



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE NO. 150 OF 2012

PATRICK LOKWANGA.....1ST PLAINTIFF
PAUL ROP KOMEN.....2ND PLAINTIFF
JACOB CHEBOI.....3RD PLAINTIFF
CHRISTOPHER KANDA.....4TH PLAINTIFF
DAVID BARNGETUNY.....5TH PLAINTIFF

Sued in their personal capacity and on behalf of KAREL CLAN)

VERSUS

JOSEPH CHEBOI.....1ST DEFENDANT
SIMION TOO.....2ND DEFENDANT
JOHNSTONE KISANG.....3RD DEFENDANT
MICHEAL CHEBET.....4TH DEFENDANT
MARTIN KIPROP.....5TH DEFENDANT
CHEPKAMABA KIPKICH.....6TH DEFENDANT

Sued in their personal capacity and on behalf of KAMOI CLAN

JUDGMENT

By a Plaint dated 30th April,2004 the plaintiffs herein sued the defendants seeking for the following orders for:

- a) A declaration that the proceedings conducted on 25/4/02 were a nullity
- b) The award adopted in Iten Resident Magistrate’s Court in land Disputes Tribunal case no. 1 of 2003 on 6/8/2003 be declared a nullity.
- c) A mandatory order to restrain the Defendants from trespassing on the Plaintiffs' parcel of land

and a further declaration that the Plaintiffs are the legal owners of the said parcel of land.

d) Costs of the suit and interest

The plaintiffs also filed a Chamber Summons together with the plaint seeking for an injunction against the defendants and a stay of the orders of the Iten Resident Magistrate pending the hearing and determination of this suit. The court ordered that the matter do proceed by way of affidavit evidence which were filed accordingly. Counsel for the parties filed their submissions and gave a background to the case.

PLAINTIFFS' COUNSEL'S SUBMISSIONS

It was the plaintiffs' Counsel's submission that on or about 25/4/02 the Defendants made a complaint over the subject suit land claiming ownership rights and the District officer Tirop Division purported to constitute a Tribunal to hear the said claim by the Defendants on the suit land. Counsel further submitted that it was the Plaintiffs' case that the said deliberations were not legally sanctioned in conformity with the requirements of the Land Disputes Tribunal Act, 1990 (now repealed).

Counsel stated that the Defendants filed a defence and counterclaim on 10/2/09 disputing the claim and sought that the proceedings of the Tribunal be upheld and a permanent order of injunction be issued against the Plaintiffs from further trespassing, harassing or in any way dealing with the suit land. The Defendants further prayed for a declaration that they are the true owners of the suit land.

Counsel for the plaintiffs listed four issues for determination the court as follows:

1. Whether the Tribunal by the District Commissioner was legally constituted and whether their actions had any legal backing with regard to the Land Disputes Tribunal Act, 1990(now Repealed).
2. Whether the decree issued by the Resident Magistrate Court at Iten was legal and capable of being executed
3. Whether this court has powers to grant the orders sought in the Plaint
4. Whether the Defendants' claim is tenable in law

On the first issue on the legality of the Tribunal constituted by the District Commissioner, Counsel submitted that the jurisdiction of the Land Disputes Tribunal was set out in Section 3 (1) of the Land Disputes Tribunal Act , 1990(now repealed) The said section provided that:

"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 (1) There shall be established a Tribunal, to be called the Land Disputes Tribunal, for every registration district. (2) Each Tribunal shall consist of—

(a) a chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 5; and

(b) either two or four elders selected by the District Commissioner from a panel of elders appointed under section 5.

Counsel therefore submitted that from the proceedings of the Tribunal of 25/4/02 and the verdict rendered by the Tribunal was beyond their jurisdiction. The verdict was as follows: "*The land in dispute be awarded to Kamoi Clan and a piece of it to the following people from Karel clan. 1. Chekose 2. Kipkutungei and 3. Chenokwony...*"

Miss Odwa further submitted that from the above verdict it is clear that the purported Tribunal was called upon to determine an issue of ownership of the land which issue was outside the scope and duties of the Tribunal as laid out in the repealed Act. She stated that the Tribunal had no jurisdiction to deliberate on the issue of ownership of land thus acting ultra vires.

