



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

E&L JUDICIAL REVIEW APPLICATION NO. 9 OF 2013

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE APPLICATION FOR
JUDICIAL REVIEW FOR ORDERS OF CERTIORARI**

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

IN THE MATTER OF CIVIL PROCEDURE ACT RULES

AND IN THE MATTER OF LAND KNOWN AS KESSESS KELCHIN FARM LR/NO. 9621/2

AND

IN THE MATTER OF THE UASIN GISHU LAND DISPUTES TRIBUNAL

BETWEEN

REPUBLICAPPLICANT

VS

THE CHAIRMAN UASIN GISHU LAND

DISPUTES TRIBUNAL1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT ELDORET..... 2ND RESPONDENT

AND

WILLIAM KIPSOI SIGEI & 6 OTHERSINTRESTED PARTIES

AND

JOHN ARUSEI KIPTO & 13 OTHERSEX PARTE APPLICANTS

(Suit to quash decision of the Land Disputes Tribunal; Tribunal having purported to sit after repeal of the Land Disputes Tribunal Act; whether such proceedings valid; continuity of cases that were before the Land Disputes Tribunal; Such matters to have been continued before the Magistrate's Court; Award and decree held to have been made without jurisdiction and same are quashed)

RULING

1. This application has been brought pursuant to the provisions of Sections 8 and 9 of the Law Reform Act, and Order 5 Rule 3 of the Civil Procedure Rules, 2010. The applicants want orders of certiorari to quash the decision of the Uasin Gishu Land Disputes Tribunal made on 28 November 2011, concerning the land L.R No. 9621/2 Kesses Kelchin Farm, and which award was adopted on 14 December 2011 vide Eldoret Chief Magistrate's Court Award No. 49 of 2011. The core complaint of the ex-parte applicants is that the tribunal had no jurisdiction to determine the matter. There is a replying affidavit filed by the respondents and interested parties opposing this motion.

2. The supporting affidavit to the Motion is sworn by John Arusei Kiptoo, who has described himself as the the Chairman of Kesses Kelchin Farm. He has deponed that the suit land measures approximately 2005 acres, and that there are a total of 1460 members, but summons from the Tribunal were only issued to himself and three other individuals. He has averred that the suit land was acquired by a group of people, and that the land was in 1973, sub-divided according to the shares of each member. It is deponed that in the year 2010, some members (the interested parties), moved the Uasin Gishu Land Disputes Tribunal (hereinafter "the tribunal"), so as to have the tribunal determine the issue of ownership of various parcels of land, also with a view of bringing on board people they termed as "absentee Kipsigis", whom they claimed ought to have been given a share. He has deponed that the "absentee Kipsigis" were never there during the hearing and that they were not represented. It is stated that the tribunal proceeded to determine the issue of ownership in a way that was unfair and unlawful and that it overstepped its mandate and acted ultra vires. It is also averred that the applicants were not given a chance to speak at the tribunal and that the tribunal was "biased against the interested parties" (probably meant applicants).

3. The 1st interested party, William Kipsoi Sigei, has sworn a replying affidavit that was adopted by the other interested parties. He has deponed that the tribunal had jurisdiction to deal with sub-division of the Kesses-Kelchin farm. He has deponed that some of the applicants are shareholders of Kesses-Kelchin Farm but others, the 1st,4th,5th,6th,8th,10th,12th,13th, and 14th, are not. He has averred that to date, the Farm has not been sub-divided and that some of the applicants are not entitled to any land or occupy what is more than their entitlement. He has listed several names said to be shareholders of the Farm. It is averred that ownership was not in issue but how the land was to be sub-divided amongst shareholders. It is averred that all parties before the tribunal were treated fairly and given a hearing. In a nutshell, the interested parties want the decision to stand. There are further affidavits filed by both applicants and interested parties but I think the only issue of interest that comes out of this affidavits, is the averment that the tribunal proceeded to file its award after the repeal of the Land Disputes Tribunal Act, which is the statute that established the Land Disputes Tribunals.

