



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC CASE NO.549 OF 2013

ANTHONY KIPROP

(Suing as the Legal Representative of The Estate of Luka Kiprop Kiptai).....PLAINTIFF

VERSUS

SYLVESTER CHEMWENO SANG.....1ST DEFENDANT

CHEBIEMIT LAND DISPUTES TRIBUNAL.....2ND DEFENDANT

RESIDENT MAGISTRATE'S COURT ITEN.....3RD DEFENDANT

JUDGMENT

By an amended plaint dated 19th December 2018 the plaintiff herein sued the defendants seeking for the following orders: -

- a) Declaration that LUKA KIPTAI is the owner of land parcel No. Moiben/Kimnai/276.
- b) A declaration that the decision of the Chebiemit Land Dispute Tribunal was void ab initio for lack of jurisdiction and the same together with its adoption by the Iten Resident Magistrate's Court should be set aside.
- c) Costs of the suit be borne by the 1st and 2nd Defendants.
- d) An order that the registration of decree from the Principle Magistrate's Court L.T.D No. 14/2011 issued on 29th February, 2012 against the register for parcel No. Moiben/Kimnai/276 be cancelled.

The 1st defendant filed a defence dated 31st January, 2014 denying all the averments in the plaint.

PLAINTIFF'S CASE

PW1 testified that he is the son to the late Luka Kiprop Kiptai and an administrator of the deceased father's estate. He produced a grant of letters of administration and a land certificate as exhibits.

It was PW1's further evidence that in 1997, the defendant sued his deceased father and in 2011, the court ruled that Sylvester be paid the purchase price and produced a copy and minutes of the Land Disputes Tribunal.

PW1 stated that the award was confirmed as a judgment of the court on 29th February 2012 which decree was registered at the land's office on 12th April 2012. PW1 also produced a copy of the search certificate. The plaintiff urged the court to enter judgment as prayed in the plaint.

The defendants did not tender any evidence but they filed submissions.

PLAINTIFF'S SUBMISSIONS

Counsel gave a brief background to the case and stated that the deceased plaintiff's father was sued by the Defendant at Chebiemit Land Dispute Tribunal Case No.14 of 2011 and a decree was issued on 29th February, 2012 at Iten Principal Magistrate's Court Land Dispute Tribunal No.14 of 2011

Further that before that the matter was filed at the tribunal by the Defendant, the Defendant SILVESTER CHEMWENO had sued the plaintiff's late father LUKA KIPROP KIPTAI in Resident Magistrate's Court at Iten Civil Suit No.2 of 1997, Silvester Chemweno v Luka Kiprop Kiptai which was concluded

Counsel submitted that the decision of Chebiemit Land Disputes Tribunal was void for lack of jurisdiction hence should be set aside together with the award adopted by Iten Resident Magistrate's Court.

On the second issue as to whether the matter is res judicata, counsel submitted that the Plaintiff testified that his father the registered owner of Parcel Number **MOIBEN/KIMNAI/276** sued his late father LUKA KIPROP KIPTAI vide Iten Magistrate's Court, Civil Suit No.2 of 1997 and upon the conclusion of the suit, it was decreed vide a decree dated 18th July 2011 and ordered that the Defendant do refund the purchase price with interest and costs of the suit be borne by the Defendant.

It was counsel's submission that upon the issuance of the decree, the plaintiff's late father refunded the decretal amount/purchase price to the defendant and despite the same having been concluded, the 1st Defendant went ahead to sue the Plaintiff's father in the tribunal whose decision was adopted by the court.

Counsel relied on the provisions of Section 7 of the Civil Procedure Act which provides that:-

“No court shall try any Suit or issue in which the matter is directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised has been heard and finally decided by such court.”

Counsel submitted that the **Iten Resident Magistrate's Court No.2 of 1997**, was an issue involving the parcel of land known as **MOIBEN/KIMNAI/276** between the same parties, litigating under the same title, and the issues was heard and finally determined by a competent court.

Counsel cited the case of **Peter Mbogo Njogu v Joyce Wambui Njogu & Another [2005]eKLR** where the court held:-

“Whereas the Tribunal could generally hear matters relating to a claim to occupy land, it is not their business to hear a fresh matter already determined by another competent judicial body No appeal was filed from the Judgment in the case before the lower court.”

On the second issue that the decision of Chebiemit Land Disputes Tribunal was void *ab initio* as the Land Disputes Tribunal had already been repealed, counsel submitted that the Land Disputes Tribunal Act No.18 of 1990 which established the Land Disputes Tribunal was repealed by the Environment and Land Court Act No.19 of 2011 by Section 31 whose date of commencement is 30th August, 2011.

It was submitted that as per the minutes of the Tribunal in Land Dispute Case No.23 of 2009, the witnesses signed the minutes between diverse dates of 3rd September, 2011 and 6th September, 2011 hence the decision was made when the Act had already been repealed.

Counsel relied on the case of **Sella Nyakoa Etenyi v Andrew Kiprop Tanui & Another [2019]eKLR** where the court held that:-

“I must find that the proceedings took place before the Tribunal irregularly on 20th September, 2011 because the Land Disputes Tribunal Act No.18 of 1990 had been earlier repealed on 30th August, 2011 by the Environment and Land Court Act which came into effect on that date. The Panel of Elders did not exist at least in the eyes of the law by 20th September, 2011The evidence of the Plaintiff was not controverted. The case went unopposed. I find that the Plaintiff has established his claim on a balance of probabilities against the Defendants.”

Counsel therefore urged the court to enter judgment in favour of the plaintiff as prayed in the plaint.

