



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 830”A” OF 2012

ESTHER JEPKORIR SAWE

[Suing as the Legal Representative of the

Estate of JAMES KIPKEMBOI CHIRCHIR – DECEASED]..PLAINTIFF

VERSUS

WESLEY SOSTEN KIPLANGAT SAINA.....1ST DEFENDANT

THE CHAIRMAN LAND DISPUTES

TRIBUNAL, KAPSABET.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1. **James Kipkemboi Chirchir**, the deceased, commenced this suit through the Plaint dated the 14th March, 2012 and amended on 22nd November, 2012 through the leave granted on the 21st November, 2012 and extended on the 18th December 2012, seeking for the following prayers;

“(a) A declaration that the decree dated 25th August, 2011 and Order dated 21st February, 2012 in Kapsabet LDT No. 42 of 2011 is illegal and or nullity and incapable of being executed by the 1st Defendant as against land parcel number Nandi/Kamobo/1443.

(aa) A declaration that the Land Disputes Tribunal acted outside its jurisdiction in entertaining dispute over a road access.

(b) Permanent order of injunction do issue restraining the defendant from enforcing and/or executing the decree dated 25th August, 2011 and Order dated 21st February, 2012 as against land parcel number Nandi/Kamobo/1443.

(c) Cost of the suit.

(d) Any other relief that this court may deem fit and just to grant.”

The Plaintiff avers that the 1st Defendant lodged an oral complaint with the 2nd Defendant on 9th March, 2011 over a disputed road of access to land parcel Nandi/Kamobo/2549 through the Plaintiff’s parcel Nandi/Kamobo/1443. That the 2nd Defendant referred the dispute to the County Land Registrar and Surveyor who recommended that a road of access be created through Plaintiff’s parcel to Nandi/Kamobo/2549, thereby reducing the Plaintiff’s land’s acreage if implemented or executed. That the 2nd Defendant’s Award was on the 21st February, 2012 adopted by Kapsabet Resident Magistrate’s Court and decree issued. That the Land Registrar and Surveyor did not have authority to carve a road of access to serve the 1st Defendant parcel as he had purchased his parcel at a different time and from a different person, and that land is served by a different access road. That the 2nd Defendant had no jurisdiction to adjudicate on the issue of road of access. That the award for the access road to be created through the Plaintiff’s land, was therefore a decision of the Land Registrar and Surveyor, and not of the Tribunal. That the Land Registrar and Surveyor exceeded their mandate by recommending creation of an access road through the Plaintiff’s land instead of confirming to the Tribunal that a road of access serving the 1st Defendant existed.

2. The claim is opposed by the 1st Defendant through the statement of defence dated 27th November, 2012 and amended on the 29th January, 2013. The 1st Defendant avers that the Plaintiff had blocked the road of access on several occasions and that the Land Registrar and Surveyor

visited the lands and confirmed the existence of the road. That the referral of the dispute to the Surveyor was by consent of the parties and Plaintiff should not complain. The Plaintiff should have challenged the Tribunal decision through judicial review proceedings and not by suit commenced through a Plaint. That the decree/order made by the Court and the Tribunal do not relate to the Plaintiff's land parcel No. Nandi/Kamobo/1443, and therefore the suit is defective and should be dismissed with costs.

3. **Esther Jepkorir Sawe** moved the Court vide the Motion under Certificate of Urgency dated 21st March, 2019 that was allowed the same day to be substituted for the original Plaintiff, who had passed on the 9th September, 2018 having obtained Letters of Administration Ad litem, in Kapsabet Senior Principal Magistrate Ad Litem Cause No. 32 of 2018 issued on the 5th December, 2018.