4. The State on behalf of the respondents, filed Grounds of Opposition in which it is contended that the application is fundamentally defective and that strange affidavits have been filed.

5. I invited counsels to file written submissions, but I have only seen the submissions of the respondents and interested parties. There are some procedural issues raised about the verifying and supporting affidavits, but I think that the same are technical in nature and do not affect the substance of the Motion. I think the core issue is whether the tribunal had jurisdiction to entertain the dispute and secondly whether they proceeded to hear the dispute after the repeal of the parent statute.

6. The issue in the matter revolved around ownership of the Kesses-Kelchin Farm. I have read the proceedings of the tribunal and the award. The complainants before the tribunal were the interested parties, who claimed that the land ought to be sub-divided amongst the original members, some of whom are said to be Kipsigis who are resident in Kericho and not in the Farm. They are the so called Kericho absentees (or Kipsigis absentees). The ex-parte applicants on the other hand countered that the land ought to be sub-divided according to the occupation on the ground and according to the boundaries that exist. The tribunal sat according to the following schedule :-

2/10/10 - statements by the claimants.

9/11/10 - statements by the objectors.

16/11/10 - clarification of some issues.

23/11/10, 7/12/10 and 13/12/10 - clarification of issues by both claimants and objectors.

Jan-Oct 2011 - Fact finding.

27/10/11 - Analysis.

28/11/11 - Ruling, Filing in court and dispatch of copies.

The award is dated 28 November 2011. In the award, the tribunal agreed with the complainants (interested parties) and directed the farm to be sub-divided amongst the original members including the Kericho absentee members. The award was as follows :-

1. Survey and sub-division of Kesses-Kelchin Farm Ltd LR No. 9621/2 comprising 2005 acres and located in Kesses Division in Wareng District-Uasin Gishu County be effected immediately without further delay.

2. The absentee Kipsigis members, hereby recognized as bona fide shareholders, be ordered to surrender the title deed to the Lands Officer Uasin Gishu immediately to facilitate the survey process.

3. By this verdict the Lands Officer Uasin-Gishu county is asked to assist in directing the plaintiffs to apply to the Land Control Board for consent to sub-divide the farm to all the 207 legitimate shareholders get title deeds. The rest of the members-those who bought portions after 1976 from the aforesaid shareholders shall be given their shares by the sellers afterwards.

The 207 legitimate share-holders comprise :-

(a) The original land buyers.

(b) New members who bought full shares from the original members.

(c) Members who bought acres sold for raising money to pay AFC loans in 1976.

(d) Heirs of the deceased members of the above groups.

Appendix (v)

4. The District surveyor Uasin Gishu County be directed to prepare to start the survey and sub-division process as soon as practicable, and the District Lands registrar to subsequently prepare and issue title-deeds.

5. Public utilities be set aside first before sub-division to the share holders.

6. The County Security Council of Uasin Gishu to provide adequate security bearing in mind the intensity of the tension, and the volatility of the situation in the farm.

7. All costs of the survey and sub-division be borne by the individual share-holders.

The award seems to have been filed on 30 November 2011 before the Chief Magistrate's Court at Eldoret and the same was read to the parties on 14 December 2011.

7. The Land Disputes Tribunal Act, Act No. 18 of 1990,(now repealed by the Environment and Land Court Act, Act No. 19 of 2011) at Section 3, provided for the jurisdiction of the tribunals. The said

provision was drawn as follows :-

3. (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.

It will be seen from the above, that the jurisdiction of the tribunal, was only on matters related to the division or determination of boundaries; claims to occupy or work land; and trespass to land.

8. It may be that their decision on how the suit land was to be divided was a decision falling under Section 3(1)(a) above, as the claim was one touching on division to land. But I think that the claim went further than merely making a decision on how to divide land. There were counterclaims that the absentee Kericho members are not entitled to any land, which then would make the dispute morph into one related to ownership of land, which jurisdiction would be outside the parameters of Section 3 of the Land Disputes Tribunal Act. I think the tribunal therefore did not have jurisdiction to entertain the dispute.

