



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 141A OF 2012**

**[Formerly Eldoret Hccc No. 31 of 2004]**

**JOSEPH KIRUIYOT SITIENEI.....1<sup>ST</sup> PLAINTIFF**

**JOHN KIBET KWAMBAL.....2<sup>ND</sup> PLAINTIFF**

**MARTIN CHERONO CHEPTARUS.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**DANSON CHEMJOR KIRUI.....1<sup>ST</sup> DEFENDANT**

**SIMON K. A. BII.....2<sup>ND</sup> DEFENDANT**

**BENEDETA JEPKEMOI KIPTUM.....3<sup>RD</sup> DEFENDANT**

**JAMES K. CHEPKONGA.....4<sup>TH</sup> DEFENDANT**

**BENJAMIN MALAKWEN RUTO.....5<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL (On behalf of the Chairman of the Kapseret Land**

**Disputes Tribunal).....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Joseph Kiruiyot Sitienei, John Kibet Kwambai and Martin Cheron Cheptarus (hereinafter referred to as plaintiffs)** have come to court against **Danson Chemjor Kirui and 5 Others** including the Attorney General on behalf of the Chairman of the Kapseret Land Disputes Tribunal claiming that on or about the 29<sup>th</sup> day of October, 2002, the 6<sup>th</sup> Defendant upon Application by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants awarded 01.721, 0.6075 and 0.7492 Ha out of Land Parcel Numbers KARUNA/KARUNA BLOCK 2 (KARUNA) 74, KARUNA/KARUNA BLOCK 2 (KARUNA) 31 and KARUNA/KARUNA BLOCK 2 (KARUNA) 177 respectively to them which award was on 27.02.2003 adopted by the Chief Magistrate's Court at Eldoret as Judgment of the Court in Land Disputes Tribunal Case Number 8 of 2003. It is the Plaintiffs' contention that the award was null and void for reasons that the Plaintiffs are the registered owners of the said Land Parcels Numbers KARUNA/KARUNA BLOCK 2 (KARUNA) 74, KARUNA/KARUNA BLOCK 2 (KARUNA) 31 and KARUNA/KARUNA BLOCK 2 (KARUNA) 177 and that the award was read and adopted in the Plaintiffs' absence. That the award was made in blatant contravention of the mandatory provisions of the Land Disputes Tribunals Act Number 18 OF 2000 and was arrived at in gross contravention of the principles of natural justice. That in the alternative and without prejudice to the foregoing, the plaintiffs aver that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants in collusion with the 6<sup>th</sup> defendant fraudulently had themselves awarded portions out of the plaintiffs' said parcels of land

The particulars of fraud are purporting to sit and deliberate upon the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' claim without notice to the Plaintiffs. Purporting to have jurisdiction to entertain the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' claim when the 6<sup>th</sup> Defendant knew or ought to have known that it lacked such jurisdiction. Sneaking the award into the Chief Magistrate's Court at Eldoret while knowing that the award had been obtained by fraud and deception. Purporting to entertain the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' claim when it was already time barred by limitation.

That the Plaintiffs' claim against the Defendants jointly and severally is for a declaration that the award made by the 6<sup>th</sup> Defendant in honour of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants is null and void and the subsequent order of the Honorable Chief Magistrate's Court at Eldoret

LDT No. 8 of 2003 adopting and confirming the said award is hence null and void ab initio.

That the Plaintiffs' further claim against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants is for a declaration that any subdivision and transfer of the Plaintiffs' said Parcels of Land is null and void and the same be revoked forthwith

That further and without prejudice to the foregoing, the Plaintiffs' claim against the Defendants jointly and severally is for damages for conversion of portions totaling to 3.0777 Ha. The plaintiffs pray for costs of this suit.

The 1<sup>st</sup> to 5<sup>th</sup> defendants in their defence deny that the Award of Tribunal was a nullity. They aver that the award of the Tribunal was adopted by the Magistrate's court with the full knowledge and active participation in strict compliance with the Land Disputes Tribunal Act No. 18 of 1990. The allegations of fraud are denied. The defendants are now the registered proprietors.

The 6<sup>th</sup> defendant states that the Land Disputes Tribunal had jurisdiction to entertain the dispute as it revolved on a claim to occupy the suit land. He denies allegations of fraud and that the suit is incompetent.

I have considered the submissions filed by the plaintiffs and defendants and do find the facts of this case as being that in the year 2002, the 1<sup>st</sup> to 5<sup>th</sup> defendants lodged a claim with Kapseret Division Land Disputes Tribunal that they were entitled to shares of the parcel of land in issue whereupon the 6<sup>th</sup> defendant proceeded and awarded the parties from the land parcels in issue which were the plaintiffs' individual plots. The award was adopted on 27.2.2013 as a judgment of the court in Eldoret CMCC No. 8 of 2003.

The plaintiffs are aggrieved by the award hence have come to this court for a declaration that the award is null and void and therefore, the decree of the court is equally null and void. Hence any further subdivision is null and void.

Section 3(1) of the Land Disputes Tribunal act provides for the Limitation of Jurisdiction of the Tribunal as follows: -

***“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.(2)”***

Section 8 provides for appeals from the decision of the tribunal thus: -

***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.***

***(2) The appeal shall be registered in a register of appeals in the same manner as the register of claims under section 3 (3); and a notice thereof shall be served on the other party or parties to the dispute in the same manner as provided in subsection (4) of section 3.***

***(3) The appeal shall be in documentary form and shall contain a brief statement, to be divided into separate grounds of appeal, of the reasons upon which the party appealing wishes to rely.***

***(4) The appeal shall then be set down for hearing by the Appeals Committee at a date, time and place to be notified to the parties thereto.***

***(5) The appeal shall then be determined by the Appeals Committee, which shall consist of three members appointed under section 9.***

***(6) At the hearing of the appeal, the party bringing the appeal shall begin.***

***(7) After giving each party an opportunity to state his case the Appeals Committee shall determine the appeal giving reasons for its decision: Provided that the Committee may in its discretion permit the party appealing to reply to the other party's submission if that submission contains any new matter not previously introduced at the hearing or on the appeal.***

***(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....***

plaintiffs' suit is filed contrary to law as it offends the above provisions of law. The plaintiffs have sought an order for a declaration when the Land Disputes Tribunal Act is very clearer on the procedure to be undertaken by a party aggrieved.

In the case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others Civil Appeal 184 of 2011**, where the learned Judges of Court of Appeal 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 1<sup>st</sup> 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."**

Following by the aforesaid decision of the Court of Appeal which is binding on this Court, it follows that even if the court were to grant the declaratory orders, the same would have no effect in the face of the judgement of the lower court that remains undisturbed and may create confusion as there will exist two judgments of the court. The Plaintiff may by way of an appeal or judicial review move the Court for appropriate orders in respect to the judgment of the Magistrate's court.

The plaintiffs neither appealed nor applied for a judicial review orders to quash the proceedings of the Land Disputes Tribunal for breaching the rules of natural justice as they claim.

I do find that the procedure adopted by the plaintiffs to be improper and therefore the suit is dismissed with costs to the defendants.

**Dated and delivered at Eldoret this 31<sup>st</sup> day of January, 2019.**

**A. OMBWAYO**

**JUDGE**