



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Misc Civ Appli 285 of 1997

DINAH CHEPKERING KEMBI..... .APPLICANT

VERSUS

ANNAH KIMITEL..... 1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

The applicant sought and he was granted leave to apply for an Order of certiorari for an order that the decision of the Uasin Gishu Land Disputes Tribunal dated 4th December, purportedly sub-dividing and wrongfully allocating shares in land Title No. LR. 15449(P.No. 9723) Sergoi River Farm Uasin Gishu District be and is hereby immediately quashed.

2. Costs of the application be granted to the applicant.

The grounds in support are set out in the supporting affidavit, statement, affidavit of verification annexure and oral submissions in court. The main ones are that;

1. She is the administrator of the estate of one Lawrence Kemei while the interested party is the administrator of the estate of Nyangio Kimitei.

2. That the dispute dates back to 1963 when the deceased purchased the suit land together and a dispute arose when the late Lawrence Kemei sought to have the land subdivided so that he gets his rightful share. In pursuance to this the matter was referred to a panel of elders under the old legislation namely the Magistrate Amendment jurisdiction Act whereby an award was filed and was found to be incapable for enforcement. The said award was filed in the Magistrate's court which ordered the award to be remitted back to the same panel of elders with directions on what action to take. The said panel of elders was;

(a) To set a period when the defendant was to hand over the said portion of land to the plaintiff.

(b) State action to be taken if condition No. 1 is not met or complied with,

(c) Get information and documents relating to the land in question.

The findings were to be filed back in court within 60 days.

3. That no action was taken on the matter for a whole 6 years when the matter was taken before a different panel of elders for consideration. That the authority to rehear the dispute stems from the earlier ruling and the subsequent panel should have complied with the direction in that ruling.

4. That the new panel had a different composition heard evidence a fresh and came to a different ruling which ruling did not comply with the directions given earlier.

5. That if it is to be taken that the dispute was lodged a fresh then the same had to comply with the new Act whereby a fresh claim should have been filed, served on the applicant and she be given an opportunity to be heard by filing her defense and calling witnesses and being given an opportunity to be heard which is not the case herein. That this was not the case herein and the absence of the requisite procedures being followed as to the lodging of the complaint the tribunal had no jurisdiction as the dispute was not properly instituted.

6. That the person who presented the dispute had no locus standi as he did not have letters of administration to the estate of Lawrence Kemei contrary to the law which is clear that the only person who can represent the interest of an estate legally is the holder of a grant of representation to that effect, that herein one Ambrose Kemei did not have the grant of representation to the deceased's estate and he was therefore an intruder and the proceedings are therefore a nullity.

7. That she as the Administrator- of the deceased's estate was not called to participate in the proceedings which proceedings were a nullity and the same was in breach of the rules of natural justice. 8. That the tribunal did not consider the earlier record of proceedings and had it done so *it would* have discovered that one Nyangio Kimitei had admitted that Lawrence Tanui was one of the purchasers of the suit land.

9. That the dispute related to title of land which is outside the jurisdiction of the elders as the said land was registered under the RTA.

10. In response to the grounds of opposition counsel submitted that the office of the Attorney General should not have acted for the interested party as well as it is supposed to represent the interests of the government only and not of individuals. That the tribunal was expected to have been impartial and so its advocate should also have been impartial by not acting for one of the parties to the dispute.

(b) That there is no notice of appointment and so the papers are improperly before court,

(c) It has not been established that an appeals committee exists in order to allege that an appeal should have been filed.

(d) That no appeal could be resorted to as the award had already been adopted as at the time the applicant had notice of it.

(e) That an appeal could not be resorted to as there was no valid decision made as they content that the proceedings were a nullity.

(f) That the applicant fully complied with the provisions of order 53 and her papers are properly before this court.

' in reply counsel for the tribunal and the interested party and their points in opposing the application are that;

1. The applicant has not served the claimant in the *lover* court contrary to order 53 rule 2 which require that all parties to the proceedings be served.

2. That the applicant is a stranger to the proceedings as she has not shown the interest she has in the matter.

3. They agree the land was registered and the title has been exhibited to show that the deceased Lawrence Kernel had no interest in the said land.

4. No explanation has been given as to why applicant did not present her case when one Ambrose Tanui

filed the proceedings before the elders. Her deponement shows that she was aware of the proceedings and so she cannot turn round and say that she was not heard as nobody prevented her from coming into the proceedings. She has come because the son lost.

4. That there is no evidence that the matter was not taken back to the same panel of elders.
5. That the interested party was a defendant and so she could not file the claim. Alternatively there was no need to file a claim as there were proceedings already filed in court.
6. That if the applicant insists that the new tribunal should have followed the directions given by the court earlier on then it is their stand that Ambrose Tanui validity appeared on behalf of the family and the mother should not be allowed to prosecute the same proceedings just because the son lost.
7. They have not annexed the earlier proceedings to confirm that a different panel of elders was constituted.
8. That their papers are properly in court as they were served and they entered appearance.
9. That any complaints arising from section 26 of the constitution should be referred *to the* constitutional court.
10. That the tribunal is a creature of statute having been created by the government and the proper person to defend them is the office of the Attorney General,
11. That if the tribunal erred then the applicant should pay costs as it is her son who took the proceedings to a wrong person.