4. The hearing commenced on the 18th November, 2019 when the Plaintiff testified as **PW1**. She told the Court that her late husband owned Nandi/Kamobo/1443, which he had bought from the three previous owners. That the 1st Defendant is a neighbor and owns Nandi/Kamobo/1901, which was amalgamated with another to be Nandi/Kamobo/2599, but they do not share a boundary. That she knew that in 2011 and 2012, the 1st Defendant lodged a complaint with the Land Disputes Tribunal in Case No. 42 of 2011 for her husband to give him a road of access through his land. That the Tribunal's decision was filed with Kapsabet Law Courts and adopted as an order of the Court, but has not been executed due to the stay order. That the 1st Defendant's parcel has an access road already, and do not need creating another through her husband's land. During cross-examination, PW1 confirmed that the Land Surveyor and Registrar filed their report dated 12th July, 2017 with the Court after an exercise that had been agreed upon by the parties, and directed by the Court. The witness conceded that only the Land Registrar and Surveyor can authoritatively confirm whether there exists a public road of access through her parcel of land. She further stated that her late husband had participated in the Tribunal hearing and did not file an appeal to the Provincial Land Disputes Appeals Committee. That the Surveyor's Report dated 12th July, 2017 does not state that there is a public road of access passing through their land parcel Nandi/Kamobo/1443.

5. The 1st Defendant testified as DW1. He told the Court that he bought parcels Nandi/Kamobo/1901 and 2299 in 1989. That the sellers showed him the access road that passed through Nandi/Kamobo/1443 which was jointly owned by three people then, who later sold it to late husband to the Plaintiff. That in May, 2012, the Plaintiff's husband told him that he had been illegally passing through his land as there was no road there, and he proceeded to block it. DW1 stated that he reported to the Land Registrar who visited the locus and then referred them to the Land Disputes Tribunal. That he lodged his complaint with the Tribunal who heard them, but referred the matter to Kapsabet Law Courts without making a decision. That the Court in turn referred them to the County land Registrar and Surveyor, and a report was filed with the Court. That the Court read the report to them. That the Land Disputes Tribunal had not made a decision on the complaint, but only referred it to the Court. During cross examination, DW1 testified that the Plaintiff and her late husband had participated in the hearing before the Land Registrar and Surveyor. He clarified that the Plaintiff's late husband had approached him first about stopping passing through his land in October, 2010 and in May, 2012, he lodged a complaint with the Tribunal after being referred there by the Land Registrar. That the complaint he lodged with the Tribunal was that the late husband to the Plaintiff had blocked the public road. That the Tribunal heard the two sides but did not make a decision on the dispute but instead, referred it to the Court. That the road of access that had been blocked was opened after the Land Registrar's visit and is still open to-date.

6. The learned Counsel for the Plaintiff and the 2nd and 3rd Defendants plus the 1st Defendant filed their written submissions dated the 28th February, 2020, 9th March, 2020 and 14th May, 2020 respectively.

7. The following are the issues for the Court's determinations;

(a) Whether the Land Dispute Tribunal's decision was within its jurisdiction.

(b) Whether the Land Registrar's and Surveyor's Report was part of the Land Disputes Tribunal's decision or the Court's decision. That if it was the Court's decision, whether it can be challenged in this proceedings without making the Court a party.

(c) Whether the Plaintiff is entitled to any of the prayers sought.

(d) Who pays the costs of this suit?

8. The Court has carefully considered the parties' pleadings as summarized above, the oral and documentary evidence tendered, the written submissions by Counsel plus the superior court's decisions and the law cited therein and come to the following findings;

