



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

LAND CASE NO. 412 OF 2013

SAMUEL KIPKURGAT SOI.....PLAINTIFF

VERSUS

THE CHAIRMAN, ALDAI LAND DISPUTE TRIBUNAL.....1ST DEFENDANT

JOHN KIPKOECH SOI.....2ND DEFENDANT

THE LAND REGISTRAR, NANDI COUNTY.....3RD DEFENDANT

JUDGMENT

Samuel Kipkurgat Soi hereinafter referred to as the plaintiff has filed this suit against the *Chairman, Aldai Land Dispute Tribunal, John Kipkoech Soi* and the *Land Registrar, Nandi County* claiming to be the registered owner of land parcel No. Nandi/Chepkongony/472. That on or about the 4.1.2002, the defendant registered a court order or Decree arising out of proceedings in a Land Disputes Tribunal against the plaintiff's land parcel Nandi/Chepkongony/472. That the plaintiff was never served with any proceedings of the Land Disputes Tribunal. That the award and Decree arising from the said Land Disputes Tribunal is null and void. That the Land Disputes Tribunal established under legal notice No. 18/19990 (now repealed) did not have the jurisdiction to hear and determine claim over a registered land. That the proceedings of the alleged Tribunal were conducted in his absence and an award given and the whole parcel of land awarded to the defendant. That the proceedings of the Tribunal were conducted unprocedurally and as a result, the said Land Disputes Tribunal illegally awarded the plaintiff's land to the defendant.

That the plaintiff's claim against the defendants is for orders of declaration that the award and decree and the entire proceedings of the tribunal awarding the 1st defendant John. That Kipkoech Soi, the plaintiff's land parcel Nandi/Chepkongony/472 is a null and void.

That the plaintiff claim against the Lands Registrar is for removal of entries registered against the plaintiff's land and eviction of the 2nd defendant out of land parcel Nandi/Chepkongony/472 and costs of this suit.

The plaintiff served the 2nd defendant with summons to enter appearance and upon failing to enter appearance and file defence, interlocutory judgment was entered.

The 1st and 3rd defendants filed a statement of defence stating that the claim was lawfully and procedurally filed by the 2nd defendant for determination by the 1st defendant and claimed that the plaintiff was served, summoned to appear as required by law and that the Tribunal deliberated openly and delivered its award in public. That the 1st and 3rd defendants further avers that the contents of paragraph 6 of the plaint are incorrect and that the plaintiff was notified of the award when it was filed in court for

adoption and did not raise any objection. Furthermore, the 1st and 3rd defendants aver that the relief sought by the plaintiff are not available to him as he should have moved the court by way of judicial review.

That the 1st and 3rd defendants avers that he shall raise a preliminary objection on the grounds that at the time of instituting this suit, the plaintiff knew that an award had been delivered and subsequently adopted by the court in Kapsabet PMCC No. 34 of 1999 and a decree issued which could only be challenged through judicial review.

That in view of the foregoing matters, the 1st and 3rd defendants plead that the plaintiff's suit discloses no reasonable cause of action against the 1st and 3rd defendants, is scandalous, frivolous and vexatious and is otherwise an abuse of the court process.

The plaintiff submits that without his knowledge, the 2nd defendant filed an award before the Aldai Land Dispute Tribunal on 23.12.1999. the plaintiff was never served to appear in court for hearing and that the award was adopted on 23.12.1999. He was not aware that the decree had been issued against him and registered in respect of land No. Nandi/Chepkongony/472. He argues that the decree has not been enforced for 15 years since it was registered and there is no application of the Land Board for enforcement of the land. It is argued that, at the time of registration of decree, there was a legal charge on the property which has never been discharged.

The Attorney General through ***Mr Joseph Ngumbi*** argues that there was no prejudice suffered by the plaintiff in adopting the award in his absence as he participated in the tribunal proceedings and failed to appeal within the thirty days stipulated hence rendering the adoption of the award necessary. Since the adoption did not change the content of the award, service upon him was superfluous.

