



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

JUDICIAL REVIEW NO. 1 OF 2016

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT 1990 (NOW REPEALED)

AND

IN THE MATTER OF THE GOVERNMENT LAND ACT

CHAPTER 280 OF THE LAWS OF KENYA (NOW REPEALED)

AND

IN THE MATTER OF ORDER 53 CIVIL PROCEDURE RULES 2010,

CIVIL PROCEDURE ACT CHAPTER 21 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM

ACT CHAPTER 26 OF THE LAWS OF KENYA

AND

IN THE AMTTER OF THE MAGISTRATES COURTS ACT

CHAPTER 10 OF THE LAWS OF KENYA (NOW REPEALED)

AND

IN THE MATTER OF THE KABASIRAN AND KAPKENY CLANS

BETWEEN

REPUBLIC OF KENYA.....APPLICANT

VERSUS

COUNTY COMMISSIONER

ELGEYO MARAKWET & 6 OTHERS.....RESPONDENTS

AND

GEORGE CHEBET & 5 OTHERS.....INTERESTED PARTIES

GABRIEL CHEMWENO & OTHERS.....EX-PARTE

JUDGMENT

By a Notice of Motion dated 20th June 2016 the Ex Parte Applicants sought for the following judicial review orders:

- 1) THAT an order of prohibition do issue to prohibit the County Commissioner Elgeyo Marakwet County from enforcing the Court order issued in ELDORET SRMC LAND CASE NO. 53 OF 1983 issued on 6th April 1984 as it has become unenforceable through operation of law and further to prohibit the County Commissioner for Elgeyo Marakwet County from taking sides in the land dispute pitting the Kabasiran and Kapkeny clans.
- 2) THAT an order of mandamus do issue against the County Commissioner Elgeyo Marakwet County compelling him to ensure law and order is maintained in an impartial manner between the two warring clans — Kabasiran and Kakeny.
- 3) THAT an order of prohibition do issue to prohibit the County Government of Elgeyo Marakwet from enforcing the Court order issued on 6th April 1984 being an award that was adopted as the order of Court in ELDORET SRMC LAND CASE NO, 53 OF 1983 but whose enforcement is now time barred by operation of law.
- 4) THAT an order of prohibition do issue to prohibit the County Surveyor Elgeyo Marakwet County from carrying out any survey work and / or demarcate the community land and / or to mark out the boundaries currently being occupied by both the Kabasiran and Kapkeny clans in terms of the Court order of 6th April 1984.
- 5) THAT an order of prohibition do issue to prohibit the County Land Registrar Elgeyo Marakwet County from opening any Green card, registering any portion of the community land and / or issuing any Title Deeds based on the Court order issued in ELDORET SRMC LAND CASE NO. 53 OF 1983.
- 6) THAT an order of prohibition do issue to prohibit the Chief Magistrate Eldoret from issuing any further orders and / or conducting any further proceedings in ELDORET SRMC LAND CASE NO. 53 OF 1983 as the Court is now functus officio and the order of 6th April 1984 is incapable of being enforced through operation of law.
- 7) THAT an order of prohibition do issue to prohibit the Chief Land Registrar from registering any right and /or interest in relation to Kabasiran and Kapkeny Community land based on the Court order issued in ELDORET SRMC LAND CASE NO. 53 OF 1983 issued on 6th April 1984 and to further prohibit the Chief Land Registrar from registering any instrument purporting to dispose of rights or interest in community land of Kabasiran clan except in accordance with the law relating to community land which law is still under consideration before the National Assembly.
- 8) THAT an order of mandamus do issue to compel the Cabinet Secretary for Lands to ensure the speedy enactment of Community Land Legislation as provided for by Article 63(5) of the Constitution of Kenya, 2010 as well as to ensure that the Legislation on Community land is enacted within the period set out in the fifth Schedule of the Constitution of Kenya 2010 i.e within 5 years.
- 9) THAT costs of this application be awarded to the ex-parte applicants.
- 10) THAT any other and further relief that this Honourable Court shall deem just and expedient to.

