



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO.36 OF 2013

PAUL FRANCIS NJOROGE.....PLAINTIFF

=VERSUS=

ANNAH NDUTA NJOROGE.....1ST DEFENDANT

JOSEPH KINYUA MWANGI.....2ND DEFENDANT

PAUL OCHIENG ODEK.....3RD DEFENDANT

DAVID NGANGA KINYENI.....4TH DEFENDANT

DANIEL WANYOIKE KIGUNI.....5TH DEFENDANT

GICHUHI NJOROGE KAMAU.....6TH DEFENDANT

JUDGMENT

By a plaint dated 23rd November 2013 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) A declaration that the proceedings before the Land Disputes Tribunal and the decision of the Tribunal issued on 22/1/2002 changing the boundaries to Land Reference Nos.UASIN GISHU/KIMUMU/1638, 1639, 1640, 1641, 1642 1643 and 1644 and the adoption of the same in Eldoret Chief Magistrate’s Court award No. 23 of 2002 were a nullity for want of jurisdiction.
- b) A declaration that the survey boundaries and or map subsisting in 1999 on Land Reference Nos. UASIN GISHU/KIMUMU/1638, 1639, 1640, 1641, 1642 1643 and 1644 ought to be reinstated and the subsequent survey maps and or plans were an illegal exercise.
- c) A declaration that the land reference No. UASIN GISHU/KIMUMU/1092 had ceased to exist in 1999 and it could not form the subject of a claim before the land Disputes Tribunal in the year 2001.
- d) Costs of the suit.

The plaintiff and the defendants gave evidence and called witnesses to support their case and both Counsel filed submissions in respect of their clients’ cases.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff gave a background to the case and submitted that the plaintiff and the defendants purchased a portion of land reference Uasin Gishu/Kimumu/1092 after which the registered owner Rael or Racheal Wanjiku hired the services of a surveyor and later she signed mutations to have the land subdivided and resultant title deeds issued. That after the subdivision (Racheal) Rael Wanjiku transferred the resultant parcels to the plaintiff and the defendants

Mr. Momanyi submitted that from the evidence the plaintiff secured a title deed to land reference Uasin Gishu/Kimumu/1642 and the other parcels were to be transferred to the defendants. However, the defendants were dissatisfied with the subdivision which gave rise to the parcels of land that were ultimately transferred into their names Uasin-Gishu/Kimumu/1638,1640,1641,1643 and 1644.

It was Counsel's submission that the defendants orally lodged a case before the Land Disputes Tribunal seeking to have the survey exercise cancelled and another survey exercise undertaken to change the boundaries and shape of the parcels of land to their satisfaction. That the defendants claimed that they were unhappy with the survey plan and wanted the proposed survey plan substituted and implemented on the ground upon cancellation of the earlier survey plan which had been fully implemented by the survey office.

Further that the mutations had been registered and the resultant parcel registers opened. Counsel submitted that it was not legally tenable for the Land Disputes Tribunal to sit and determine a dispute over the subdivision of land reference Uasin Gishu/Kimumu/1092 which had already ceased to exist by the time the claim was filed. Similarly that , it was not for the tribunal to substitute survey plans already implemented with those proposed by resultant land owners without consent of all registered owners of the resultant parcels.

Mr. Momanyi also submitted that what the defendants were seeking was to have the boundary and lay out of the plaintiff's parcel of land reference Uasin Gishu/Kimumu/1642 changed so that the shape of the defendant's parcels of land and therefore it was an issue of title to land and not a boundary dispute. In essence that the defendants were praying for before tribunal to have the process of survey leading to the issuance of the title deed held by the plaintiff cancelled.

Counsel therefore submitted that the dispute went beyond what the Land Disputes Tribunal could deal with within its jurisdiction on boundary disputes. Counsel listed two issues for determination as follows:

- a) Whether or not the claim before the Land Disputes Tribunal was within its mandate.
- b) Whether the proceedings of the Tribunal could be challenged through a declaratory suit

On the first issue Counsel submitted that the dispute could not be handled or adjudicated upon without revocation of the survey exercise and change of boundaries to the plaintiff's parcels of land. Further that the Land Disputes Tribunal had no power to alter boundaries and the shape of the plaintiff's parcel of land as the dispute was in essence a challenge of the survey undertaken on land reference Uasin Gishu/Kimumu/1092.

