



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ENVIRONMENT & LAND CASE NO. 984 OF 2012

JEMELI CHEPKISA.....PLAINTIFF

VERSUS

JAMES R. RONO.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

J U D G M E N T

Jemeli Chepkisa (*hereinafter referred to as the Plaintiff*) has come to court by way of plaint against James K. Rono and the Hon. Attorney General (Hereinafter referred to as defendant's). The Attorney General is being sued because of the actions and decisions of Kilibwoni Land Disputes Tribunal. It is alleged that in or about 1968, through Michael Cheruiyot (now deceased), the Plaintiff and her co-wife, Jebet Cheruiyot (now deceased) the mother of Michael Cheruiyot (deceased) jointly bought that piece and parcel of land known as Title No. NANDI/KAPTEL/263 measuring approximately 6.6 Ha. of land from Tapkili Kobot Kiptarus (now deceased). The Plaintiff avers that when her co-wife Jebet Cheruiyot and herself were buying the land, the same was free from any encumbrances. The said Michael Cheruiyot (now deceased) acted only as the trustee for the Plaintiff and her biological mother, Jebet Cheruiyot (now deceased) and therefore held the said land in trust for and on behalf of the plaintiff and her mother Jebet Cheruiyot (now deceased). The Plaintiff avers further that the said suit land was to be transferred into the names of the plaintiff and Jebet Cheruiyot and that the same was to be later shared out between the plaintiff and Jebet Cheruiyot according to their contributions/shares. The plaintiff and Jebet Cheruiyot upon acquiring the said suit land, took possession of the same and also went into occupation of the same with their families and continued to enjoy peaceful stay thereon until the year, 1993 when without any colour of right Kiprono Boit started to lay claim over 3 acres of land contained in the suit land. The plaintiff avers that at no point in time did Kiprono Boit purchase 3 acres of land comprised in Title No. NANDI/KAPTEL/263 from either plaintiff and or her co-wife (now deceased or their trustee (Michael Cheruiyot) hence his claim was/is unfounded.

In or about early 1998, and at the instance of Kiprono Boit (now deceased), the Kapsabet Land Disputes Tribunal, without jurisdiction, awarded 3 acres of land contained in Title No. NANDI/KAPTEL/263 to the said Kiprono Boit (now deceased), the proprietor of Title No. NANDI/KAPTEL/863, measuring approximately 2.8 hectares of land. The plaintiff avers that at the time the said tribunal, was arbitrating over the issue of ownership/title over the said Title No. NANDI/KAPTEL/263, a land registered and still registered under the Registered Land Act (Cap.300) Laws of Kenya, the registered owner Michael Cheruiyot was deceased having died on 7/12/1972. The plaintiff avers that the said panel of elders/tribunal, on or about 23/02/1998 forwarded its proceedings and judgment/award to Kapsabet Principal Magistrate's Court who upon receiving the same, on 12/3/1998 adopted the said award/decisions as its Judgment and it did so in a file which it had opened and named as Kapsabet Principal Magistrate's Court Succession Cause No.75 of 1993 and that there was no succession cause as such for Jebet

Cheruiyot and the Plaintiff had not instituted succession proceedings, after all they had not been issued with certificate of death for the said Michael Cheruiyot. The said certificate was only issued to the plaintiff on 15/11/2011.

The plaintiff further avers that Kiprono Boit (now deceased) did not at all have any legal basis to claim 3 acres of land from the estate of Michael Cheruiyot (deceased) for if at all he had any, then he ought to have claimed the same from the person who sold the same and not from the said estate and that the said tribunal did not have jurisdiction to arbitrate/adjudicate over an issue concerning ownership/title over the said Title No. NANDI/KAPTEL/263, a land registered under the Registered Land Act (Cap. 300) of Laws of Kenya. The said tribunal therefore, acted *ultra vires* its powers hence its actions and decision(s) were null and void and were therefore not capable of being adopted as the Judgment of Kapsabet Principal Magistrate's Court.

The plaintiff states that even after the demise of Kiprono Boit (deceased), the 1st defendant has, without any colour of right, continued to lay claim over the said 3 acres of land forming part and parcel of the estate of Michael Cheruiyot (deceased), namely Title No. NANDI/KAPTEL/263 and that at the instance of the 1st defendant herein, the said land comprised in Title No. NANDI/KAPTEL/263 was earmarked for visitation and subdivision on or about 25/11/2011 and that was pursuant to an order and decree both issued by Kapsabet Principal Magistrate's Court on 23/11/1998 and 2/9/1998 respectively, and which order and decree is a nullity. The plaintiff avers that the 1st defendant still insists on actualizing the said order and decree.

