REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CONSTITUTIONAL PETITION NO. 17 OF 2014

CHEPKWONY CHELULE……..……..PETITIONER

VERSUS

SENIOR RESIDENT MAGISTRATE

SOTIK LAW COURTS……..1ST RESPONDENT

HON. ATTORNEY GENERAL ……..……2ND RESPONDENT

DAVID KIMUTAI KOECH (*Sued as Administrator of the estate of*

MARY CHEMUTAI MOSONIK - Deceased)…….....3RD RESPONDENT

JUDGMENT

The Petitioner herein filed a Constitutional Petition dated 7th November 2014 seeking the following prayers:

a) That this court be pleased to issue a declaration that the judgment of Sotik, Senior Magistrate in Sotik, Miscellaneous Application No. 2 of 2009 infringed on the Petitioner's constitutional rights in Title number KERICHO/KAITET/1057 and it therefore ultra vires the Constitution, null and void.

b) That a declaration do issue that section 7(2) of the now repealed Land Disputes Tribunal Act No. 18 of 1990 was invalid and ultra vires the Constitution.

c) That this court be pleased to quash the judgment of the Sotik Senior Resident Magistrate Court's Misc Application No. 2 of 2009 between Mary Chemetet Mosonik and Chepkwony Chelule & Brothers

d) That a permanent injunction do issue restraining the 3rd Respondent by himself, his servants, agents, assigns or anyone claiming through or under him from entering, working on, building or in any way whatsoever and howsoever carrying out any activities and/or interfering with the Petitioners occupation and use of the Petitioner's land comprised in title number KERICHO/KAITET/1057

e) Costs of this suit

f) Any other or further relief that this court may deem fit to grant.

Simultaneously with the Petition, the Petitioner filed a Notice of Motion seeking for temporary orders of injunction in line with prayer d) above pending the hearing and determination of the Petition. The said application came up for hearing on the 26th January 2016 and a Ruling was delivered on 8th April 2016 granting the injunction as prayed.

When the matter came up for directions on 25th July 2016, it was agreed that the Petition would be canvassed by way of affidavit evidence. The Respondents were given 30 days to file their responses after which the parties agreed to file written submissions. The 1st and 3rd Respondents filed their submissions while the second respondent indicated that they would not be opposing the application.

It is the Petitioner's case that he is the beneficial owner of land parcel number KERICHO/KAITET/1057 which is registered in the name of his deceased mother one Angelina Cherono Maina. On 28th November 2007, Mary Chemutai Mosonik (deceased) who was the 3rd respondent's mother filed case No. 78 of 2007 at the Sotik Land Disputes Tribunal. The Petitioner alleges that the said case was disguised as

a boundary dispute yet it touched on land ownership. The Petitioner further alleges that he had no locus standi to be sued as he had not taken out letters of administration in respect of his deceased mother's estate and he was not the registered owner of the suit property. The Tribunal heard the case and delivered its decision which was subsequently adopted as a judgment of the court vide Kericho SRM Misc Civil Application No. 2 of 2009. The said judgment was as follows:

a) The applicant's land parcel number KERICHO/KAITET/318 truly extends beyond the road and must remain so by practical occupation

b) The District Land Surveyor and Land Registrar must put border marks to enable the applicant fence her land. The respondents (sons of Cherono Maina) are given twelve months to rear and harvest the eucalyptus trees on the northern borderline with the access road. This is to start with effect from the date when the court adopts the verdict.

c) That the surveyor with the assistance of the area chief to show the applicant the true boundary of KERICHO/KAITET/318 and also remove plot no. KERICHO/KAITET/613 which belongs to the County Council but was wrongfully acquired by Mosonik.

Pursuant to the said judgment the 3rd Respondent's mother applied for an eviction order on 11th November 2014 and the same was granted on 16th February 2016.

The Petition is opposed by the 3rd respondent through his replying affidavit sworn on the 20th July 2016. He depones that the Petition is fatally defective as the Petitioner filed the same before obtaining a Grant of letters of Administration. A copy of the said Grant is attached. The Grant was issued on 4th November 2015 while the Petition was filed on 10th November 2014.

The 3rd respondent has also deponed that the Petition is an afterthought as the Petitioner was aware of the previous decisions in this matter but took no action.

The issues for determination are as follows:

a) Whether the Petition is fatally defective as it was filed before the petitioner obtained a Grant of letters of administration.

b) Whether the judgment of Sotik RM Misc Application No. 2 of 2009 infringed on the petitioner's constitutional rights in title number KERICHO/KAITET/1057

c) Whether section 7 (2) of the now repealed Land Disputes Tribunal Act No. 18 of 1990 was ultra vires the Constitution

d) Whether the judgment of Sotik SRM Misc Application No. 2 of 2009 between Mary Chemitet Mosonik and Chepkwony Chelule & Brothers should be quashed

e) Whether orders of injunction should be granted to restrain the 3rd respondent from interfering with the petitioner's occupation and use of land title number KERICHO/KAITET/1057

With respect to the first issue, it is common ground that the Petitioner who is the son of Angelina Cherono Maina- deceased (the registered owner of land parcel number KERICHO/KAITET/1057) filed the Petition herein before he obtained a Grant of letters of administration. The position in law as regards locus standi in matters relating to administration of estates is well settled. In the case of **Rajesh Pranjivan Chudasama V Sailesh Pranjivan Chudasama (2014) eKLR** where the case of **Otieno V Ougo and Another 1986 EA 468** was cited as follows:

"An administrator is not entitled to bring any action as an administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception"

I need not say more on that point.