In reply counsel for the applicant reiterated that the decision being challenged is the one dated 4.12.96 which falls under the new Act,

2. That the law of succession recognizes a grant holder and not a wife or son.

Upon hearing all the parties to these proceedings I find that the status of the applicant has been challenged by the respondent because she was not a party to the proceedings before the elders, I agree that one Ambrose Tanui initiated the proceedings before the elders which gave birth to these judicial review proceedings, be that as it may order 53 allows any party affected with the proceedings to come to court and be heard, it follows that all that the applicant needs to do is to show that she has been affected by that decision and that alone qualifies her to be heard. Her counsel has submitted that she has already shown that she alleges to be the widow of one Lawrence Kemei who allegedly purchased the suit land jointly with late Nyongio Kimitai. That she holds a grant to the estate and yet she is not a party to proceedings. The grant is exhibited and it has not been shown that she is not wife of late Kemei and so she has every right to complain and she is rightly before this court.

It was further submitted by the state counsel that the applicant has changed hats with her son Ambrose Tanui because Ambrose Tanui lost before the elders. That this is evidenced by the fact that he Ambrose Tanui has not been served in respect to these proceedings and further that he be taken to have, represented the interests of the family which have been finally and duly adjudicated upon and the applicant has no business coming to court over the same matter, I agree that the record shows that it is Ambrose Tanui who commenced the proceedings both in the earlier proceedings and the current one and he is of necessary party herein, I agree that he should have been served and brought in by applicant. However the rules allow an aggrieved party not served to come into the proceedings and be heard if he has any interests to project. The failure of Ambrose Tanui to come shows not so much that there is collusion between him and the mother but from the submissions of the applicants-counsel it stems from his knowledge of the position in law of his action or exercise in futility and so he could not legally pursue any masters herein.

The position in law is that Ambrose does not claim to be a joint purchaser but alleges that the father was

before he died. The 1983 proceedings were filed after his death and so Ambrose needed *a* grant to *do* that. Since he had no grant all that he purposed to do for the benefit of the estate was an exercise in futility and therefore a nullity, no rights accrue to any party from such an action and therefore none can be pursued competently before any tribunal. Ambrose therefore made the right decision to stay out of these proceedings as he had no rights to pursue. And whether applicant was ignorant of this or not does not bar her from bringing this action.

This brings me to the legality of the proceedings. Counsel for the applicant alleges that they are a nullity because the earlier proceedings were not followed. The proceedings filed in 1988 were subject to the Magistrates jurisdiction and amendment Act now repealed. When the lower court remitted the matter back to the lower court it was within the provisions of that Act. The elders were given 60 days within which to operate. They did not act within that time. The position in law then was that where an order of reference lapses before any action *is* made the proceedings lapsed and the parties have to start a fresh. This was the same position herein. The affected proceedings were liable to suffer death again because they were commenced by a person without the grants and were therefore a nullity, being null and void they cannot form the basis for attacking the subsequent proceedings.

On their own the subsequent proceedings were filed in the same case file as the earlier ones headed as Ambrose Tanui being the plaintiff and Annah Kimitei as the defendant. The same illegality which plagued the earlier proceedings also plagues the subsequent one. One thing which is clear is that Ambrose did not claim his own rights but claimed them through the deceased father. He was therefore championing the interests of the deceased's estate and he could only do so if he had letters of representation.

The applicants counsel further submitted that the proceedings were unprocedurally commenced as there was no claim filed and defense filed. As submitted by the state counsel that argument goes against the person who took out the proceedings who was Ambrose.

As regards the representation of the tribunal and the interested party I find that the tribunal is a creation of the government and the proper person to represent them *is the* office of the Attorney General. The fact that the interested party is also represented does not mean that the Attorney Generals office *is partisan*. It just means that they are defending the proceedings together.

For the reasons given the proceedings herein were null and void from the start and cannot stand the absence or non participation of Ambrose Tanui who commenced the same notwithstanding.

Indeed the title was exhibited showing that the name of Lawrence Kemei is not in the title but that does not prevent an agrieved party from championing her or his interests.

I therefore allow the application quash the elders proceedings as well as the consequent orders emanating from the filing and adoption of the same in Eldoret SPMCC Mo, 1/83 be and are hereby removed into this court and quashed.

Since the proceedings were void ab initio each party will bear his/her own costs,

Dated at Eldoret this 4th day of February. 1999.

P. NAMBUYE

Eldoret this 15th day of Feb,1999

R.NAMBUYE

JUDGE