On the second issue as to whether the proceedings of the Tribunal could be challenged through a declaratory suit, Counsel submitted that it is admitted that the plaintiff did not file an appeal before the Provincial Appeals Committee Rift Valley nor did he seek judicial review or prerogative orders and that what the plaintiff did instead was to file a declaratory suit which is legally tenable. Mr. Momanyi also stated that courts have held severally that what could be achieved through prerogative orders is achievable through a declaratory suit and that so long as the court is able to ascertain what relief the party seeks and there is no prejudice occasioned on the opposite party the court should proceed and determine the matter on merits.

On the issue of setting aside the adoption of the decision of the Magistrates court Counsel submitted that

the same is a consequential relief to forestall a situation whereby the decision of the Tribunal is set aside while leaving its adoption undisturbed if the decision of the subordinate court remains then it will lead to an absurd situation. Counsel relied on three authorities attached to support the plaintiff's claim and urged the court to allow the claim as prayed for in the plaint with costs.

DEFENDANTS' SUBMISSIONS

Counsel for the defendants similarly gave a background to the case and reiterated the decision of the Land Dispute Tribunal which ordered a resurvey as follows:-

- a) The boundaries fixed in UASIN GISHU/KIMUMU 1092 for plots No. 1638, 1639, 1640, 1641, 1642, 1643 and 1644 as shown in the survey map marked "C" are hereby revoked.
- b) Re-survey were to be done according to the way the people are living in their plots and should be close to the proposed subdivision plan marked 'GA'
- c) The objector should refund tribunal fee to the Claimant since he did not pay his part.
- d) The title Deeds to be issued in the names of the Claimants and the Objectors.
- e) Costs of the suit is awarded to the Claimants.

Counsel submitted that it is Defendants contention that there was a conflict in the boundaries which prompted them to go to Uasin Gishu Land Dispute Tribunal vides Case No. 51 of 2001 which resolved the said dispute by ordering sub division to be done in Land Parcel Number UASIN GISHU/KIMUMU/1092 of which the plaintiff never preferred an appeal.

Mr. Chepkwony also submitted that the Tribunal had jurisdiction to hear and determine the matter and hence the Honorable court lacks jurisdiction to hear the matter as it was already Res judicata. Further that the Plaintiff had an avenue for appeal at the Provincial Appeals Committee or Judicial Review if dissatisfied with the decision of the tribunal but he never did so.

Counsel submitted that the decision of Land Dispute Tribunal entirely dealt with the issue relating to the boundary and therefore it was within their mandate to hear and determine the dispute. He cited Section 3 (1) of the Land Dispute Tribunal Act No. 18 of 1990 now repealed, the jurisdiction of the Tribunals established there under was limited to hearing all cases of Civil nature involving disputes at to;-

- a) Division of, or the determination of boundaries to land including land held in common shall be heard and determined by a Tribunal established under section 4.
- b) A claim to occupy or work land ,or
- c) Trespass to land.

Further that in this suit, the Defendants only wanted the parcels of land resurveyed so that the accuracy of the boundaries could be established making it a boundary dispute. That the decision did not cancel the Title Deeds as claimed by the Plaintiff but rather to rectify the register of the affected parcels of lands by determining the correct boundaries and not to interfere with the way the parties are occupying their lands. Counsel relied on the case of GILBERT NDIGWA MWANGILE V SAMWEL NJAGI M'NYAMBU (2017) eKLR (Civil Appeal case No. 21 of 2017) where the Appellant was challenging the award of Provincial Appeals Committee that the District Land Dispute Tribunal had no jurisdiction. The court ordered that the Provincial Appeals Committee Award/Judgment/Ruling be set aside and the same be substituted with the Award of the District Land Dispute Tribunal in Chuka Land Dispute Tribunal Case No. 6 of 2009 which was to the effect that the survey of Kenya to move and rectify and bring the boundary to where it was fixed as the same was purely dealing with a boundary dispute.

Counsel further cited that case of NEWTON WEKESA WANGUSI V LEONARD CHELOTI WALUKANA (2014) eKLR [Civil Appeal No of 2012] where the court findings were that the dispute as deduced from the proceedings was concerning a boundary claim between the parcels owned by the Appellant and the one owned by the Respondent. The court also found that the resurvey to establish boundaries would not amount to the Appellant losing a portion of his land and therefore the opinion of A. Omollo J. was that the resurvey would merely establish the extent and the boundaries of the size comprised in the said lands.

On the issue of adoption of the award by the Chief magistrates court Counsel cited section 7 of the Act which provides as follows:

Section 7(i) the Chairman of the Tribunal is required to cause the decisions of the tribunal to be filed in the Magistrate's Court together with any disposition or documents.

Section 7 (2) 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 enforced in the manner provided in the Civil Procedure Act.