This motion was filed pursuant to leave granted by the Court on 2nd June 2016.

EX- PARTE APPLICANTS CASE

A brief summary of the Ex- Parte applicants' case is that they are residents of community land currently occupied by the Kabasiran clan within Elgeyo Marakwet County. That in 1982, Mzee Tilomwa Kipkech, a member of the Kapkeny clan, had a complaint about some land he wanted to occupy which belonged to the applicants' clan. A meeting was held concerning the issue and it was concluded that there was no land to be given to him as the land belonged to Kabasiran Clan. He therefore filed papers in Court purportedly from the panel of elders and had them adopted as the order of the Court on 6th April 1984 in Eldoret SRMCC Land Case No. 53 of 1983.

It was the applicants case that the Court order was not enforced until 2005 when they attempted to implement it after a period of 21 years. The applicants further stated that the warring parties were summoned to a meeting attended by the Provincial Administration to try and resolve the stalemate whereby it was resolved that the affected were first to be compensated and a further meeting would then be called at a later date to resolve the Land issue.

It was further the applicants' case that the Ex-parte applicants' clan (Kabasiran) compensated the other clan Kapkeny from which the interested parties hail but the Kapkeny did not reciprocate and instead launched fresh hostilities. They stated that the primary source of the skirmishes was the Court order of 6th April 1984 which permitted the splitting of Kabasiran land into two to accommodate the Kapkeny clan.

The applicants submitted that there was no meeting of the panel of elders and therefore the adoption of the decision as an order of the Court on 6th April 1984 in Eldoret SRMCC Land Case No. 53 of 1983 was fraudulent. The applicants stated that the land disputes Tribunal meeting of 7th October 1982 or 8th October 1982 were a sham which took place without the members of the Kabasiran clan.

That the Court order having not been enforced is time barred and that the applicants before the Land Dispute Tribunal are both deceased and therefore a third party cannot enforce orders obtained by a deceased person without first taking out letters of administration to the respective

estates. Counsel further submitted that the Court order of 6th April 1984 is now an order that cannot be enforced through operation of law as its enforcement is now expressly barred by Section 4(4) of the Limitation of Actions Act Chapter 21 of the Laws of Kenya.

The applicants contend that the panel of elders had no jurisdiction to apportion land as they did to deliberate on the ownership of land. The decision of the panel of elders was adopted as an order of the Court in secrecy and without notice to the inhabitants. The resultant Court order was not challenged as the ex-parte applicants were unaware of it.

The ex parte applicants further contend that they were not a party in the case in Eldoret SRMCC Land Case No. 53 of 1983 and as such the interested parties cannot enforce the said order to the detriment of the ex-parte applicants.

Counsel submitted that the prayer for the order of prohibition to prohibit the County Commissioner Elgeyo Marakwet County from enforcing a time-barred order/judgment is based on Section 4(4) of the Limitation of Actions Act and should extend to the County Government of Elgeyo Marakwet County. Counsel cited the

provisions of section 4(4) of the Limitation of Actions Act Chapter 21 of the Laws of Kenya which reads;

(4. Actions of contract and tort and certain other actions

The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

- (a) actions founded on contract;
- (b) actions to enforce a recognizance;
- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

.....

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

Counsel urged the Court to grant the orders to ensure peace prevails on the ground. Counsel also submitted that the prayer for the order of mandamus to the 7th respondent is overtaken by events as the Community Land Act was assented to on 31st August 2016 and came into effect on 21st September 2016 which was after the cause was filed.

The applicants relied on **NAIROBI CIVIL APPEAL NO. 266 OF 1996 (CA) KENYA NATIONAL EXAMINATION COUNCIL V REPUBLIC** where the functions of the orders of prohibition and mandamus were brought out. The ex-parte applicants therefore prayed that the application be allowed.

1ST TO 7TH INTERESTED PARTIES' CASE

The 1st to 7th respondents submitted that the conflict between the 2 parties resulted in negotiations the result of which was the elders award dated 22nd November 1983 which was consequently adopted as an order of the Court on 6th April 1984. It was the interested parties case that according to the consent orders the suit property was divided equally among the warring clans.

The respondents' relied on article 60 and 63 of the Constitution on Land Policy and Community Land Act. The respondents further submit that the Court should dismiss the application and allow the respondents to effect registration of the suit property in a manner that had been allocated by the Court order of 6th April 1984.

With regards to the technicalities complained of by the applicant, Counsel for the respondents submit that the overriding objective enjoins the Court to serve justice without fetters. The respondents relied on *Githere v Kimungu* [1976-1985] E.A. 10.

The respondents submitted that section 4 of the Limitation of Actions Act is not couched in mandatory terms and should be interpreted by looking at the text and the context in order to ascertain the true legislative intent. They relied on *Adrian Kamotho Njenga v Kenya School of law* [2017] eKLR and *Reserve Bank of India v Peerless General Finance and Investment Co. Ltd*, 1987 SCR (2) 1.

The respondents further submitted that in the current constitutional dispensation, the Courts in interpreting any statute must ensure that the purposes, values and principles of the Constitution are protected and promoted and that is the task the honourable Court should undertake in this matter. Further, that section 4(4) of the Limitation of Actions Act must not be interpreted to deny the interested parties clan an

opportunity to enjoy their rights under article 40 of the Constitution.

Counsel submitted that the circumstances leading to the delayed execution of orders were as a result of ;

- a) Death of elders responsible for execution of the orders on behalf of the clan.
- b) Conflict on the area which drove majority away thus little attention paid to the matter.
- c) General ignorance of the elders responsible which can be attributed to illiteracy.

The respondents submitted that the parties who represented the clans obtained orders that were given for the benefit of communities involved and therefore there is no need for grant of administration as the community to which the order was given still exists.

Counsel submitted that the issue for determination is whether the application falls within the scope of judicial review. On this Counsel cited the case of **In Republic-versus-Public Procurement Administrative Review Board & 2 others Ex Parte- Sanitam Services (E.A) Limited (2013) eKLR**, where **Mumbi Ngugi J.** explained the scope of judicial review as follows:

Judicial review proceedings is that remedy of judicial review concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process. The purpose of the remedies available to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected.

The purpose is not to substitute the opinion of the Court that of the administrative body in which is vested statutory authority to determine the main question.

Counsel further cited the case of **Municipal Council of Mombasa-versus-Republic & Umoja Consultants Ltd Civil Appeal No. 85 of 2001** where the Court of Appeal demystified the scope of judicial review as follows:

“Judicial review proceedings, is concerned itself with the decision making process, not with the merits of the of the decision itself: The Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

Counsel therefore submitted that the current application does not fall in the ambit of a judicial review as the ex parte applicants are concerned with ensuring that the orders granted on 6th April 1984 are not enforced. They are not saying that the Land Disputes Tribunal acted ultra vires. Does this involve the decision making process, whether the correct procedure was followed by the Land Disputes Tribunal. The dispute is about the illegibility of the enforcement of the Court order.

Mr. Maritim further submitted that it is trite law that where the dispute revolves around contested issues of ownership or occupation of land judicial review would not be the appropriate forum to ventilate them. Counsel further submitted that the prayer for prohibition is untenable and relied on the case of **Kenya National Examination**

Council-versus-Republic ex parte Geoffrey Gathenji where the Court of Appeal observed that:

The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is made. Such an order can only prevent the making of a decision. That in our understanding is the efficacy and scope of an order of prohibition.

Further that the prayers for mandamus cannot be granted as was observed in the above case that

The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.

Counsel therefore urged the Court to dismiss the application with costs to the respondents.

Analysis and determination

The issues for determination are as to whether the ex parte applicants have met the threshold for grant of judicial review orders. The Court has presented a summary of what was in contention above. Once the Court deliberates on whether this is a proper case for judicial review orders then the other issue would be who is to bear the costs of the application.

What is the purpose of judicial review?

Courts have set out the purpose of judicial Review in several cases.. In the case of **Municipal Council of Mombasa..Vs..Republic, Umoja**

Consultant Ltd, Nairobi Civil Appeal No.185 of 2007 (2002) eKLR, the Court held that:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a Court hearing a matter by way of judicial review is concerned with and such Court is not entitled to act as a Court of Appeal over the decider. Acting as an Appeal Court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review”.

Further, in the case of Pastoli...Vs...Kabale District Local Government Canal & Others 2008 2EA, Justice Kasule elaborated as follows:-

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules, expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision.

(Al-Mehidwi...Vs...Secretary of State for the Housing Department (1990) AC 876”.

In the case of Kenya National Examination Council...Vs...Republic Exparte Geoffrey Gathenji & 9 Others, Civil Appeal No.266 of 1996, the Court elaborated what Judicial Review orders entail. The Court held as follows:-

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the Council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition vol.1 at Pg.37 paragraph 128..”

From the foregoing, are the Ex parte applicants entitled to the orders sought in the judicial review. From the above, it is apparent that the Court has to consider the following issues before making a decision on the prayers sought;

- a) Did the Magistrate’s Court have the jurisdiction to adopt the order the award as an order of the court?
- b) Were the persons affected by the decision heard before it was made?
- c) Did the decision maker take into account relevant matters or did they take into account irrelevant matters/ Was the decision arrived at rationally?

Further, from the submissions and pleadings by both parties, there are other issues which need determination;

- d) Is the order time barred?
- e) Did members of the Kapkeny Clan require letters of administration to enforce?

I will therefore deal with the issues as to whether the Magistrates Court had jurisdiction to adopt the award as an order of the court.

The applicants have submitted that the panel of elders had no jurisdiction to apportion land or to deliberate on the ownership of land. Section 3 of the Land Disputes Tribunal Act states the jurisdiction of the tribunal as;

(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.

From the applicants submission it is clear that the land claimed was purportedly community land which had not been titled. There was no evidence that it was registered land which would not therefore fall in the ambit of the Land Disputes Tribunal. Further, they have listed in their grounds that the land belonged to the Kapkeny clan therefore it is apparent that the land in dispute was held in common. The court would not be in a position to go into the merits of what happened in the Tribunal as that is not judicial review is for. This would not be proper as the court did not have the opportunity to hear and evaluate the evidence. The court is not sitting as an Appeal Court in this matter.

The applicants' orders are sought against the decision of the Magistrates' Court and not the Tribunal therefore the Court should assess the Magistrates' Courts' jurisdiction to adopt the order. The applicants have not applied to quash the decision of the tribunal therefore they appear to take issue with the adoption of the order but have failed to seek prayers against the decision of the tribunal.

Section 7 of the Land Disputes Tribunal Act states;

(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's Court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The Court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.

I find that the decision was therefore adopted by a Court that had competent jurisdiction to do the same. The other issue on prohibition of the Magistrate's court from issuing further orders in respect of the case as it is functus officio, the applicants have not established a good reason why such an order of prohibition should issue. Supposing the order of prohibition is issued, what step would the applicant take in respect of a claim that was adjudicated upon more than 35 years ago.

Do the applicants intend to file another suit or they will also be tying themselves with the issue of res judicata and limitation of actions. Is it a situation where the applicants are saying if I cannot have it then no one should have it? Having explained the purpose of prohibition I find that the order would not be suitable to stop the Magistrate to further deal with the enforcement of the order. The respondents might decide not to enforce the order on their own volition or with the order of the court. Would this serve the applicants?

On the issue as to whether the persons affected by the decision were heard before it was made, this limb is in respect of the adoption of award at the court which from the record dated 6th April 1984 both the plaintiff and the defendant were present before J L.A Osiemo Senior Resident Magistrate. This means that they were present when the award was adopted.

In Republic v Marakwet District Land Disputes Tribunal & 6 others Ex-Parte Shaban Clan & 3 others [2016] eKLR the Court held;

There is a real question whether the interested parties could speak for their clan. But it is a double edged sword because the ex-parte applicants themselves have not fully complied with the requirements of a representative suit. Certainly no authority to act on behalf of other members has been annexed. Quite obviously the clan is a large and fluctuating body. A large number of the members are not even parties to this suit. But that would hoist a technical objection over substantive justice. It flies in the face of article 159(2)(d) of the Constitution; more so in a land matter.