On the second issue as to whether the Petitioner's right to own property was infringed, it is important to appreciate that under the old land law regime, the Land Disputes Tribunal had the jurisdiction to adjudicate land matters in accordance with section 3(1) of the Land Disputes Tribunal Act No. 18 of 1990.

The said section provided as follows:

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.

The dispute that was filed at the Tribunal was a boundary dispute and indeed a decision was made affecting the boundary of land parcel number KERICHO/KAITET/318 which had the effect of depriving the petitioner of part of his land. In order to appreciate the jurisdiction of the Land Disputes Tribunal I rely on the case of **Masugu Ole Koitalel Naumo V Principal Magistrate's Court Kajiado Law Courts and Another (2014) eKLR** where Odunga J held as follows:

> *"The view that the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land, otherwise section 3 of the Land Disputes Tribunal did not limit the jurisdiction of the Tribunal to lands outside the regime of the Registered Land Act".*

To the extent that the Tribunal determined the dispute relating to the boundary, it cannot be said to have deprived the petitioner of his right to own land.

The third issue touches on the constitutionality of section 7(2) of the Land Disputes Tribunal Act which provides as follows:

> *"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".*

It has been submitted by counsel for the Petitioner that the mandatory language of the Act offends the Article 160 of the Constitution as it turns the Magistrate's courts into a rubber stamp of the then Tribunal thus making such courts to act under the control and direction of the Tribunal into recording unlawful and arbitrary judgments contrary to the Constitution. With due respect I do not agree. I associate myself with the reasoning of Khamoni J in the case of **Republic V Chairman, Land Disputes Tribunal Kirinyaga District & Another Ex- parte Peter Maru Karuiki 2005 eKLR** where he stated as follows:

> *"By virtue of section 159 of the Registered Land Act, (repealed) a Land Disputes Tribunal becomes a "court" as seen in section 3 of the Registered Land Act which states that the court, except as otherwise expressly provided, means the court having jurisdiction in the matter by virtue of section 159"*

Section 159 of the repealed Registered Land Act provides as follows:

> *"Civil suits and proceedings relating to the title to, or the possession of land, or to the title to lease or charge, registered under this Act or any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court, and where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or where the dispute comes within the provisions of section 3(1) of the Land Disputes Tribunal Act, in accordance with the Act"*

In view of the above provision, it would appear that the intention of Parliament was not to make the Magistrates court subservient or beholden to the Tribunal. It merely provided for a mechanism through which decisions of the Tribunal could be enforced. In any event such decisions were not final as they could be challenged at the Provincial Appeals Committee and High Court. Additionally, judicial review proceedings could be taken out in the High Court to quash the decision of the court adopting the award. That is not to say that the Land Disputes Tribunals created under the Land Disputes Tribunal Act were perfect, indeed there is a plethora of authorities in which their jurisdiction was challenged. However, even if this court were to declare at this late stage that the Act was unconstitutional, it would be of no effect as the Act was repealed in 2011 pursuant to the enactment of the Environment and Land Court Act.

The fourth issue with regard to whether the judgment in Sotik SRM Misc Application No. 2 of 2009 between Mary Chemitet Mosonik and Chepkwony Chelule & Brothers should be quashed is also coming rather late in the day. The petitioner squandered his opportunity to challenge the judgment of the SRM which was delivered on 27th August 2009. He had six months within which to apply for leave of the court to file Judicial Review proceedings to quash the decision of the court in accordance with section 9(2) of the Law Reform Act. No explanation has been given why this was not done. It is trite law that equity does not assist the indolent. Faced with a similar situation in the case of **Florence Nyaboke Mochani V Mogere Amosi Ombui & 2 Others (2014) eKLR** the Court of Appeal in endorsing the legal reasoning by Makhandia J (as he then was) stated as follows:

> *"The 1st defendant had the right to appeal against the award of the Borabu Land Disputes Tribunal to the Appeals Committee constituted for the province in which the land which was the subject matter of the dispute is situate. This is vide section 8(1) of the Land Disputes Act. He chose not to do so. He never took up the challenge. Incidentally, the plaintiff had counsel on record then. He also had a right to commence Judicial Review proceedings in the nature of certiorari to quash the award. Again, he did not do so. I do not for once buy his excuse for failure to do so on account of the ruling on the application to adopt the ward as a judgment of the court being delivered on a date unknown to him in his absence, and by the time he became aware, 6 months presumably in which he should have commenced Judicial Review Proceedings in the nature of certiorari aforesaid had by then lapsed.*
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> *It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of a court and is enforceable, the question 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 defendants' 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 if the remedy of a declaration is available to the plaintiff, it would impugn a valid court judgment and decree"*

In the case at hand, it has been submitted that the decree issued by the court has since been executed and it would be unjust to reverse the clock. The courts will not issue orders in vain.

Having found that the judgment of the Sotik SRM in Misc. Application No. 2009 cannot be quashed, there would be no justification for issuing orders of injunction to restrain the 3rd respondent from interfering with the petitioner's occupation and use of land title number KERICHO/KAITET/1057. The Petitioner has clearly not met the threshold for the grant of injunctive orders.

I have carefully considered the petition herein , the affidavit evidence on record together with the annextures and the submissions filed by both Counsels. I have come to the conclusion that the petition lacks merit and is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 23rd DAY OF OCTOBER 2017

J.M ONYANGO

JUDGE

IN THE PRESENCE OF;

Mr. Bii for the 3rd Respondent

No appearance for the Petitioner

No appearance for the 1st and 2nd Respondents

Court Assistant: Rotich