



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 959 OF 2012

DAISY JESONDIN BIRGEN.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

ESTHER BIRGEN.....2ND DEFENDANT

JUDGMENT

Daisy Jesondin Birgen (hereinafter referred to as the plaintiff) has sued the **Honourable Attorney General** as the 1st defendant and **Esther Birgen** as the 2nd defendant. Both plaintiff and the 2nd defendant are administratrix of the Estate of the late Meshack Kiptoo Birgen and are joint registered proprietors in equal shares of all that parcel of land known as L. R. Nandi/Sarova/83.

It is alleged that prior to the deceased death, he gave each of his wives a portion to live and develop in which they lived peacefully without any quarrel until his death on 15.6.1994. That the 2nd defendant never at any time raised a complaint concerning the portion of land that was apportioned to her when their husband lived or even at the stage of the issuance and confirmation of grant. That in 2007, the 2nd defendant filed a cause under LAND DISPUTE TRIBUNAL (LDT) NO. 64 OF 2007 for the sharing of land known as NANDI/SARORA/83 between the two widows in a certain skewed way that alters the state that was put in place by the deceased and the probate court. That on 8th May 2011, a decree was given to the favour of the 2nd defendant where by it was ordered that the land be sub-divided equally into four portions irrespective of who lives on which part. This has the effect of altering the boundaries set by the deceased and approved by the probate court to the great detriment of the plaintiff and her children. That it is the plaintiff's case that the tribunal did not have jurisdiction to entertain the claim lodged by the 2nd defendant which fell outside the provisions of Section 3(1) and Section 6 of the Land Dispute Tribunal Act, as the jurisdiction thereof is vested in court under Section 159 of the Registered Land Act Cap 300 of the Laws of Kenya and the decision arrived at is illegal, null and void as more particularly set out below.

Illegality is particularized as follows: -

- (i) The Tribunal did not have jurisdiction to entertain a claim touching on registered land.
- (ii) The dispute was heard and determined by a panel which was not qualified to hear and determine the dispute under the provision of Land Disputes Tribunal Act, 1990.
- (iii) The decision is ambiguous and unenforceable.

The plaintiff further claims against the defendant's jointly and severally is for a declaration that the 1st defendant's decision dated 10th May, 2011 and signed on 17th May, 2011 in KAPSABET PRINCIPAL MAGISTRATE'S COURT LAND DISPUTE CASE NO. 64 OF 2007 is illegal, null and void and incapable of giving rise to any rights cognizable in law. The plaintiff avers that there is no suit pending between the plaintiff and the defendants over the same subject matter except the dispute that was registered as KAPSABET LDT NO. 64 OF 2007. The plaintiff prays for an order restraining District Surveyor Nandi District from entering, dealing with and or subdividing the said land as per their letter dated 22nd February, 2011. She prays that costs be provided for.

The 2nd defendant filed defence and counterclaim denying the allegations by the plaintiff and more particularly that the deceased had apportioned them to suit property. She states that the suit property was distributed to them during confirmation of grant of the Estate of the deceased. They were registered on joint properties and a title deed issued. The deceased never apportioned them to suit property.

That the 2nd Defendant denies that any boundaries had been set by the deceased as claimed or at all and further denies that the panel of elders' decision is skewed as to divide the land into four portion and to interfere with the boundaries as claimed or at all and the Plaintiff shall be put to strict proof.

The Defendant avers that the parcel of land known as NANDI/SARORA/83 is naturally divided by ridges, valleys and or roads into about 6 portions measuring approximately 60, 10, 45, 8, 6 and 4 acres respectively some of portions of each being rocky and some fertile.

That both the Plaintiff and the 2nd Defendant reside on one of the parcels measuring approximately 60 acres and the deceased was buried on the portion nearest to the 2nd Defendant's House.

That the Defendant avers that the panel of Elders had and rightly exercised their Jurisdiction for the subdivision of the parcel of land known as NANDI/SARORA/83 and that the decision arrived at vide their decision of 10th May, 2011 is legal and enforceable.