The law governing decision of Land Disputes Tribunals was the Land Disputes Act No. 18 of 1990. Under section 3 of the Act, the Tribunals are empowered to decide on the specific matters. The section provided that:-

(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

Section 4 of the said act provided that :-

(1) There shall be established a tribunal, to be called 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.

Section 7 of the Act empowers the chairman of the Tribunal to cause the decision of the Tribunal to be filed in the Magistrate's court.

Subsection 2 requires the Magistrate's court to enter judgment in accordance with that decision of the Tribunal and issue of decree for enforcement under Civil Procedure Act Cap. 21.

Section 8 of the Act gives any party aggrieved by a decision of a Tribunal to file an appeal to the Provincial Appeals Committee within 30 days. A further appeal on respect of law can be filed in the High Court.

The record however, shows that the suit land herein is in Nandi/Chepkongony registration section. The land referred to as Nandi/Chepkongony/472 measures approximately 2.4 acres and was first registered in the name of Kiprotich Arap Lagat on the 9.6.1976. On the same date, the land was registered in the names of Kibet Arap Rono.

On the 19.10.1981, the parcel of land was registered in the name of Samuel Kipkurgat Soi at a consideration of Kshs.10,000/= and a land certificate issued on 22.10.1981.

On the 11.5.1984, a charge was registered to secure the sum of Kshs.60,000/=. On the 4.1.2002, a decree issued in the Principal Magistrate's Court at Kapsabet was registered wherein the suit land was awarded to the 2nd defendant. The said decree was issued pursuant to the Land Disputes Tribunal award read to the parties confirmed as the decision of the court.

The upshot of the above was that the 2nd defendant was awarded the suit land. The plaintiff herein was given 30 days to appeal but never preferred any appeal. The plaintiff now intends to challenge the decision of the Tribunal and the Magistrate's Court by way of plaint.

The plaint seeks the declaration by this court that the award and the entire proceedings in the Land Disputes Tribunal No. 34 of 1999 in respect of land parcel No. Nandi/Chepkongony/472 is null and void.

The first issue is whether this court has the power to revisit the decision of the Land Disputes Tribunal as adopted by the Principal Magistrate's Court, Kapsabet for purposes of a declaration that the same were a nullity.

In **Johana Buti Vs Walter Rasugu Omariba and three Others C.A. Civil Appeal No. 182 of 2006 (Kisumu)**, the Court of Appeal held that;

“a declaration or declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force – that is, it does not require anyone to do anything. It is available both in private and public law save in Judicial Review jurisdiction at the moment. The rule gives general power to the Courts to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter.”

I do find that the court has the jurisdiction to entertain the matter though brought by way of plaint. The second issue to consider is whether the decision is a nullity.

This court finds that the Tribunal as constituted was a nullity as it offended the provision of section 3 of the Act (repealed) as the tribunal lacked jurisdiction to determine matters touching on ownership of land.

Moreover, the decision was a nullity as it offended the provisions of section 4 of the said Act due to the fact that the panel of elders constituted comprised of the chairmant and 3 members as opposed to the chairman and 4 members.

Lastly, the court did not consider the fact that the land was encumbered as there existed a charge in favour of the Standard Bank registered on 11.5.1984.

The upshot of the above, is that the plaintiff succeeds in terms of prayers that a declaration that the award and entire proceedings in LDT No. 34 of 1999 against land parcel Nandi/Chepkongony/472 is null and void.

In view of the decision in *Johana Buti Vs Walter Rasugu Omariba and three Others C.A. Civil Appeal No. 182 of 2006 (Kisumu)*, this court has no power to issue the order sought by the plaintiff against the Lands Registrar for removal of order registered against the plaintiff's land and eviction of the 2nd defendant out of land parcel Nandi/Chepkongony/472 due to the fact that it would require strict adherence to the procedure set out in the repealed statute for an appeal or an application for judicial review. Accordingly prayers b and c of the plaint are dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF APRIL, 2016.

ANTONY OMBWAYO

JUDGE