Counsel relied on the case of Republic v Chairman, Kapsabet Land Disputes Tribunal & 2 others Ex parte David Kiprop Eldoret HCC No 29 of 2011 where the court cited with approval the Court of Appeal decision in JOTHAM AMUNAVI -VS- THE CHAIRMAN SABATIA DIVISION LAND DISPUTES TRIBUNAL & ANOTHER CIVIL APPEAL NO. 256 OF 2002 where it was held that;

if the implementation of the decision of the Tribunal entails the subdivision of the suit land into two parcels opening a register in respect of each sub-division and thereafter the transfer of the sub-division of half acre, it is clear that the proceedings before the Tribunal related to both title to land and to beneficial interest in the suit land and such a dispute is not within the provisions of Section 3 (1) of the Land Disputes Tribunal Act as such disputes can only be tried by the High Court or by the Resident Magistrate's Court in cases where such latter court has jurisdiction. "

It was also Counsel's submission that there was no formal claim lodged by the Defendants as contemplated under Section 3 (2) and (3) of the Land Disputes Tribunals Act (now repealed) to warrant the purported deliberations on the land. Section 3(2) and (3) provide that:

(2) Every dispute referred to in subsection (1) shall be instituted by presenting a claim to the Tribunal for the area in which the land is situated, and shall contain, and contain only, a summary of the material facts on which the claimant intends to rely.

(3) Every claim shall be registered in register of claims to be kept by the Tribunal in the prescribed manner and the claims shall be numbered consecutively in each year according to the order of their institution. ..

Miss Odwa submitted that from the Tribunal proceedings, there was no number allocated to the purported claim by the Defendants thereby contravening the provisions of section 3 set out herein above. Counsel stated that the purported Tribunal proceedings did not indicate the nature of the complaint as envisaged under Rule 6 of the Land Disputes Tribunals (Forms and Procedures) Rules, 1993. Further that the purported panel appointed to constitute the alleged "Tribunal" was not formed in compliance with Section 4 of the Land Disputes Tribunal Act, 1990(now repealed) which provides that a Chairman shall be appointed by the District Commissioner from the Panel of elders who shall be appointed for each registration district. The panel of elders who presided over the hearing were neither gazetted nor were they from the area which the land was situate. The panel therefore had no authority to deliberate on land matter without the minister's approval or gazettelement.

On the second issue as to whether the Resident Magistrate Court Iten issued a decree capable of being executed pursuant to the verdict of the Tribunal, Counsel submitted that from the affidavit of Paul Rop Komen, it is evident that there was no decree capable of being executed. The Act provided that the Court shall enter judgment in accordance with the decision of the Tribunal and not make an order as in the instant case .

Section 7(2) provides that:

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.

On the third issue as to whether this court has powers to grant the orders sought in the Complaint, Counsel submitted that this court is vested with the requisite powers to grant the reliefs sought given that the Plaintiffs are seeking declaratory orders to nullify the decisions made by the purported Tribunal that had no right and/or authority to deliberate on land ownership. Counsel relied on the Court of Appeal decision in Nairobi Civil Application No. 312 of 1999 where a 3 Judge bench held as follows:

“In our view the fact that the decision of the Commissioner of Lands can be challenged by way of judicial review does not prevent the same from being challenged in a suit seeking a declaration that such a decision is null and void”

On the last issue as to whether the defendants' Counterclaim is tenable in law, it was Counsel's submission that under Order 7 Rule 5 of the Civil Procedure Rules, 2010 states that a defence and counterclaim filed under Rule 1 and 2 shall be accompanied by an affidavit where there is counterclaim. Counsel submitted that the counterclaim filed on 10/2/09 did not comply with the mandatory provisions of the above section as no verifying affidavit was attached to verify the correctness of the counterclaim filed. She stated that in effect there was no competent counterclaim capable of being considered by this court and therefore the same should be dismissed on that ground alone.

Miss Odwa also submitted that the Defendants failed to file a response to the Plaintiffs' claim and in support of its Counterclaim, therefore the same has not been challenged as such the counterclaim should be dismissed with costs. Further it was Counsel's submission that the Defendants' counterclaim having been grounded and/or premised on the decision of the alleged Tribunal constituted by the District Officer Tirop Division which she submitted was a nullity due to lack of jurisdiction should fail.

Counsel finally submitted that the court should grant the orders as sought in the complaint and issue a further order and/or directive to the effect that the adjudication processes be commenced on account of this decision so as to ensure that the Plaintiffs get registered and/ or obtain legal documents as to ownership and/or titles to the subject land so as to avert and/or prevent future suit/litigation over the same cause of action or subject matter.

DEFENDANTS' COUNSEL'S SUBMISSIONS

Counsel for the defendants gave a background of the case and submitted that it appeared that the plaintiffs had encroached on to the land belonging to the defendants thereby necessitating the adjudication of the dispute by a panel of elders in 2002. Counsel stated that after the resolution by the elders the same was filed at the Iten Resident Magistrates' Court and adopted as a judgement of the court.

