REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 214 "A" OF 2012

(Formerly Eldoret Hccc No. 76 of 2011)

KIPKULEI CHESEREM...PLAINTIFF

VERSUS

BARNABA K. CHELIMO..1ST DEFENDANT

JOHN K. CHELIMO..2ND DEFENDANT

KILSON KANGOGO CHEMWENO........................3RD DEFENDANT

THE ATTORNEY GENERAL

***(On behalf of Keiyo District Land Disputes Tribunal)*....4TH DEFENDANT**

JUDGMENT

Kipkulei Cheserem ***(hereinafter referred to as the plaintiff)*** brings this suit against **Barnaba K. Chelimo**, **John K. Chelimo**, **Kilson Kangogo Chemweno** ***(hereinafter referred to as the defendants)*** and **the Honourable Attorney General on behalf of Keiyo District Land Disputes Tribunal** ***(hereinafter referred to as the 4th defendant).*** The plaintiff claims that the 4th defendant is the Attorney General of the Republic of Kenya and is being sued on behalf of Keiyo District Land Disputes Tribunal which tribunal is established under the provisions of the Land Disputes Tribunal Act. The plaintiff is the owner of the whole of that parcel of land originally known as **Elgeyo/Marakwet/Kibendo/183** having inherited the same from his grandfather.

That the 1st, 2nd and 3rd defendants jointly and severally without any consent from the plaintiff subdivided the said parcel for themselves as hereunder:

- ***Barnaba Chelimo*** ***Parcel No. 536.***
- ***John K. Chelimo*** ***Parcel No. 537.***
- ***Kilson Kangogo Chemweno*** ***Parcel No. 535.***

That the 4th defendant went further and endorsed the possession of the aforesaid subdivided parcels by the terms of the decree issued on 23rd March, 2011. That upon subdividing and claiming ownership of the said parcels, the 1st, 2nd and 3rd defendants are in the process of taking possession so as to do some

developments, to the detriment of the plaintiff herein. The plaintiff has consequently been in peaceful uninterrupted occupation of the suit parcel of land for all that period. The plaintiff avers that the award and the decree in issue are a nullity and of no legal value for the reasons.

The plaintiff avers that a declaration should issue that the award and subsequent decree in Keiyo Land Disputes Tribunal No. 4 of 2002 is null and void. The defendant by himself, his servants and or agents be injuncted perpetually from executing the decree in Keiyo District Land Disputes Tribunal No. 4 of 2009. The plaintiff consequently prays for injunction permanently restraining the defendants jointly and severally, their servants and/or agents from entering, trespassing into, constructing upon, occupying, transferring and/or otherwise interfering with former land parcel number ELGEYO/MARAKWET/KIBENDO/183 subdivided into numbers 535, 536 and 537.

There is no other suit pending suit in any court and there have been no previous proceedings in any court between the plaintiff and defendants on the subject matter herein.

Particulars of the nullity of the decree In Keiyo District Land Disputes Tribunal No. 4 Of 2009 are pleaded as the failure to follow the procedure for instituting a land dispute claim and that the Award is too vague and given in ambiguous terms amounting to an order in rem.

The plaintiff states that demand and notices of intention to sue have been issued to the defendants in vain. The cause of action arose within the jurisdiction of this honourable court. The plaintiff avers that as the decree is a nullity a declaration should issue that the award and subsequent decree in Keiyo District Land Disputes Tribunal No. 4 of 2009.

The plaintiff prays for a declaration that the proceedings and the award made by the 4th defendant's tribunal on 7th October, 2010 and subsequent judgment and decree given pursuant to award in Iten SRMC Award No. 4 of 2009 between the defendants and the plaintiff are illegal and void and consequently prays for an injunction permanently restraining the defendants, their servants and/or agents from entering, trespassing into, constructing upon, occupying, transferring and/or otherwise interfering with former land parcels number ELGEYO/MARAKWET/KIBENDO/183 subdivided Nos. 535, 536 and 537.