Furthermore, the Plaintiff's claims that the said Tribunal lacked jurisdiction to entertain and deliberate on an issue of ownership/title in respect of a land registered under the Registered Land Act and an estate of a deceased person hence whatever it did was a nullity and that since the proceedings of the said tribunal as well as its verdict and award were a nullity *ab initio*, then the said tribunal's decision(s) was not capable of being adopted as a judgment of a Court of Law.

The plaintiff avers that there is no other suit pending, and that there have been no any previous proceedings, in any Court between the plaintiff and the defendants over the same subject matter, save for Kapsabet Principal Magistrate's Court Succession Cause No.75 of 1993 which was between Jebet Cheruiyot (now deceased) and the plaintiff on one side and Kiprono Boit (now deceased) on the other side, and that the cause of action herein relates to the plaintiff named in the plaint and more in particular the estate of Michael Cheruiyot (deceased).

In a nutshell, the Plaintiff's case is that the Tribunal's proceedings, verdict and award deserve to be declared a nullity and that the said 1st defendant has no *locus standi* to actualize the said decision of the said Tribunal and/or the order or decree of Kapsabet Principal Magistrate's Court.

The plaintiff's case against the 2nd defendant is that from the word go he failed, ignored and/or neglected to accordingly advise the said tribunal.

The plaintiff prays for an order of stay of execution of the decision of the said tribunal and the order and decree of the Kapsabet Principal Magistrate in KAPSABET P.M. SUCCESSION CAUSE NO.75 OF 1993. The plaintiff also prays for an order of permanent injunction do issue against the 1st defendant to restrain the 1st defendant whether by himself or through his servants and/or agents or through any other person, authority or body of persons or otherwise howsoever from trespassing onto and/or dealing in any way whatsoever with the deceased's estate to wit Title No. **NANDI/KAPTEL.263** and that the Land Registrar Nandi District and/or Nandi County be ordered and/or directed to delete any entries or changes that have been made in the register of the suit land pursuant to the order and decree in **Kapsabet Principal Magistrate Succession Cause No. 75 of 1993** and an order of mandatory injunction directing and ordering the Land Registrar, Nandi District and/or the Land Registrar Nandi County to cancel and/or delete any entries or changes made in Title No. NANDI/KAPTEL/263 pursuant to the order and decree in the Kapsabet Principal Magistrate's Succession Cause No.75 of 1993.

The 1st defendant file a statement of defence stating that the Deceased Michael Cheruiyot is the sole

proprietor/owner of the Parcel of Land Nandi/Kaptel/263 on first Registration and that no trust was noted on the register. The defendant states that it is within his knowledge that Kiprono Boit now deceased made a claim for 3.0 acres of NANDI/KAPTEL/263 as a Purchaser for value, and which claim was accepted by the Tribunal and Kapbaset Principal Magistrate's Court and state further that the claim of Kiprono Boit has existed for a long time even prior to the demise of the Registered Owner. According to the defendant, all the parties to the agreement are deceased and adds that the claim has existed for some time and continued to even after the registration of Michael Cheruiyot as the proprietor of the land. The defendant reiterates that KIPRONO BOIT had and has a valid claim for 3.0 acres of NANDI/KAPTEL/263 and this is a decision to that effect. It is the defendant's contention that he is legally entitled to the land for and on behalf of his father, namely 3.0 acres of NANDI/KAPTEL/263 and the Court ought to effect the claim to bring to an end the long protracted land claim.

The defendant further states that the Decree emanating from the Court is a valid Decree capable of being executed and which Decree has not been set aside varied and or abandoned. The Court did indeed adopt the decision and or Verdict of the Tribunal and since the Plaintiff did not Appeal, set aside and or vary she accepted the same and the Defendant cannot be faulted. The Defendant categorically denies the existence of a trust relationship between the Plaintiff and Jebet Cheruiyot on one hand and Michael Cheruiyot as no such claim was ever noted in the register of parcel No. NANDI/KAPTEL/263 or any other at all.

In answer to paragraph 11, 12 and 13 the defendant states that the deceased Kiprono Boit cannot and could not be faulted on the direction and citation of title of the file opened in Kapsabet Principal Magistrate's Court and denies that the claim of Kiprono Boit was in respect of land claim illegally brought for Adjudication before Court. Further, the decision to refer the dispute the Tribunal was not of his own making as the same was an Order of the Court likewise the adoption and decision as the Judgment of the Court. According to the defendant, on adoption of the decision of the Tribunal the Court became functus officio after the Decree was issued and which Decree no Appeal was preferred against and consequently a valid Decree exist to date requiring execution in favour of Kiprono Boit deceased but the issue of Certificate of Death of Michael Cheruiyot is not within his knowledge. The Defendant denies knowledge of the 2nd Defendant's failure to advice the Tribunal.

