IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 73 OF 2007

BETWEEN

RAEL MUYAKA …..……..……..……. FIRST APPELLANT

HELINA NASIMIYU ……..……. SECOND APPELLANT

WASIKE MUTAMBOCHI ……...…...……. THIRD APPELLANT

DAVID SICHARANI …..……...……..… FOURTH APPELLANT

DICKSON SABUNI ……...…….…… FIFTH APPELLANT

FLORENCE NAMALWA …...……. SEVENTH APPELLANT

THOMAS SHIKUKU ……...…….…. EIGTH APPELLANT

AND

WAITALUK LAND DISPUTES TRIBUNAL COMPRISING OF:

MBOTO KIDAI

EZEKIEL KESSIO

HARUNI KIPSUGUT……...……..... FIRST RESPONDENT

AND

ANNAH CHEPTOO MURSOI

(SUBSTITUTED IN PLACE OF

SAMWEL MURSOI …...…….. SECOND RESPONDENT

(An Appeal from the ruling of the High Court of Kenya at Kitale ***(Etyang, J.)*** *dated* ***18th December, 2001***

in

H.C.MISC. APPLICATION NO. 102 OF 2001)

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JUDGMENT OF THE COURT

1. In the ruling that gave rise to this appeal, the High Court dismissed an application by the appellants seeking an order of certiorari to remove into that court and quash the decision of Waitaluk Land Disputes Tribunal ***("the Tribunal")*** that was read and adopted as a judgment of the court in **Kitale SPM Land Case No. 76 of 1999** on 11th April, 2001.

2. The dispute was over a parcel of land at Tulwet measuring 74 acres ***("the suit land")*** which was being claimed by one Samuel Mursoi as his property and he wanted the appellants evicted from the suit land.

3. In their amended Notice of Motion, the appellants stated that the Tribunal fell into error when it heard a dispute that had not been properly instituted in that no written statement of claim had been filed and served.

4. They further alleged that the claim before the Tribunal was time barred, having been filed in 1998, yet they had been on the suit land since 1971; that the Tribunal heard the matter when one of the appellants, **Rael Muyaka**, had died but had not been substituted; that **David Sicharani,** one of the persons (*appellants)* sued, was non-existent, and that the Tribunal did not give reasons for its decision.

5. The second respondent, being the administrator of the estate of Samuel Mursoi (deceased) filed a replying affidavit and denied the appellants' averments. She stated that they were duly served with the statement of claim but they failed to appear before the Tribunal. She annexed to her affidavit the statement of claim and the summons.

6. Regarding Rael Muyaka, the second respondent averred that she was alive when the case was heard and determined before the Tribunal.

7. In response to the appellants' contention that the claim was time barred, the second respondent stated that **"… this was purely a case of trespass to land and time could not run as trespass to land has no time limit."**

8. The second respondent concluded by stating that all the persons sued were the proper ones and that the Tribunal gave reasons for its decision.

9. The memorandum of appeal contains the same grounds that were raised before the High Court as summarized herein above. When the appeal came up for hearing there was no appearance for the first respondent and **Mr. Otieno,** who held brief for **Mr. Chepkwony** for the second respondent, did not oppose it. **Ms Munialo,** learned counsel for the appellants, submitted that there was no statement of claim as required by **section 3 (2) (3) (4) and (5)** of the **Land Disputes Tribunals Act**, *now repealed*. That factual statement is not correct. In the replying affidavit filed by the second respondent, she annexed the statement of claim dated 22nd October, 1998. The learned judge stated as much in his impugned ruling.

10. Regarding service of the statement of claim and summons, counsel submitted that there was no affidavit of service, yet the learned judge accepted the second respondent's contention that the appellants were served but they refused to sign at the back of the summons in acknowledgement of service and also failed to attend the Tribunal.

11. Section 3 (4) of the repealed **Land Disputes Tribunals Act** stated that:

> **"Every claim shall be served on the other party, or, where there are more than one, on each of the other parties to the dispute and the provisions of the Civil Procedure Act as regards**

service of summons shall thereafter apply."

That being the case, the court was under a legal obligation to consider whether the provisions of **Order 5 rule 15** of the **Civil Procedure Rules** regarding filing of affidavits of service had been complied with. That rule requires the serving officer to swear and annex to the summons an affidavit of service stating the time and the manner in which summons were served, and the name and address of the person identifying the person served and witnessing the delivery or tender of the summons.

12. That mandatory provision of the law was not complied with. Where it is demonstrated that a party to proceedings has not been served, usually the ex parte judgment is set aside ***ex debito justitiae.***

13. Turning to the issue of death of **Rael Muyaka,** whose appeal has since been withdrawn, the burial permit revealed that she died on 25th November, 1998. The Tribunal heard the dispute and delivered its ruling on 30th September, 1999. We do not know whether the Tribunal was aware of the demise of Rael. The issue was raised before the High Court but the learned judge did not pronounce himself on the same.

14. The High Court did not also make any determination on the issue of time limitation. The appellants had stated that they had been on the suit land since 1971, yet the claim for their eviction was filed in 1998.

15. Section 13 (3) of the repealed **Land Disputes Tribunal Act** was explicit that:

> **"… nothing in this Act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which the time for bringing such proceedings is barred under any law relating to the limitation of actions."**

It is evident that the learned judge did not give any regard to the provisions of **section 7** of the **Limitation of Actions Act** which stipulate that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him.

16. We have said enough, we believe, to demonstrate that this appeal ought to be allowed, which we hereby do. Consequently, the High Court ruling of 18th December, 2001 is hereby set aside. We substitute therefor an order of certiorari quashing the decision of Waitaluk Land Disputes Tribunal delivered on 30th September, 1999 and subsequently adopted as judgment of the court in Kitale SRMCC Land Case No. 76 of 1999 on 11th April, 2001.

17. The appellants are awarded the costs of the appeal as well as the costs in the High Court.

DATED and delivered at Kisumu this 27th day of May, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

……..

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

…….

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR