



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 5 OF 2014

JOHANA CHEPKURUI KIBIWOTT

Alias JOHANA A.CHEPKURUI.....APPELLANT

VERSUS

MICAH CHEBOI KIBIWOT.....RESPONDENT

(Being an Appeal arising from the decree, order or ruling of Hon. Nyakundi Senior Resident Magistrate at Eldoret Chief Magistrate's Court Civil Case No. 1344 of 2005 dated 7th February 2005)

JUDGMENT

This appeal arises from a suit filed by the Appellant against the respondents in the lower court seeking for a permanent injunction to restrain the defendant by himself, his agents or servants including the Kapyego Division District Officer, the Area Chief Assistant Chief, Surveyors, Security officers/Askaris, the area Land Control Board, or whosoever from subdividing, transferring, entering into, or any other dealings in respect of the plaintiff's suit land namely SAMBIRIR/SAMBIRIR/69

The court heard a preliminary objection by the defendant dated 18th November 2004 and upheld the same necessitating the filing of this appeal. The appellant filed a memorandum of appeal listing 12 grounds of appeal.

Counsel agreed to canvass the appeal by way of written submissions which they filed.

APPELLANT'S SUBMISSIONS

Counsel submitted on ground 1, 2, 3, 9, 10 and 11 on whether the court lacked jurisdiction to hear and grant the orders sought in the affirmative save for jurisdiction to transfer or refer the case to the Land Disputes Tribunal and the Magistrate's Court at Iten. Counsel submitted that the ruling was delivered after 77 days and the same was full of contradictions.

On grounds 2, 4, 5, 6, 7, 8 as to whether there was misinterpretation and misdirection on the relevance of the provisions of the Land Disputes Tribunal Act, 1990 and the Land Control Act (Cap 302), Counsel submitted that the upholding and rejection of the Appellants submission was an error leading to the current appeal. Counsel submitted that the Appellant is entitled to the reliefs sought and costs of the appeal as prayed.

It was Counsel's submission that the parties in Eldoret CMCC No. 1344 of 2004, the Marakwet Land Disputes Tribunal and the Iten RMCC LDT case No. 7 of 2006 and that parties were the same but the Appellant was denied an opportunity to be heard at the Land Disputes Tribunal which lacked Jurisdiction to entertain the land Dispute.

Further that there was stay of execution of orders in Eldoret CMCC No. 1344 of 2004 as at 14th March 2007. Counsel submitted that on 28th February 2006 the Tribunal's proceedings and ruling were forwarded to the Residents Magistrate's Court at Iten before the same was registered in the Iten RMCC LDT case no. 7 of 2006 after the Tribunal heard or conducted proceedings on 27th October 2005 in the absence of the appellant.

Further that the respondent's claim as at 2005 was time-barred pursuant to the provisions of section 13(3) of the Land Disputes Tribunals Act No. 18 of 1990 and the Limitation of Actions Act (cap 22) and that the Land Disputes Tribunals lacked Jurisdiction to entertain the matter and also breached the Law Natural Justice by condemning the appellant unheard on 27th October 2005.

Counsel submitted that the respondent had no objection to the registration of the appellant as the proprietor of the suit land under the Land Adjudication Act (Cap 284) and the Registered land Act (cap 300)(Repealed)/Land Registration Act. That the Chief Magistrate's Court at Eldoret at Eldoret lacked jurisdiction to refer the matter to the Marakwet District land Disputes Tribunal and the Magistrate's Court at

Iten pursuant to the provisions of the Land Disputes Tribunal Act, 1990 or any other law. It was Counsel's submission that the decisions of the lower court at Eldoret, Iten law court and the land Disputes Tribunal in respect of the Appellant's suit land Sambirir/Sambirir/69 are unlawful, illegal, null and void ab initio for want of jurisdiction.

Mr. Cheptarus Counsel for the Appellant submitted that the appellant's Judicial review application for leave to apply for orders of Judicial review was declined before the Appellant preferred an appeal namely ELDORET HCC No. 27 of 2007 arising from the Iten RMC LDT No. 7 of 2006. That the Judge in the Eldoret High Court Judicial Review (MISC) No. 260 of 2006 that was filed on 10th May 2006 declined to give orders due to the other pending matters in the lower courts at Eldoret and Iten.

It was Counsel's submission that the Magistrate's court at Iten held that there is no provision for the adopting court to grant a stay execution of an award by a Tribunal. The award was adopted before the parties who were given 30 days stay of execution to appeal. Further that the Magistrate's ruling delivered at Iten on 14th February 2007 where the Magistrate held that there were three parties in the Land Disputes Tribunal case while it was evident that there were only 2 parties and the jurisdictional issue is the gist of this appeal. Counsel therefore urged the court to allow the appeal as prayed.

RESPONDENTS' SUBMISSIONS

Counsel for the respondent gave a brief background to the appeal stating that the instant appeal was lodged by the Appellant, Johana Chepkurui Kibiwot, vide the Memorandum of Appeal dated 2nd March, 2005 and the Memorandum of Appeal dated 14th March 2007 in Eldoret High Court Civil Appeal No. 21 of 2005 and Eldoret High Court Civil Appeal No. 27 of 2007 respectively. That the court directed that the two appeals be consolidated vide the Ruling of P. M Mwilu, J (as she then was) dated and delivered on 2nd December, 2009.

Counsel submitted that the appeal arose from the ruling dated 7th February 2005 in which the Court upheld the Preliminary objection on a point of law raised by the Respondent

herein where the Court ordered the matter to be referred to the Land Disputes Tribunal which was vested with the jurisdiction to entertain the same. The Appellant sought to have the said ruling or order set aside or overturned on the basis of a number of grounds which are in the Memorandum of Appeal.