The Defendant's answer to paragraph 24 is that there is nothing to be stayed as the Magistrate's Court is not a party to the suit and has no knowledge of the same and therefore the orders being sought cannot be granted and ought to be dismissed with costs.

In answer to paragraph 25 it is the Defendant's contention further is that no order of injunction can issue since the claim cannot be stayed or enjoined as the claim is in respect of the Estate of the Deceased which falls within the jurisdiction of Probate and Administration Court and which Estate include the Estate of Kiprono Boit – Deceased vide the contested Decree. The Land Registrar being a party to this suit cannot be ordered to delete any entries or changes made pursuant to Succession Cause No.75 of 1993. The contents of paragraph 27 of the Plaint are admitted save that there was a previous suit between the Deceased Michael Cheruiyot – Deceased and Kiprono Boit – Deceased as Misc. 223 of 2008 in this Court. The jurisdiction of the Honourable Court is denied as the dispute in issue touches on the Estate of the Deceased person which falls under a Probate and Administration Court. The Defendant further states that the Plaintiff's claim is made in bad faith as she has obtained limited grant of letters in respect of only part of the estate of the Deceased Cheruiyot Michael so as to pre-empt the claim by the Estate of the Late Kiprono Boit. Pleadings were closed when the Plaintiff filed the reply to defence on the 16/3/2012.

When the matter came up for hearing, the plaintiff testified that she lives in Kaptel and knows Michael Cheruiyot who is now deceased but does not remember when he died. The mother of Michael Cheruiyot was her Co-Wife and therefore Michael was her Step-Son. Michael's mother was Jebet Cheruiyot also deceased. She produced their death certificates. There is Land registered in the name of Michael Cheruiyot which land is in Kaptel and that she lives on this land with 2 children of Jebet Cheruiyot (her Co-Wife). They have lived on the land for a long time, the title deed is in the name of Michael Cheruiyot. She produced the certificate of official search for NANDI/KAPTEL/263 dated 2/11/2011. She also produced a Grant of Letter of Administration authorizing her to commence the suit. She testified that

she bought the land with Jebet Cheruiyot from Tapkili Kiptarus which was about 16 acres. Her share in the land is 10 acres which she occupies whilst the rest is for Jebet Cheruiyot. They agreed that the land be registered in the name of Michael Cheruiyot because he was in Eldoret and was educated. He was to hold the land on their behalf but he did not contribute for the purchase of the same. Michael died and they never followed subdivision. Michael and Jebet were buried on the land.

She states that she knows Kiprono Boit as the father of James Rono the 1st Defendant as they are neighbors. Their parcel of land is separated by a road and that they have no relationship with the defendant. The defendant has another parcel of land in Sangalo. They lived peacefully until James Rono claimed 3 acres of the land. The dispute was referred to the Land Dispute Tribunal at Kapsabet and the Tribunal took away 3 acres of the land. She was not satisfied with the decision which was later filed in Kapsabet Court. She produced the proceedings of the Tribunal and the letter forwarding the same. The Court adopted the decision of Tribunal. The District Surveyor wrote a letter indicating that he would subdivide the land according to the decision. During adjudication, the land was surveyed and titles issued. The defendant should pursue the person who sold his land to Kiprono Boit.

On cross-examination, she states that she does not have the title deed. Her step-son was registered as proprietor and that they have never complained. She does not remember the parcel number they purchased and she does not remember whether the land had a parcel number at the time of purchase. She does not have the agreement of purchase. The decision of the Elders was in relation to the Succession Cause. The decision went to court and the court made a decision that 3 acres to be given to the defendant. They were not satisfied and filed an appeal. It is the Kapsabet Court which referred the matter to the Tribunal.

PW.2 was David Kalya who also lives in Kaptel is a Village Elder. He witnessed the sale of the Land between the Plaintiff and Tapkili. He does not know Chebet Cheruiyot. He does not know Michael Cheruiyot. He Counted kshs.6,400/= for the land purchase and Kshs.100/= for the house. He lives 500 metres from the land in the same village. He did not testify before the Tribunal.

On Cross-Examination by ***Mr Choge learned counsel for defendant***, he stated that he cannot recall the years he served as a village elder. He never arbitrated this dispute as the village elder. He has never appeared before the Tribunal or a panel of elders or the District Officer in this dispute. On re-examination by R.M. Wafula, he states that he is between 80 – 90 years old. Jemeli Chepkisa and his family came from elsewhere.

PW.3 is Richard Kiplagat Arap Leting lives in Kaptel/Sirma village, Nandi County. He was 79 years only when he testified. He knew the Plaintiff who is his neighbour. He married the daughter of Jebet Cheruiyot a Co-Wife of Jemeli Chepkisa. According to PW.3, the suit land was bought by the Plaintiff and Jebet and registered in the name of Michael Cheruiyot. The two subdivided the land between themselves and continued using it peacefully. PW.3 continues to state that the 1st defendant father is deceased. The wives of the 1st defendant lived in Sangalo. James Rono was not a resident on the land when it was bought. He does not know whether Kiprono Boit bought any land in the area.

