving a dispute as to-

(a) the divison of, or the determination of boundaries to land, including land held in commpon;

(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 dispute before the Tribunal related to the sale of the subject land between the Applicant and the Interested Party. (Refer to the verdict elsewhere in this Judgment). There were also other

emerging issues relating to the land, namely;

- That a case is pending awaiting determination that was filed by the Interested Party way back in 1990, being Eldoret High Court Civil Case No. 197 of 1999. See copy of Plaint dated 27th September, 1999 and amended by an Originating Summons dated 22nd November, 1999 exhibited by the Ex-parte Applicant as annextures MJM.4 and MJM.5 respectively.
- That there are various titles extracted under the same land – See Ex-parte Applicant's annextures MJA.6 – 10 (b).
- The suit land is subject of a Succession Cause.
- There are allegations of fraud and manipulation of titles by the Interested Party.

Be that as it may, it is evident that by virtue of the fact that the dispute related to an interest in the land, the Tribunal's jurisdiction was automatically outed. The Tribunal therefore acted ultra vires its jurisdiction or mandate when it purported to deal with issues that were outside the confine of Section 3 of the Land Disputes Tribunal Act – See **REPUBLIC -VS- CHAIRMAN OF KAPSABET DIVISION LAND DISPUTES TRIBUNAL & ANOTHER (2006) e KLR** in which the High Court stated:-

"I have considered the application and the submissions by counsel. It is common ground that the Tribunal lacked jurisdiction to determine questions or disputes relating to title and ownership of registered land. I agree with that position."

The land in dispute is also a registered land over which the Tribunal had no jurisdiction. I thus agree with counsel for the Applicant in this respect, that the Kabiyet Land Disputes Tribunal had no jurisdiction to entertain the claim.

It is also gainsaid that other courts handling other disputes relating to the land will completely deal with the issues at hand before them. This court was not provided with an outcome in any of the cases, and so I decline to hold that this application is Res Judicata.

In the result, I allow the application. Prayer (a) and (b) are granted accordingly with costs to the Ex-Parte Applicant.

DATED and **DELIVERED** at **ELDORET** this 17th day of July, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Birech Advocate for the Ex-Parte Applicant

No appearance for the Attorney General for the Respondent

Mr. Momanyi Advocate for the Interested Party