The 1st, 2nd and 3rd defendants filed their defence and the gist of their defence is that the defendants further aver that the plaintiff's pleadings are vague, do not establish any cause of action against the defendants, fatally defective and ought to be struck off. The defendants further aver that the plaintiff seeks to question the award of the Tribunal in which he was the plaintiff, yet the tribunal did not make any decision capable of being reviewed by this court. The defendants shall at the first hearing hereof raise a preliminary objection on a point of law and shall seek that the pleadings be struck off.

The defendant claims that the plaintiff has no locus standi to institute the proceedings herein and that the plaintiffs are their first cousins and that the defendants father Chelimo Chesoo and the plaintiff's father Cheserem Chesoo were brothers and that the land in question Elgeyo Marakwet/Kibendo/183 measuring approximately 3 acres belonged to their grandfather Chesoo Tobosei in addition to other parcels. The defendants further aver that their grandfather's parcels of land were equally and fairly distributed amongst all his sons (the plaintiffs and the defendants' fathers) respectfully and none complained.

The defendants aver that they are not in possession of the subject parcel as claimed by the plaintiff and neither is the plaintiff in actual possession or occupation and that instead it is one Kimutai Chelimo, Clement Rotich (Son to 2nd defendant), and Timothy Korir (Son to 1st defendant) who have been in actual possession since sometime around 1961.

Parties agreed to deal with this matter as case stated and agreed to file with submissions. The plaintiff submits that the award in dispute is misleading and an abuse of the legal process in that there was no firm decision made to warrant a judicial review and they humbly submit that this honourable court be pleased to issue a permanent injunction restraining the defendants jointly and severally, their servants and/or agents from trespassing into, constructing upon, occupying, transferring and/or interfering with former land parcel No. L.R. No. Elgeyo Marakwet/Kibendo/183 which has now been subdivided into Plot Nos.

535, 536 and 537 and further pray for the costs of this suit together with any other relief this honourable court may deem just and fit to grant.

The 4th defendant submits that the resolution of the dispute by the Land Disputes Tribunal was conducted pursuant to the Land Disputes Tribunal Act, 1995 (now repealed). After making the award, the Tribunal forwarded it to Iten Court for adoption. Consequently, the court entered judgment and issued a decree on 19/5/2011. Being aggrieved by the award and decree herein, the plaintiff chose to institute these proceedings, which they submit that they are strange and unknown under the Land Disputes Tribunal Act.

That the pertinent question that they wish to pause at this juncture is what then were the available avenues of challenging the award or decree issued under the Act? Is a declaratory suit contemplated under the Act?

Firstly, section 8(1) of the Land Disputes Tribunal Act was instructive. It provided as follows:

> ***'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 '***

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 under the Act, it became an irrefutable presumption that the plaintiff was not aggrieved by the award of the tribunal. That explains why in his presence and knowledge the award was adopted by the Iten Court.

Secondly, even assuming that the plaintiff, out of indolence, was unable to file the appeal to the Appeals Committee nothing stopped him from challenging the award and decree in the High Court through Judicial Review proceedings. The Land Disputes Tribunal Act did not contemplate filing of a declaratory suit as a way of challenging the award or decree made under the Act.

The defendant therefore submits that the plaintiff ought to have approached court by way of an appeal under Section 8(1) of the repealed Land Disputes Tribunal Act or Judicial Review against the award or decree now being challenged in this forum this suit is defective in substance and law.

In the case **Paul Muraya Kaguri -versus- Simon Mbaria Muchunu [2015] eKLR**, *Waithaka J* opined as follows:

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

Also in ***Republic -versus- Marakwet District Land Disputes Tribunal & 6 others ExParte Shaban Clan & 3 others [2016] eKLR***, the court rightly held that the Land Disputes Tribunals Act did not contemplate filing of declaratory suits. That even assuming that these proceedings are properly before this Court, which is not the case, it is incumbent upon this court to determine the following twin issues: whether the tribunal was properly seized with the matter before it and if so whether parties were afforded opportunities under the Act. This, they submit, is the essence of section 3 of the Land Disputes Tribunal Act.

On the first question, section 3(1) set out the mandate and scope of the tribunal exercising powers under the Act. It is trite law that the tribunal can only entertain disputes in relation to the right to use, work, occupy, trespass and boundary disputes. What was before the tribunal was the 1st, 2nd and 3rd defendants' right to use, work and occupy LR No. ELGEYO/MARAKWET/KIBENDO/535, 536 and 537 registered in their respective names. It is instructive to note that the tribunal did not concern itself with title to registered land nor did it address questions relating to sub-divisions. If it had done so, then the plaintiff would be right to question the mandate of the tribunal but again not in this forum. They submit that the answer to the first question confirms that the tribunal acted properly.

Secondly, on the question of whether parties were afforded ample opportunity under the Act they rely strictly on the proceedings of the tribunal. The proceedings and decision of the tribunal on record confirm that all the parties to the dispute were afforded an opportunity to be heard and they called and or questioned witnesses.

Thirdly, the Plaintiff also failed to tender evidence to prove that the proceedings and award made by the tribunal and the subsequent judgment and decree in Iten court were illegal and void *ab initio* for any other reason known in law. Again, even if he had done so, which is not the case, this suit would still have failed for want of forum.

In his plaint, the Plaintiff seeks a declaration that the judgment and decree issued in Iten SRMCC Land Dispute Tribunal No.35 of 2010 are null and void. However, the Iten court is not a party to this suit. They submit that adverse orders cannot be made against an entity that is not a party to a suit. They rely on ***Republic -versus- Registrar of Societies Safina Lungazo Aluse Mathias Abwotho & Joel Onono [2074] eKLR***, where the court declined to make orders against an entity that was not a party to the proceedings in court. In the upshot, this suit lacks merits, its ill-conceived, a non-starter and fatally defective and the same must be dismissed with costs.

I have considered the pleadings, evidence on record and do find that this matter was determined in accordance with the provision of the Land Disputes Tribunal Act No. 18 of 1990. There is no appeal against the decision of the Tribunal. There is no Judicial review order either quashing the decision of the tribunal or the proceedings.

In the case **Paul Muraya Kaguri -versus- Simon Mbaria Muchunu [2015] eKLR**, *Waithaka J* opined as follows:

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

Also in ***Republic -versus- Marakwet District Land Disputes Tribunal & 6 others ExParte Shaban Clan & 3 others [2016] eKLR***, the court held that the Land Disputes Tribunals Act did not contemplate filing of declaratory suits. Ultimately, the order of declaration is not available.

I do rely on the Court of Appeal decision in the case of **Florence Nyaboke Machani Vs Mogere Amosi Ombui & 2 Others (2014) eKLR**. In this particular Appeal, a party who was aggrieved by a verdict of the Borabu Land Disputes Tribunal did not challenge the decision of the Tribunal in accordance with the procedure set out in the repealed Act. Neither were judicial review proceedings taken to quash the award. He instead chose to file suit for declaratory orders and compensation. The Court of Appeal entirely agreed with the trial Judge's decision to dismiss the suit. The Court of Appeal endorsed the following legal reasoning by Makhandia J (as he then was)

> **"The 1st defendant had the right to appeal against the award of** 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 Tribunals Act. He chose not to do so. Indeed, he was even advised by the SRM's court at Keroka 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 the failure to do so on account of the ruling on the application to adopt the award as a judgment of the court being delivered on a date unknown to him and in his absence. And that by the time he became aware six months presumably in which he should have commenced judicial review proceedings in the nature of certiorari aforesaid had by then elapsed. I have looked at the proceedings of the Senior Resident Magistrate's court at Keroka and in particular the order adopting the award as a judgment of the court dated 23rd May, 2008. It is apparent that the plaintiff had an advocate and though he was not present on that day, I**

doubt that the court would have allowed the application unless it was satisfied that the respondent's counsel was duly served with the application and or a hearing notice and had failed to turn up.

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."

I entirely agree with the reasoning of the Court of Appeal and Makhandia J, (as he then was) that a declaratory suit is not a remedy available to a party aggrieved by a decision of the district land disputes tribunal (now repealed). In my view, to allow a fresh declaratory suit against a decision and valid Judgment made within the framework of the repealed Land Disputes Act would go against the spirit of finality in litigation and would offend public policy. The upshot of the above is that the suit is dismissed with costs.

Dated and delivered at Eldoret this 24th day of November, 2017.

A. OMBWAYO

JUDGE