On cross-examination by ***Mr Choge***, he states that the transaction was in 1968 at that time land was not demarcated. He was present when the money was exchanged. He maintains that Kiprono Boit never bought the land. He never testified before the Tribunal . Mr. Choge did not call any evidence as all parties agreed to do written submission at the close of the plaintiff's case.

The Plaintiff submits that since the 2nd Defendant does not wish to participate in the matter and did not file any papers he did not oppose the suit as the Tribunal lacked jurisdiction and because they wanted to save the Honourable Court's precious time. The Plaintiff submits that the Tribunal lacked jurisdiction to adjudicate over the issue of ownerships as regards title No. NANDI/KAPTEL/263. The Plaintiff has referred to Section 3 of the LDT Act (repealed). The Plaintiff has referred to several authorities which are very clear that the Land Disputes Tribunal's lacked jurisdiction to adjudicate disputes on ownerships of Land. I commend Mr. R.M. Wafula counsel for the applicant for doing a detailed research on the jurisdiction of the Land Disputes Tribunal , however in all the authorities cited, the decisions of the Land

Disputes Tribunal had been challenged either by Judicial Review or appeal to the High Court or Court of Appeal.

In Republic -versus-The Chairman, Kapsabet Land Dispute Tribunal and Others the Exparte applicant filed an application for Judicial Review for an order of certiorari to remove into the High Court for purposes of quashing the Kapsabet land Dispute Tribunal's award and an order of the Principal Magistrate's Court Kapsabet adopting the award and the subsequent decree given on 22/2/2011. This can be distinguished from the suit herein which is brought by way of Plaintiff for a declaration that the decision of a Tribunal is a nullity.

In Mary Wairimu Muraya ... versus Ngari Muraya decided by myself can also be distinguished from this matter as the same was an appeal to this court from a decision of the Central Province Appeals Committee as it then was.

In Dominica Wanyu Kilu and Johana Ndira Wakaritu the appeal in the Court of Appeal had been filed against a decision of the High Court on appeal from the Appeals Committee which had presided over an appeal from the decision of the Land Disputes Tribunal. Again, **Republic -VS-Uasin Gishu Land Dispute Tribunal** was a Judicial Review application seeking to quash the decision of the Land Disputes Tribunal having made orders declaring interested party and others as being owners of the land of the exparte applicant.

The 1st Defendant submitted that this matter was referred to the Land Dispute Tribunal by the trial court by consent of the parties. An appeal was subsequently filed against the verdict being appeal No.1 of 1998 and it was heard on 11/2/1998 at the District Officer's Office, Kapsabet. The award was in favour of the 1st Defendant and it was subsequently forwarded for adoption and Judgment was entered in terms of the Tribunal's award on the 12/3/1998.

I have considered the submissions of all parties and do find that the main issue is whether the Plaintiff has approached this court in the proper manner there being a decision of the lower court and a decree which has already been registered by the Kapsabet Land Registrar. The meaning of the above is that once the decision of the Tribunal is adopted by the Magistrate's Court as the Judgment of the Court, it becomes a decision of the Court from which the decree can be extracted. Any dissatisfied party could file an appeal in the appeals committee and if dissatisfied the party would file an appeal from the Appeals' Committee to the High Court. The other alternative was to file an application for Judicial Review. The procedure of filing a formal suit to challenge the decision of the Tribunal is not known in law. There is no known provision in law for such a procedure.

In EMILY JEPKEMEI NGEYONI & another v NICHOLAS KIPCHUMBA KOGO & another [2006] eKLR Hon Justice Dulu held that "the award of the Land Disputes Tribunal could be irregular, or even a nullity. However, it can only be challenged through the existing legal regime. The plaintiffs are following the wrong procedure by filing the amended plaint before this court, to challenge the decision of the Land Disputes Tribunal and its execution. They should have followed the right legal machinery."

The Court of Appeal at Kisumu, in Civil Appeal No, 184 of 2011 in an appeal premised on grounds that the High Court had failed to find that the Land Disputes Tribunal lacked jurisdiction to deal with title to land, and so its decision was null and void, dismissing the appeal and upholding the High Court's position observed:

"The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The appellant instead chose to file the suit for declaratory orders and compensation..."

I will not belabor to determine the other issues as there is a valid judgment and decree of the court which ought to be set aside in the right procedure. The upshot of the above is that the suit is not merited and is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 4TH DAY OF NOVEMBER, 2016.

ANTONY OMBWAYO

JUDGE