That the Defendant denies that the decision of the tribunal is illegal, null and void as claimed and all the particulars of illegality are denied and the Plaintiff is put to strict proof. The Defendant avers that the Plaintiff's suit is misconceived, unmerited and ought to be dismissed with costs.

In the counterclaim, the defendant's states that vide ELDORET HCC P/A NO.21 OF 1996 she and the Plaintiff were appointed the legal administrators of their late husband Col. (Rtd.) MESHACK KIPTOO BIRGEN, and that they subsequently acquired joint ownership of parcel NO. NANDI/SARORA/83 by transmission. That the 2nd Defendant avers that the parcel of land known as NANDI/SARORA/83 is naturally divided by ridges, valleys and or roads into several portions measuring approximately 60 acres, 10 acres, 45 acres, 8 acres, 6 acres and 4 acres respectively with some portions of each rocky and others fertile.

The 2nd Defendant avers that the Plaintiff has severally and unjustifiably refused to allow the parcel of land to be formally surveyed and subdivided with a view to fair sharing. That the 2nd Defendant avers that the Land Disputes Tribunal had the Jurisdiction to entertain and determine the 2nd Defendant's claim over the parcel of land known as NANDI/SARORA/83.

The 2nd Defendant avers that the Plaintiff was procedurally invited and did actively participate in the proceedings where it is undisputed that both the Plaintiff and the 2nd Defendant are the joint owners.

The 2nd Defendant avers that the panel of elders rightfully and legally decided that the Plaintiff and the 2nd Defendant were each entitled to an equal share of the parcel of land at 71.5 acres each and that each was entitled to a portion of the rocky and fertile portion respectively. That the 2nd Defendant avers that pursuant to the decree issued vide KAPSABET LDT NO.64 OF 2007, she caused the same to be registered, secured and paid for the surveyors who visited the land and commenced the exercise of survey.

That the 2nd Defendant's claim against the Plaintiff is for an order of declaration that the panel of elder's decision made on 10th May, 2011 and adopted as an order of the Court on 17th May, 2011 vide KAPSABET PMCC LDT. NO. 64 OF 2007 is legal and enforceable.

That in the alternative and without prejudice to the foregoing, the 2nd Defendant's claim against the Plaintiff is for an order that the various portions of land constituting parcel of land known as NANDI/SARORA/83 be each divided into 2 equal portions in favour of both the Plaintiff and the 2nd Defendant so as to each consist of both a rocky and fertile portion, and for an order compelling the Land Registrar NANDI County to register each of the Plaintiff and the 2nd Defendant against their respective portion.

That the 2nd Defendant's further claim against the Plaintiff is for an order of injunction restraining the Plaintiff by herself her agent and or servants from interfering with the Plaintiff's use and enjoyment of her portion.

The 2nd Defendant avers that there is no other suit pending and there have been no previous proceedings between the Plaintiff and the 2nd Defendant over the subject matter save for the succession cause No. 21 of 1996.

The 2nd defendant prays that the decision of the Land Disputes Tribunal dated 10th May, 2011 and adopted as an order of the Court vide KAPSABET LDT. NO. 64 OF 2007 is legal and enforceable. In the alternative, an order that the various portions of land constituting land parcel NO. NANDI/SARORA/83 be each divided into 2 equal portions, each consisting of both a portion of rocky and a portion of fertile land in favour of the Plaintiff and the Defendant respectively and an Order compelling the Land Registrar NANDI County to register the Plaintiff and the Defendant against their respective portion. Moreover, an Order of Permanent Injunction to restrain the Plaintiff by herself, her agents and or servants from interfering in anyway whatsoever with the Defendants use and enjoyment of her portion and last but not least, costs of this suit.

The 1st defendant filed defence stating that the plaintiff amount challenge to decision of the Land Dispute Tribunal or that of the Magistrate's Court by way of Plaintiff and that the suit should be dismissed. Parties agreed that the court relies on the pleadings and the written submissions.