Mr. Chepkwony submitted that the court was limited by these provisions and therefore we submit that it had jurisdiction and the said adoption cannot be considered a nullity. Counsel also stated that the plaintiff should have filed an appeal to the Provincial Appeals Committee and cited the case of JAMIN AMEYO V HARRY OMBERA AGEMA (2010) eKLR as cited in the case of NEWTON WEKESA WANGUSI V LEONARD CHELOTI WALUKANA (2014) eKLR•,

Kariuki J. stated that:-

"Where one fails to appeal to the appeals committee and the Award is consequently adopted by the Resident Magistrate's Court as a decision of the court, no appeal lies from the decision of the Resident Magistrate because the provisions of the Land Dispute Tribunal Act do not give any right of appeal to this court from such act."

In conclusion Counsel submitted that the tribunal had the mandate to determine a boundary dispute and hence the plaintiff's suit should be dismissed with costs.

Analysis and determination

The issues for determination are as to whether the Land Disputes Tribunal had jurisdiction to hear and determine this case and whether the plaintiff was required to file an appeal to the Provincial Appeals committee or Judicial review.

On the first issue as to whether the Land Disputes Tribunal had jurisdiction to hear and determine the matter, we have to look at the provision of the Act that stipulated its mandate.

Section 3 (1) of the Land Disputes Tribunals Act (now repealed) limited the jurisdiction of Land Disputes Tribunals as follows;

- 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.

This therefore makes the tribunal inept to hear and determine matters of title to land. The question that we must also answer is what the dispute before the tribunal was. From the record the dispute before the Tribunal was in respect of boundaries which is one of the mandates that had been granted to the Tribunal under Section 3(1) (a). From the determination and the recommendations given by the Tribunal which are

as follows

- a) The boundaries fixed in UASIN GISHU/KIMUMU 1092 for plots No. 1638, 1639, 1640, 1641, 1642, 1643 and 1644 as shown in the survey map marked "C" are hereby revoked.
- b) Re-survey were to be done according to the way the people are living in their plots and should be close to the proposed subdivision plan marked 'GA'
- c) The objector should refund tribunal fee to the Claimant since he did not pay his part.
- d) The title Deeds to be issued in the names of the Claimants and the Objectors.
- e) Costs of the suit is awarded to the Claimants.

From my reading and understanding of the orders, I find that the Tribunal was dealing with a boundary dispute and not title to land. It talked about fixing of boundaries.

The Land Dispute tribunal Act (now repealed) provided avenues for redress under section 8 (1) which provides as follows:-

“Section 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 constituted for the Province in which the land which is the subject matter of the dispute is situated.

Section 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”.

The plaintiff being aggrieved had the option of filing a Judicial Review if the award had not been adopted by the Court or an appeal through the Provincial Appeals Board to the High Court. In this case, the Plaintiff neither filed a judicial review nor appealed the judgment of the Magistrate’s court as provided for under the said Act and instead filed this declaratory suit. This does not mean that a party cannot file a declaratory suit to declare the decision of a Land Disputes Tribunal null and void. It is trite that the avenues of appeal and judicial review are available, but a declaratory suit is also an available relief as was held in the case of Nairobi Civil Application **No 312 of 1999 (CA) Robert Entwistle – vs- Trustees of Nairobi Baptist Church** in which it was held that the mere fact that a decision can be challenged by way of judicial review does not prevent a party from taking proceedings for a declaratory suit. In **Eldoret HCCC No 55 of 1998 Daudi Ngetich Kimibei -vs- Attorney General and Another** it was held that where an application for judicial review has been struck out without hearing it was on the merits, the only option available is to file a declaratory suit. The reason for rejecting the plaintiff’s claim is that the Tribunal had jurisdiction to hear and determine the matter before it. If the court found out that the Tribunal had no jurisdiction to deal with the matter, then it would not shy away from declaring so.

I am further guided by 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.”

It should be noted that when there are laid down procedures to be followed in respect suits and appeals, then the same must be adhered to. The rules are not put in place in vain but to assist the court and litigants in certainty and access to justice. In this particular case the plaintiff neither enjoined the Land Disputes Tribunal, the AG nor the Magistrates Court that he wanted the court to impugn their decisions. I find that the plaintiff's case lacks merit and is dismissed with costs to the defendants.

DATED and DELIVERED at ELDORET this 4th DAY OF October, 2019.

M. A. ODENY

JUDGE

JUDGMENT read in open Court in the presence of Mr.Momanyi for Plaintiff and Miss. Kinyua holding brief for Mr.Chepkwony for Defendants.

Mr. Mwelem – Court Assistant