(a) That this suit was commenced by the Plaintiff through the Plaint dated 14th March, 2012 and filed on 15th March, 2012 initially as Eldoret Hccc No. 47 of 2012, and thereafter transferred to this Court and registered as Eldoret ELC No. 830"A" of 2012. That though not produced specifically as an exhibit by any of the parties, the proceedings of the Kapsabet Land Disputes Tribunal between the Plaintiff and the 1st Defendant featured prominently in their pleadings and oral evidence. That fortunately, a copy of the proceedings headed "**MINUTES OF KAPSABET DIVISION LAND DISPUTE TRIBUNAL HELD ON 9TH MARCH, 2011 TO ARBITRATE ON PARCEL NO. NANDI/KAMOBO/1443, 2549 AND 4957 ROAD OF ACCESS**", forwarded to the Principal Magistrate, Kapsabet Law Courts vide a letter dated the 7th July, 2011 was annexed among other documents to the Plaintiff's affidavit sworn on 14th March, 2012 in support to his Motion of even date for stay orders and marked "**JKC2**". That the Court has every right to peruse the contents of the said document and make its inference especially in ascertaining the nature of the dispute lodged, and the decision thereof, if any. That way, the Court will be in a position to make a determination whether or not the Tribunal was with jurisdiction to handle the dispute, and to make the decision it made, if any.

(b) That the statement or testimony in the Tribunal's Minutes attributed to **Wesley Sosten Kiplangat Saina**, who the Court takes to be the 1st Defendant herein is as follows;

“I’m here because my neighbor James Kipkemboi Chirchir has closed the access roads to my land No. Nandi/Kamobo/2549... This road is now closed and I would like it opened....”

That the following is an extract of the statement or testimony of James Kipkemboi Chirchir who the Court takes to be the initial Plaintiff herein;

“I bought this land No. Nandi/Kamobo/1443 from three people under one title deed. ...when I finished the deal, I called those who sold me this land and told them that when I bought this land you told me that there was no road but I can see somebody passing through. One of the people who sold me land phoned Wesley Sosten Kiplagat Saina and told him there was no road in this land. Instead of Kiplagat Saina talking to me in a good way, he told me that there was a road and I could do what I want. I reported to the District Officer on 1.11.2010...according to the ruling of District Officer; they told me that there was no road so I was right to close this road... The officer told us that the right place was at the Lands Tribunal...”

That the foregoing extract of the statements or testimonies attributed to the initial Plaintiff and 1st Defendant confirms to the Court that the dispute that the 1st Defendant had lodged with Kapsabet Land Disputes Tribunal against the initial Plaintiff was over a road of access that the initial Plaintiff had closed over his land parcel Nandk/Kamobo/1443 serving Defendant’s parcel Nandi/Kamobo/2549.

(c) That upon hearing the parties and their witnesses, the Tribunal came up with its findings and ruling that was signed by the Chairman and one member on 30th June, 2011 as set out at page 7 as follows;

FINDINGS

- 1. That this case is not a land case but road.***
- 2. That the two parties each bought from different people.***
- 3. That Wesley Sosten Kiplagat Saina bought land in 1993 from Japta Keino and was shown access road to his land.***
- 4. That James Kipkemboi Chirchir bought land from three people in 1996 and was shown access road to his land.***

RULING

That we pray to the honourable Court to direct the District Land Registrar and District Surveyor to visit the ground and assess so that each parcel is accessible to the road.”

That the other document annexed to the said Plaintiff’s affidavit is the decree issued in Kapsabet Principal Magistrate Court LDT No. 42 of 2011, dated 25th August, 2011 and marked “JKC3”. The decree states that the matter was coming up for reading and adopting the award of Kapsabet Division Land Disputes Tribunal and sets out the orders issued thereof as follows;

“That the suit herein is settled in the following terms;

- 1. That the award of Kapsabet Division Land Disputes Tribunal filed herein on 15th July, 2011 be and is hereby read and adopted as judgment of this honourable court.***
- 2. That the District Land Registrar and District Surveyor to visit the ground and assess so that each parcel is accessible to the road.***
- 3. That 30 days right of appeal.”***

That also annexed to the said affidavit is the Land Registrar’s Report dated the 19th December, 2011 and marked “JKC4” which confirms that the parcels of land owned by the Plaintiff and 1st Defendant had an access road that was provided during the subdivision of Nandi/Kamobo/1441 to create Nandi/Kamobo/1900 and 1901. That the other document attached to the said affidavit is the Court’s order dated the 21st February, 2012 in Kapsabet Principal Magistrate’s Court LDT No. 42 of 2011. The order indicates that Counsel for the Plaintiff and Defendant addressed the Court after which the following orders were issued;

“1. THAT the District Land Surveyor and District Land Registrar with the independent and registered Surveyors nominated by each party do visit the land and finally lay the access roads on the ground and prepare a comprehensive report for adoption by this Court.