Counsel also listed three issues for determination by the court. The issues were similar to the ones that the plaintiff had listed although the wording was different but the message was the same. Counsel cited the provisions of the Land Disputes Tribunal Act (now repealed.) He cited the establishment of the Tribunal, its composition and jurisdiction.

It was Counsel's submission that the suit land was within the jurisdiction of the land Disputes Tribunal that handled it. The land being situate in Tirop in Elgeyo Marakwet County. He stated that the proceedings took place under the chairmanship of the Tribunal as required by the Act and the parties were given an opportunity to give evidence and call their witnesses.

Mr. Kiboi Counsel for the defendants submitted that the chairman of the Tribunal heard and determined the matter and was forwarded to the court for adoption which was done. He stated that if any party was aggrieved by the award then they should have appealed the decision which was not done. It was further Counsel's submission that the suit land is not registered hence the Tribunal had jurisdiction to deal with it. He urged the court to dismiss the plaintiffs' case with costs to the defendants.

ANALYSIS AND DETERMINATION

The issues for determination in this case is as to whether the Tribunal had jurisdiction to deal with the

suit land. Was the Tribunal properly constituted as per the Land Disputes Tribunal Act 1990 (now repealed) Whether the decree issued by the Iten Resident Magistrate pursuant to the award from the Land Disputes Tribunal was capable of being executed. Lastly, whether the court has powers to grant the orders sought in the plaint.

On the first issue whether the Tribunal was properly constituted, Section 3(1) & 4 of the Land Disputes Tribunal Act of 1990 (Now repealed) provides for the mandate of the Tribunal. It states the jurisdiction of the Tribunal including the membership and appointment of the members. The provisions of these section have been enumerated above. The Tribunal had no mandate to determine issue to do with land ownership.

It is evident from the award rendered by the Tribunal was in respect of ownership. It stated as follows: "*The land in dispute be awarded to Kamoi Clan and a piece of it to the following people from Karel clan. 1.Chekose 2. Kipkutungei and 3. Chenokwony...*" The Tribunal acted in excess of its jurisdiction. The issue of ownership was outside the purview of the Tribunal's jurisdiction. I find that the decision was therefore null and void.

The way the Tribunal was constituted was also not as per section 4 of the Land Disputes Tribunal Act 1990(Now repealed) as there was no formal claim lodged by the defendants as contemplated under section 3(2) of the Act which provided that:

(2) Every dispute referred to in subsection (1) shall be instituted by presenting a claim to the Tribunal for the area in which the land is situated, and shall contain, and contain only, a summary of the material facts on which the claimant intends to rely.

(3) Every claim shall be registered in register of claims to be kept by the Tribunal in the prescribed manner and the claims shall be numbered consecutively in each year according to the order of their institution. ..

There was no evidence that this was done as no number was allocated to the purported claim. The nature of the claim was also not registered. The appointment of the membership did also not conform to section 4 of the Act as they were not gazetted. There was no proof of compliance with the law.

On the issue as to whether the decree by the Iten Resident Magistrates' court is capable of being executed, it is trite law as per section 7 of the Land disputes Tribunal Act of 1990 (now repealed) that 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. Having found that the Tribunal had no jurisdiction to determine a land dispute pertaining to ownership of land, it therefore follows that there was no decree capable of being executed as it was a nullity.

In my view Section 7 of the Act cannot validate an award or decision that is otherwise void. The adoption as judgment of a void award or decision by a court under section 7 does not acquire any legitimacy merely because it has been adopted as such. A judgment must come from a legitimate process.

On the issue of the counterclaim by the defendants, I notice that the counterclaim was filed without a verifying affidavit. A counterclaim is a pleading and it a requirement that the same must be filed with a verifying affidavit to verify the authenticity of the facts. Order 7 rule 5 of the Civil Procedure Rules 2010 states that a defence and counterclaim filed under rule 1 and 2 shall be accompanied by an affidavit. I will therefore not consider the counterclaim as presented.

I have considered the pleadings, submissions by both Counsel together with the relevant judicial authorities and I have come to the conclusion that the Tribunal acted in excess of its jurisdiction in rendering an award in respect of ownership of land.

In conclusion I therefore make a declaration that the proceedings conducted on 25/4/02 were a nullity and

that the award adopted by the Iten Resident Magistrate's Court in land Disputes Tribunal case no. 1 of 2003 on 6/8/03 is also a nullity. I further grant an order of injunction restraining the Defendants from trespassing on the Plaintiffs' parcel of land and that adjudication process be commenced to finalize the issue of legal ownership of the suit land.

The costs of this suit shall go to the plaintiff.

Dated and delivered at Eldoret on this 30th day of January, 2018.

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Isiji for Plaintiff

Mr. Githeiga holding brief for Kiboi for defendant.

Mr. Koech – Court Assistant