The plaintiff submits that the land in dispute is private land and that the matter had been subject to succession and the court had already pronounced its order and therefore, the Tribunal had no jurisdiction to deal with the dispute.

Counsel for the 2nd defendant submits that the 2nd defendant filed a claim before the Land Dispute Tribunal after the plaintiff severally and unjustifiably refused to allow the parcel of land to be formally surveyed and subdivided with a view of fair sharing.

The 2nd defendant lodged a claim before the Land Disputes Tribunal where the plaintiff actively participated in the proceedings where the plaintiff actively participated in the proceedings and that it is undisputed that both the plaintiff and the 2nd defendant are the joint owners and both reside on the parcel of land. That the panel of elders' award was that the plaintiff and 2nd defendant to share the portions where rocky

and where fertile and each to get 71.5 acres.

The award was adopted as an order of court vide Kapsabet LDT No. 64 of 2004 on 10th May, 2011. Both parties were present and represented in court. Any party that was dissatisfied had a right of appeal of 60 days. That the 2nd defendant pursuant to the decree issued vide Kapsabet LDT No. 64 of 2007 caused the same to be surveyed, paid the surveyors who visited the land and commenced the exercise of survey.

That the plaintiff rushed to this honorable court and filed the proceedings herein which are strange and unknown under the land dispute tribunal. The correct avenue for challenging the decree issued under the Land Disputes Tribunal Act is provided under section 8(1) of Land Dispute Tribunal Act Cap 303A, Laws of Kenya (repealed) as follows: -

"Any party to a dispute under section 3 who aggrieved by the decision of the Tribunal may within 30 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."

He submits that there is nothing on record to show that the plaintiff lodged an appeal to the appeals committee constituted under the act. There being no appeal it became an irrefutable presumption that the plaintiff was not aggrieved by the award of the tribunal.

Further, nothing stopped the plaintiff from challenging the award and decree in the High court through judicial review proceedings. The Land Dispute Tribunal Act did not contemplate filing of a declaration suit a way of challenging an award/decree made under Land Dispute Tribunal Act.

The plaintiff ought to have approached court by way of an appeal under section 8(1) of repealed Land Disputes Tribunal Act or Judicial review against the award/decree now being challenged in court. The suit is defective in substance of law.

I have considered the pleadings, written submissions of all counsels and do find that this is a case that does not require the adducing of evidence as the plaintiffs are challenging the decision of the Land Disputes Tribunal. As rightly argued by the defendants, the correct avenue for challenging the decree issued under the Land Disputes Tribunal Act is provided under section 8(1) of Land Dispute Tribunal Act as follows: -

"Any party to a dispute under section 3 who aggrieved by the decision of the Tribunal may within 30 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."

Once the Award of the Land Disputes Tribunal is made, it is required to be adopted by the Magistrate's Court. On adoption, it becomes a decree of the court and can be challenged on appeal to the Provincial Appeals Committee. The decision of the Provincial Appeals Committee could only be challenged by appeal in the High Court or an application for Judicial Review.

In the case of ***PAUL MURAYA KAGURI -VS-SIMON MBARIA MUCHUMU (2015) eKLR*** Waithaka) found as follows: -

"It is now trite law that where statute establishes a dispute, resolution mechanisms, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say that their rights were denied"

The suit herein by the plaintiff is strange in law as it is not premised on any provision in law. It is not an appeal against the decision of the Tribunal adopted by the Magistrate's Court. It is not a Judicial review as contemplated by the Law Reforms Act, Cap 26 Laws of Kenya, Laws of Kenya. It is not an appeal from the Provincial Appeals Committee as it then was. This court has held before that where a statute establishes a special dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established mechanism, they cannot be heard to say that their rights have died.

In this case, the plaintiff departed from the procedure provided by law to appeal to the Provincial Appeals Committee as it then was, and then appeal to the High Court if dissatisfied by the decision of the appeals committee. I do find that the suit is improperly before court. The same is dismissed with costs.

Dated and delivered at Eldoret this 22nd day of November, 2018.

A. OMBWAYO

JUDGE