What is material is that the representatives of the conflicting clans were heard by the tribunal. I have studied the minutes of the meeting of L.D.T 15 of 2008 of 13th June 2008. Chepkonga Chesomoi, Joseph Alimaris and Joel Kilimo (the 2nd, 3rd and 5th ex parte applicants) were present and testified before the tribunal. Their statements were recorded at length. They clearly stated they were acting on behalf of the Shaban clan. I am thus unable to accept that the tribunal condemned the exparte applicants unheard.

From the record of the court the parties were well represented in court when the award was adopted as an order of the court.

Further that the statutory provisions are that the chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the Magistrate's Court together with any depositions or documents which have been taken or proved before the Tribunal. The Court has no part to play in the analysis of the facts in the dispute that was before the tribunal.

On the issue as to whether the court order is time barred, the applicant contends that the order dated 6th April 1983 is time barred as per section 4(4) of the Limitation of Actions Act. The respondents contended that the provision is not couched in mandatory terms and proceeded to give reasons for the delay. Further, that the Court needs to look at the context in determining whether an action is time barred.

Section 4(4) of the Limitation of Actions Act states;

An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

The respondents gave reasons for the delay in enforcement of the order as;

- a) Death of elders who were responsible for execution of the orders
- b) Conflict
- c) General ignorance of the elders which were attributed to illiteracy of the elders

In considering the delay, the Court can exercise its discretion. Ignorance is no defence but at the same time the Court is alive to the impact of clashes and the issue of land in the area and consequently the role they play in enforcement of Court orders. The applicants' application was also not brought in a timely manner.

On the issue whether there was a requirement of letters of administration to enforce a court order, from the court record the dispute involved communal land and therefore it does not belong to any of the applicants or the respondents. Actually the heading of the case at the Magistrates court was Kapkeny Clan and Kabasiron Clan, whose estate were they to take out the letters of administration for. This therefore means that the applicants are ill placed to require that letters of administration be obtained to execute the orders. It is clear that the parties were acting in a representative capacity.

The reason for citing cases on the purpose of judicial review is to show how the current case does not meet the threshold for grant of the orders sought.

I further relies on the case of **Republic...Vs...Kenya Revenue Authority, Exparte Yaya Towers Ltd (2008) eKLR**, the Court held that:-

“The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected....”

Similarly, in Seventh Day Adventist Church Limited-versus- Permanent Secretary Ministry of Nairobi Metropolitan Development & another Judicial Review Case No. 112 of 2011:

Where an applicant brings judicial review proceedings with a view to determine contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

In Republic-versus-Judicial service Commission ex parte Pareno (2004) 1 KLR 203 Hon. Nyamu J quoting with approval Supreme Court of England Practice Rules, 1997 volume 53/1-14/14 as follows:

'Even if a case falls into one of the categories where judicial review will lie the Court is not bound to grant it: the jurisdiction to make any of the various orders available in judicial review proceedings is discretionary. What order or orders the Court will make depends upon the circumstances of the case.'

Under Halsbury's Laws of England, 4th Edition, Vol. 1 at pg 37 paragraph 128, prohibition:

- a) Is an order from the High Court directed to an inferior tribunal or body which forbids a tribunal or body from proceeding in excess of jurisdiction or in breach of the law;
- b) It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice; and
- c) It does not lie to correct the course, practice or procedure of an inferior tribunal or wrong decision on merits of the proceedings.

Having considered all the submissions and the judicial authorities cited I find the applicants have not met the threshold for grant of the orders sought and the same is dismissed. I order that each party to bear their own costs as they are communities that live together.

Dated and delivered at Eldoret on this 24th day of January, 2019.

M.A ODENY

JUDGE

Judgment read in open court in the presence of Mr. C.F Otieno for Exparte Applicants, Mr.Kuria for the Respondents, Mr.Maritim for the interested Parties

M/s Topista – Court Assistant.