2. THAT both parties do share the costs of the surveyors equally and the fees assessed by the surveyors should be paid on or before 4.00 p.m. on the 22nd day of February, 2012.

3. THAT the matter be mentioned on the 29th day of February, 2012 to receive the Comprehensive Surveyor’s Report.

That followed by that order, is the District Land Registrar's Report dated the 28th February, 2012 marked 'JKC5' that refers to the court order of 21st February, 2012 and contains the following findings among others;

"FINDINGS:

Upon measuring parcel of the No. 2343, 1443 and 1901 belonging to James Kipkemboi Chirchir and Wesley Sosten Kiplangat Saina, it was found that...

(A) James Kipkemboi Chirchir's land stand on 2343 measuring (0.16) Ha on the ground against (0.1) Ha as indicated in the Mutation which is an excess of (0.06) Ha.

(B) His other land No. 1443 on the ground measures (0.26) Ha against (0.2) Ha as shown the Mutation also as excess of (0.06) Ha.

NB:

Area of parcel No. 1443 plus the road of access measures (0.3) Ha which is a clear proof that this land includes the provision for the road of access.

(C) Wesley Sosten Kiplangat Saina's land No. 1901 as also measured on the ground and found to be (0.23) Ha whereas the Mutation instrument indicates he owns (0.22) Ha there is also an excess of (0.01) Ha. Despite the excess in area of both parcels of land, both the District Surveyor and the independent surveyors hired by both parties were in agreement that the road of access leading to parcel No. 1901 to be maintained as it appears on the ground and should therefore be further reinforced to avoid any future dispute on the position of the road...blocking the road will be breach of peace enjoyed by the Plaintiff amongst other people using the road."

That this suit was filed on 15th March, 2012, which is about two weeks after the Land Registrar's Report dated the 28th February, 2012 referred to above. That the record shows that the Plaintiff also filed the Motion dated 14th March, 2012 seeking for stay of proceedings and execution of the orders in Kapsabet LDT No. 42 of 2011. That it is clear from the Plaintiff's deposition in the supporting affidavit of the same date especially paragraph 17 that he did not agree with the Land Registrar's Report dated the 28th February, 2012 made pursuant to the Court Order of 21st February, 2012 in Kapsabet Principal Magistrate's Court LDT No. 42 of 2011. That the stay of proceedings and execution order sought was granted on the 15th March, 2012. That from the documentary and oral evidence presented by both PW1 and DW1, and the Court's summary of what had earlier been annexed to the affidavits filed earlier in respect of the interlocutory applications, there is nothing to suggest, even however remotely, that any of the Land Registrar's and Surveyor's Reports prepared after visiting the locus was ever filed with, and adopted as an award, or decision of Kapsabet Division Land Disputes Tribunal, the 2nd Defendant. That indeed, there is no evidence presented that the Land Disputes Tribunal pronounced itself on the matter again after signing off their Minutes on the 30th June, 2011 after which it was forwarded to the Kapsabet Law Courts by the District Officer vide her letter dated 7th July, 2011 referred to earlier.

(d) That **Section 3(1) of the Land Disputes Tribunals Act Chapter 303A of Laws of Kenya [Now repealed under Section 31 of the Environment and Land Court Act No. 19 of 2011]** limited the Tribunal's jurisdiction as follows;

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

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land,

Shall be heard and determined by a Tribunal established under Section 4."