9. But even if they had, their decision would still have been made out of jurisdiction, for the Land Disputes Tribunals were rendered defunct after the repeal of the Land Disputes Tribunal Act (LDT Act), by the Environment and Land Court Act, Act No. 19 of 2011 (ELC Act). The ELC Act was assented to on 27 August 2011, and came into force on 30 August 2011. Section 30 of the ELC Act repealed the LDT Act. It means therefore that from 30 August 2011, the Land Disputes Tribunals were rendered non-existent. There could be no tribunal in place any time after 30 August 2011, and I fail to understand what "tribunal" sat between Jan-Oct 2011 for fact finding; 27 October 2011 for analysis, and 28 November 2011 for ruling. Owing to their non-existence, I wonder who paid for the subsistence of these "members" and their allowances.

10. The continuity of matters that were before the tribunal at the time of the repeal of the establishing statute is provided for vide Section 30 of the ELC Act which is drawn as follows :-

30. (1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

(2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.

11. The purpose of the ELC Act was to operationalize the provisions of Article 162(2)(b) of the Constitution which mandated Parliament to establish a court to hear disputes related to land and the environment. The contemplation in the Constitution is that the Environment and Land Court will be the court to hear disputes related to the environment and land. It is noteworthy to state that the Environment and Land Court became operational after the 5th November 2012 when the first batch of judges appointed to the ELC were sworn in. It is correct to state that the position of Section 30 of the ELC Act was to have matters continue to be heard in the forum where the case was filed before the Environment and Land Court came into operation, or alternatively as may be directed by the Chief Justice or the Chief Registrar. But although Section 30 allowed continuity, there could be no continuity where the forum ceased to exist. Thus a case could not be continued before the Land Disputes Tribunal after the repeal of the LDT Act on 30 August 2011. The case is different for other forums that continued in existence, such as Magistrate's Courts. Matters pending before these sort of forums whose existence remained unaffected by the ELC Act could continue being heard in the said forums, because such forums continued to exist and the law

allowed for them to continue hearing matters pending before the. But this cannot apply to a forum that ceased to exist, and the persons who delivered the award on 28 November 2011 could not purport to have been acting as members of the Land Disputes Tribunal, for there was no such tribunal in existence at that point in time. The award was therefore rendered and made by strangers, which persons, and whatever body of which they comprised, the law did not recognize as having capacity to hear any sort of dispute.

12. The only appropriate thing to have been done was to hold in abeyance all cases pending before the LDTs as at the date of the repeal of the LDT Act, pending directions from the Chief Justice or Registrar. The directions did eventually come on 9 February 2012. Five practice directions were issued relating to matters touching on disputes of land and the environment. Of concern to us is direction No. 2 which squarely dealt with cases pending before the LDTs as at the date of enactment of the ELC. The said provision is drawn as follows :-

All proceedings which were pending before the District Land Disputes Tribunals as at the date of the enactment of the Environment and Land Court Act, 2011, shall be moved to the nearest Resident Magistrate's Court for hearing and determination by a Court presided over by a Magistrate of the rank of Resident Magistrate.

13. Thus prior to the directions above, the matters pending before the defunct tribunals ought to have been held in abeyance. After the above directions, such pending matters ought to have been referred to the Magistrate's Courts for disposal.

14. That did not happen in this case. Instead, a group of persons, whose authority had been revoked by operation of law, continued to hear a dispute and make an award. Such award, made by persons without authority, cannot be allowed to stand, for it is not an award that is recognized by law, and no one is under any obligation to follow it. I therefore hereby declare the award made on 28 November 2011 null and void and the same is hereby quashed. It follows that the adoption made by the Magistrate's Court on 14 December 2011, also has to be quashed, for it will be absurd to quash the award, and let the adoption and any decree that subsequently followed to remain unaffected.

15. From the foregoing, it will be discerned that this application must be allowed. It is hereby allowed. In the circumstances of this case, I think it is fair that I make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF NOVEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of: