



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

IN THE APPLICATION (MISCELLANEOUS NO. 753 OF 2008)

**IN THE MATTER OF AN APPLICATION BY SHABAN CLAN, CHEPKONGA CHEMOSOI,
KATAUN ALIMARIS JOSEPH K. ALIMARIS AND JOEL KILIMO**

AND

IN THE MATTER SECTION 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26

AND

**IN THE MATTER OF PROCEEDINGS OF AN AWARD OF THE MARAKWET DISTRICT
LAND DISPUTES TRIBUNAL NAMEDLY L.T.D. NO. 15 OF 2008**

**DATED 30.07.2009 AND ITEN RESIDENT MAGISTRATE'S COURT L.D.T. CASE NO. 35 OF
2008**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

- 1. THE MARAKWET LAND DISPUTES TRIBUNAL.....1ST RESPONDENT**
- 2. THE RESIDENT MAGISTRATE'S COURT AT ITEN2ND RESPONDENT**
- 3. THE MARAKWET DISTRICT COMMISSIONER.....3RD RESPONDENT**
- 4. THE PROVINCIAL ADMINISTRATION4TH RESPONDENT**

AND

KAKIBARAS CLAN, JACOB KISANG

REUBEN CHELANG'AINTERESTED PARTY

SHABAN CLAN, CHEPKONGA CHEMOSOI
KITAUN ALIMARIS, JOSEPH K. ALIMARIS

JOEL K. LIMOEX-PARTE

RULING

This preliminary objection appears to be aimed at the chamber summons dated 22nd April 2010 which was due for hearing on 22nd February, 2011.

The interested parties are the objectors and the objection is grounded on the basic fact that this matter is Res-Judicata having been heard and determined by the Marakwet Land Disputes Tribunal in Tribunal Case No. 15 of 2008.

It is the objector's contention that the suit land was awarded to them by the said tribunal and that the award was subsequently adopted as a judgment of the court by the Resident Magistrate's Court at Iten on the 10th December, 2008.

The objectors also contended that the said judgment was never set aside nor appealed against and remains intact to date.

The objector's learned counsel **Mr. Chebii**, introduced another angle to the objection by stating that the six months period within which an application for certiorari may be made has since expired.

The learned counsel for the applicants **Mr. Cheptarus**, alluded to an application dated 12th October 2010 which is a notice of motion to have orders made by the court on 18th May 2010 set aside. He said that the said application ought to be heard first and if it is allowed then this preliminary objection could be raised. He contended that the preliminary objection is premature.

This being the case and although notice of preliminary objection is not specific as to which application is targeted, it would follow that the objection is not aimed at the application dated 22nd April, 2010 nor the application dated 12th October, 2010 but the entire suit brought under the provisions of sections 8 and 9 of the Law Reform Act. This explains the contention by the objectors that the suit is "**res-judicata**" on the basis of section 6 and section 7 of the Civil Procedure Act. It also explains the reason behind the introduction of the angle that the application in so far as it relates to the order of certiorari was made outside the prescribed six months period.

Basically, a suit brought under section 8 and 9 of the Law Reform Act comes under the court's special jurisdiction in judicial review proceedings which are essentially aimed at providing checks on the excesses of public officers and public bodies in performance of their quasi judicial and/or administrative duties. Being special proceedings, they are neither civil nor criminal proceedings. In such instance, the court exercises jurisdiction "**sui-generis**." Consequently, other than order 53 of the Civil Procedure Rules, the provisions of the Civil Procedure Act including section 6 and 7 would not apply in judicial review proceedings (see, **Republic v.s. Communication Commission of Kenya & Another (2001)1EA 199, Commissioner of Lands v.s. Kunste Hotels Ltd. (1995-1998)1EA1 and Welamondi v.s. The Chairman Electoral Commission of Kenya (2002)1KLR 486**).

Therefore, in as much as it is based on section 6 and 7 of the Civil Procedure Act, the present preliminary objection cannot be sustained.

In any event, the principle of res-judicata does not normally apply to judicial review (see, **De Smith Woolf and Jowell Judicial Review of Administrative Actions (Fifth Edition) and Republic v.s. Judicial Service Commission ex-parte Pareno(2004)1KLR 203**).

As to the six months period within which a person may apply for certiorari, the objectors may raise the issue during the hearing of the applicant's substantive application.

Otherwise the preliminary objection is dismissed with costs to the applicant.

J.R. KARANJA

JUDGE

(Read and signed this 1st day of March 2011 in the presence of Mr. Ngumbi for Mr. Cheptarus for applicant)