Mr. Kiboi Counsel for the Respondent submitted that Eldoret High Court Civil Appeal No. 27 of 2007 was lodged vide the Memorandum of Appeal dated 14th March 2007 against the decision, order or decree of the Learned trial Magistrate at Iten as contained in the Ruling of N. Shiundu, Resident Magistrate dated 14th February 2007 in which the Court dismissed the Appellant's Application dated 15th January 2007 for stay of execution and thereby upholding the Respondent's Grounds of Opposition dated 30th January 2007 with costs.

The Appellant sought to have the said decision and/or orders set aside or overturned on the basis of a number of grounds. Counsel submitted that the main gist of the dispute was subdivision of the suit land which the Appellant herein was opposed to because he alleged to be entitled to the entire suit land parcel.

Counsel therefore submitted that the respondent contends that the Appellant's application dated 15th January 2007 was rightly dismissed by the Court as it was unclear about orders supposedly issued by the Court on which it was based and neither did the Appellant show anyone having been cited for contempt, not to mention that the orders sought therein were obviously unmerited generally.

Further, Counsel submitted that the learned trial Magistrate did not err in any way by directing that the matter be taken before the Land Disputes Tribunal because that was the law at the time. He therefore urged the court to dismiss the appeal as it is an afterthought and an attempt to deny the Respondent his legitimate rights under the subdivision and depriving him of the fruits of a valid legal process.

Counsel cited the case of **Paul Muraya Kaguri Vs. Simon Mbaria Muchuru [2015] eKLR where L.N. Waithaka, J. in held thus:**

"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 resolution mechanism, they cannot be heard to say that their rights were denied. "

Counsel submitted that in the present case, there was a statutory dispute resolution mechanism which had to be followed, and that the Appellant cannot be heard to say that his rights were denied where he failed to follow the stipulated dispute resolution mechanism that was the Land Disputes Tribunal. That was the law as of the Land Disputes Tribunal Act, cap 303A Laws of Kenya clearly set out a dispute resolution mechanism which the Appellant was obliged to follow.

Counsel therefore urged the court to dismiss the appeal with costs to the respondent as the Tribunal was vested with powers to determine the matter as it involved a claim to occupy and work the subject land parcel.

ANALYSIS AND DETERMINATION

The genesis of this appeal is as enumerated vide the background given by the parties. The parties agreed to canvass the appeal vide written submissions but I must say that the appellant was ab initio convoluted and repetitive therefore not very clear on what he wanted to present.

From the consolidated appeals it is evident that the issues are on the jurisdiction of the Magistrate Court to transfer the matter to the Land Disputes Tribunal for hearing and determination and upholding the preliminary objection by the respondent. The other issue is whether the Magistrate erred in not allowing stay of execution of the adopted award.

This is a matter which was filed during a time when land disputes were heard and determined before Land Disputes Tribunal as per the provisions of Section 3 of the Land Disputes Tribunal Act (now repealed) which states as follows:

"3 (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 above provisions it is clear that the law which was applicable at the time, the Land Disputes Tribunal Act that the Tribunal was vested with powers and was duly authorized to hear and determine disputes relating to subdivision of land or the determination of boundaries to land, including land held in common. The Tribunal was also endowed with the powers to deal with disputes as to claims to occupy and work land.

I find that this was the prevailing law then and the Court did not err in finding that the tribunal was the right forum for hearing and determination of the dispute. As to the adoption of the Land Disputes Tribunal's decision by the trial Court, the wording of Section 7 (2) of the Land Disputes Tribunal Act cap 303A Laws of Kenya was in mandatory terms. It provided thus:

" The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act "

In the case of **Florence Nyaboke Machani Vs. Magere Amos Ombui [2018] eKLR**, the Environment and Land Court dismissed the appeal herein on the basis that the Land Disputes Tribunal was a mechanism or dispute resolution established by statute and the appellant therein was bound by the decision of the Tribunal which was adopted by the Court. The Court held that the trial Magistrate did not err in acceding to the verdict of the Tribunal and adopting the same.

The appellant faulted the Magistrate on the transfer of the matter to the tribunal but this was the only way to deal with the issue as the tribunal was clothed with the statutory mandate to hear and determine the matter. This was a matter that was in the purview of the Land Disputes Tribunal and the other option was to strike it out for lack of jurisdiction. The procedure under Section 17 of the Civil Procedure Act provides that

"Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed".

No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice.

My reading of the above section is that it allows a court on its own motion to transfer a suit especially to the land Disputes Tribunal as it then was. Further section 16 provides that that an Appellant cannot be allowed to raise an objection as to the place of suing unless the same was raised in the court of first instance. I find that this ground of appeal lacks merit and must fail. The appellant did not state the grounds under which the Tribunal lacked jurisdiction to hear the matter. This ground would not have changed the outcome of the case.

On the issue of stay of execution, the Act provides that the duty of the court is to adopt the award as presented to the court without adding or subtracting any content to it. Once the court adopts the award then it is functus officio. It cannot start entertaining the legality or the efficacy of the award. That is for the next court to deal with if a party is aggrieved by the outcome.

It is unfortunate that this matter had to take this long in the court corridors but the law must be followed. I find that the Magistrate's court did its work and did not err in arriving at the decision and the appeal is therefore dismissed with costs to the respondent.

Dated and delivered at Eldoret on this 7th day of August, 2019.

M.A. ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence of Mr.Cheptarus for the Appellant and Miss Khandambi for the Respondent.

Mr.Koech – Court Assistant