That **subsection (3)** required that ***"Every claim shall be registered in register of claims to be kept by the Tribunal in the prescribed manner and the claims shall be numbered consecutively in each year according to the order of their institution."*** That from the outset, the Court has noted from the Tribunal's Minutes (proceedings) and forwarding letter by the District Officer that it does not have a case or dispute reference number. That further, **Section 4(2) of the Land Disputes Tribunal** required each Tribunal to consist of a Chairman and either two or four elders. That the Tribunal was therefore properly constituted when consisting of a Chairman and two or four elders so as to have an odd number of either three or five. That **Section 6(2)(b) of the Act** provided that ***"the decision of the Tribunal shall be that of the majority of the members hearing the dispute."*** That though the Tribunal Minutes had names of three members, only two (2) affixed their signature at the end, and there is no explanation tendered as to why the third member **Richard K. Meli** did not sign. That further, what the Tribunal did, in what is headed ***"RULING"*** is not to make any award, or grant a decision in favour, or against any of the parties. The Tribunal instead referred the parties to the dispute to Kapsabet Law Courts with a prompt or suggestion that the dispute be handled by the Land Registrar and Surveyor. That though the Tribunal Minutes (proceedings) were on 7th July, 2011 forwarded to the Court as was required by **Section 7(1) of the Act**, and the Court proceeded to adopt it on the 25th August, 2011, it did not contain any positive order capable of being adopted and executed without additional inputs.

(e) That the Tribunal ruling may have been informed by the finding Number 1; ***“that this case is not a land case but road”***. That it is the view of the Court that the Tribunal should have dropped its tools at that stage as without jurisdiction they had no jurisdiction to make any decision or award that could be forwarded to the Court for reading and adoption (**see**) the Court of Appeal decision in the case of ***The Owners of Motor Vessel “Lillian S” Vs Caltex Kenya Ltd (1989) KLR 1***. That thereafter, the parties would have sought legal advice on how to proceed.

(f) That having made a finding that the Tribunal’s Minutes signed by two members on 30th June 2011, and forwarded to Kapsabet Law Courts vide letter dated 7th July, read and adopted by the Court on 25th August, 2011 in Kapsabet Principal Magistrate’s Court LDT No. 42 of 2011, did not contain any award capable of being executed in favour or against any of the parties, then it follows that the subsequent proceedings undertaken in Court between the parties, including the orders for the Land Registrar and Surveyor to visit the locus, and the reports filed thereof dated 19th December, 2011, and 28th February, 2011 were not part of the Tribunal award or decision. That the Court proceedings and orders made after the 25th August, 2011 could only be challenged through, for example appeals or review proceedings, judicial review or suit seeking for declaratory order as appropriate. That depending on the route taken to challenge those proceedings and or orders, the Court would need to be enjoined as a party. That prayer (a) that seeks for a declaration that the decree dated the 25th August, 2011, and order dated 21st February, 2012 in Kapsabet LDT No. 42 of 2011 are illegal and or nullity and incapable of being executed by the 1st Defendant as against parcel Nandi/Kamobo/1443, cannot be issued without enjoining the court as a party.

(g) That the record shows that on 3rd December 2015, the parties through their learned Counsel entered into a consent that was extracted on 4th December, 2015 and reads as follows;

“1. The County Surveyor, Nandi County do ascertain the boundary between land reference Nandi/Kamobo/1443 and Nandi/Kamobo/1901.

2. The County Surveyor, Nandi County do ascertain if there is a road of access bordering land reference Nandi/Kamobo/1443 serving land reference Nandi/Kamobo/1901.