2ND & 3RD DEFENDANTS'SUBMISSIONS

Counsel for the 2nd and 3rd defendants submitted that they did not tender any evidence on the basis that the suit was basically challenging the jurisdiction and procedure of the tribunal in entertaining this dispute which was purely a matter of law.

Mr Kuria submitted listed two issues for determination by the court as, whether this is the proper forum to adjudicate this matter and whether the proceedings, award and decree were made properly.

On the first issue as to whether this is the proper forum for adjudication of this dispute, counsel submitted that the plaintiff being aggrieved by the award and decree chose to institute these proceedings which are not in accordance with the Land Disputes Tribunal Act. Counsel relied on the provisions of section 8(1) of the Land Disputes Tribunal Act which provides 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.

Counsel submitted that there is nothing on record to show that the Plaintiff lodged an appeal to the Appeals Committee constituted under the Act and there being no appeal under the Act it became an irrefutable presumption that the plaintiff was not aggrieved by the award of the tribunal.

Further that if the plaintiff was unable to file the appeal to the Appeals Committee nothing stopped him from challenging the award and decree in the High Court through Judicial Review proceedings. 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.

Mr Kuria therefore submitted that the plaintiff who ought to have approached court by way of an appeal under Section 8(1) of the repealed Land Disputes Tribunal Act or Judicial Review against the award or decree hence the suit is defective in substance and law.

Counsel relied on the case of **Paul Muraya Kaguri -versus- Simon Mbaria Muchunu [20151 eKLR, Waithaka J** opined 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.

Counsel also relied on the case of **Republic -versus-Marakwet District Land Disputes Tribunal & 6 others Ex-Pame Shaban Clan & 3 others [20161 eKLR** where the court held that the Land Disputes Tribunals Act did not contemplate filing of declaratory suits.

In the case of **Catherine C Kittony v Jonathan Muindi Dome & 2 others [2019/jeKLR** the Court of Appeal held that where a party is challenging the jurisdiction of the Land disputes tribunal filing a declaratory suit is not the proper forum to ventilate their cause of action. The court held that:

"The award by the 2nd respondent ceased to exist upon adoption by the court as its judgment and a decree. The award cannot be challenged by filing a fresh suit as it is trite law that where a statute establishes a dispute resolution 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. 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 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."

Mr Kuria urged the court to find that the suit is incompetent.

On the second issue as to whether the proceedings, award and decree were made properly, counsel submitted that the pertinent issue was whether the tribunal was properly seized with the matter before it and if so whether parties were afforded opportunities under the Act which he answered in the affirmative. Further that the proceedings and decision of the tribunal on record confirm that all the parties to the dispute were afforded an opportunity to be heard where they called and or questioned witnesses.

Mr Kuria also submitted that the plaintiffs sought for other prayers in the suit which were couched to appear like is based on fraud but the underlying issue is the declaration that the award of the tribunal was incompetent. That no fraud has been proved against the defendants.

Counsel relied on the case of **TETU OLE NABORW v ATTORNEY GENERAL & 4 others [2010] eKLR** where Okwengu J. (as she then was) observed as follows:

"Moreover, as defined in Blacks Law Dictionary, 8th Edition, "a declaratory judgment" is a binding adjudication that establishes the right and other legal relations of the parties, without providing for or ordering enforcement, Although the plaintiff has sought other orders such as the setting a side of the award and judgment, and the cancellation of the registration of the defendants, as well as a claim for damages, these prayers are dependent on the declaratory relief and cannot therefore stand alone. Further, the award issued by the Land Disputes Tribunal has already been executed, and the land parcels registered in the names of the 2nd to 5th defendants. A declaratory judgment establishing legal rights to the land parcels, may be inconsistent with the title of the defendants issued pursuant to a court judgment. What purpose would such an order serve other than cause embarrassment and confusion?"

Counsel therefore urged the court to dismiss the plaintiff's suit with costs

ANALYSIS AND DETERMINATION

The issue for determination is whether the plaintiff's suit is proper as framed before this court. Section 8(1)

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 for the province in which the land which is the subject matter of the dispute is situated.

8(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:-

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved.

From the above section it is clear that an aggrieved party from a decision of the Tribunal was either to appeal to the Appeals Committee and/or to institute judicial review proceedings to quash the decision of the Tribunal if it is alleged it acted in excess of its jurisdiction.

In the case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others Civil Appeal 184 of 2011** where the learned Judge stated as follows:-

“

It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime, the 1st defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”

The Land Disputes Act had elaborate procedures on the mandate of the Tribunal and the processes to be followed when a party is aggrieved by an award. It did not provide or contemplate a declaratory suit as one of the avenues for challenging the award.

In the case of **Republic -versus- Marakwet District Land Disputes Tribunal & 6 others ExParte Shaban Clan & 3 others [2016] eKLR, (supra)** the court held that the Land Disputes Tribunals Act did not contemplate filing of declaratory suits.

In the case of **Sally Jemeli Korir & Another v William Suter & 2 others [2020] eKLR** this court held that :

“Section 23(3) (e) of the Interpretation and General Provisions Act preserves and protects decisions and awards made by the defunct Land Disputes Tribunals. Similarly, it preserves and protects judgments adopted and pronounced by Magistrates' Courts within the framework of the repealed Land Disputes Act. They remain valid judgments of the courts. The resultant decrees remain valid binding instruments capable of execution.”

I have considered the pleadings, the submissions by counsel and find that this suit is an abuse of court process and is therefore dismissed with costs.

DATED and DELIVERED at ELDORET this 2nd DAY OF DECEMBER, 2020

M. A. ODENY

JUDGE