3. The Surveyor do file his report in Court and the matter be mentioned on 26th January, 2018 for further orders.

4. The cost of survey be shared between the Plaintiff and 1st Defendant.”

That the record shows the Surveyor’s Report dated the 24th March, 2016 was filed with the Court. That the Court had in its order of 18th November, 2019 allowed any party to make reference and speak on it despite not being in the lists of documents filed by the parties. That order was informed by the fact that the Report had been procured and filed with the Court through the consent of the parties on the 3rd December, 2015. That the said Report was already part of the evidence before the Court, though each of party was at liberty to call the maker for cross-examination on it, or to call evidence to challenge its contents. That none of the parties called the maker or author of the report for cross-examination and no evidence to rebut its contents was availed. That among the findings and conclusion in the report dated 24th March, 2016 are as following;

“Findings:

From the ground, and also from the RIM, there is no common boundary between parcels Nos. 1443 and 1901. As per the RIM, there is a road of access running along the northern boundary of parcel No. 1443 and goes all the way to pass along the southern boundary of No. 1901. On the ground, the RIM position is not reflected. The road on the RIM is only clear between parcels 1286 and 5165 in the neighbourhood. As it enters parcel No. 1443, it is visible path, which is contested by the parties. The complainant argues it is his land and the defendant says it is a road.

From parametric dimensions and area computations, the road is right inside parcel No. 1443. The path further passes through another parcel No. 2499, to access parcel 1901. Perimeter measurements of parcel 1901 however, agree with the RIM.

Conclusion:

The contested road on the ground is not a true reflection of the road contained in the RIM. The same road reduces the area parcel No. 1443 from its head title to 0.30 ha if the ground position is adopted. The said road on the ground does not directly access No. 1901.”

That the finding by the Surveyor as far as the existence and position of the road of access between the Plaintiff’s and 1st Defendant’s parcels is primarily the same in the two earlier Reports by the Land Registrar dated the 19th December, 2011 and 28th February, 2012 procured through orders made in Kapsabet Principal Magistrate’s Court LDT No. 42 of 2011. That all the Land Registrar’s and Surveyors’ Reports support the position that a road of access that passes through the Plaintiff’s parcel Nandi/Kamobo/1443, to serve Nandi/Kamobo/1901 among other parcels, exists in the relevant survey documents including the Register Index Map (RIM), but has not been properly and fully positioned on the ground. That the County Land Registrar and Surveyor are the correct authorities in interpreting the contents of the relevant survey maps and other documents, and determining the points of agreement or diversion on the ground position, and they have severally done so coming to more or less the same position. That what remains now is the goodwill of the affected parties to implement the decision with the obvious technical support of the Land Registrar and Surveyor upon invitation.

(h) The despite the way the dispute between the Plaintiff and 1st Defendant was registered with the Court as Kapsabet Principal Magistrate's Court LDT No. 42 of 2011, the parties do not appear to have raised any objections, and indeed they participated in the proceedings therein with their advocates. That in view of the provision of **Article 159 (2)(d) of the Constitution of Kenya 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Chapter 21 of Laws of Kenya** and **Section 19(1) of the Environment and Land Court Act No. 19 of 2011 of the Laws of Kenya**, and as this proceedings does not amount to an appeal of any of the orders, or decree made in Kapsabet Principal Magistrate's Court LDT No. 42 of 2011, so as to invoke this Court's appellate jurisdiction, the Court finds no basis has been established to issue prayer (b) of the amended plaint.

(i) That though the Plaintiff has failed on all the prayers, the Court is of the view that each party bears their own costs as a way of cultivating goodwill between them and to encourage that they seek an amicable solution that caters for posterity on both sides.

9. That flowing from the foregoing, the Court finds the Plaintiff has failed to prove her claim against the Defendants to the Standard required of balance of probabilities. The Plaintiff's suit is therefore dismissed with each party bearing its own costs.

Orders accordingly

Delivered virtually and dated at Eldoret this 21st day of October, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Mulisa for Ogutu for Plaintiff.

Mr. Tallam for 1st Defendant.

r. Kuria for 2nd and 3rd Defendants.

Court Assistant: Christine

and the Judgment is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.