



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT JUDICIAL REVIEW NO. 107 OF 2011

**IN THE MATTER OF APPLICATION BY DANIEL MOSE NCHORE AND KENNEDY ONCHIRI
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)**

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990

AND

IN THE MATTER OF NYAMACHE LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF PRINCIPAL MAGISTRATE'S COURT AT OGEMBO

AND

IN THE MATTER OF OGEMBO PMCC MISC. CIVIL APPL. NO. 34 OF 2011

AND

IN THE MATTER OF NYAMACHE LAND DISPUTES TRIBUNAL CASE NO. 2 OF 2011

BETWEEN

DANIEL MOSE NCHORE 1ST EX PARTE APPLICANT

KENNEDY ONCHIRI 2ND EX PARTE APPLICANT

VERSUS

NYAMACHE LAND DISPUTES TRIBUNAL 1ST RESPONDENT

THE PRINCIPAL MAGISTRATE'S COURT AT OGEMBO 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. On 24th November, 2011 the court granted the ex parte applicant leave to apply for an order of

certiorari to remove and bring to the High Court for purposes of quashing the decision of Nyamache Land Disputes Tribunal Case No. 2 of 2011 dated and delivered on the 29th September 2011. By its decision the land disputes tribunal awarded the disputed land parcel measuring 90 feet by 130feet to the interested parties, Ondara Nchore and Agnes Ondara Nchore and ordered the ex parte applicants to vacate the suit premises.

2. The ex parte applicants by the Notice of Motion dated 7th December 2011 seek the following orders:-
 1. **An order of certiorari to remove into the High Court and quash the decision delivered by the 1st respondent on the 29th September 2011 in Nyamache Land Disputes Tribunal No. 2 of 2011.**
 2. **An order of prohibition prohibiting the 1st and 2nd respondents, the interested party by their agents and/or servants from executing the orders made by the 1st respondent**
 3. **Costs of the application be provided for.**

The ex parte applicants have inter alia set out the following grounds in support of the Notice of Motion:-

- a. **That the 1st respondent acted in excess of its jurisdiction in the award dated 29th September, 2011.**
 - b. **The 1st respondent acted out of her jurisdiction in arbitrating on a claim of ownership of land and eviction of the applicants from the suit land which was in contravention of sections 27 and 28 of the Registered Land Act Cap 300 Laws of Kenya (now repealed).**
 - c. **The 1st respondent failed to appreciate the Tribunal lacked the jurisdiction to deal with the matter under the provisions of section 3 (1) of the Land Disputes Tribunal Act, 1990.**
3. The Notice of Motion was further supported on the grounds set out on the supporting affidavit sworn on 7th December 2011 by Kennedy Onchiri the 2nd Ex parte applicant. By the supporting affidavit the applicant's aver that the dispute related to ownership of land parcels **Bassi/Bondonya/26** and **27** then registered in the name of a deceased person and contend that the 1st respondent lacked the jurisdiction to deal with the matter.
 4. From the record it is apparent that the application was served on the respondents and the interested parties. On 30th May 2013 Mr. Momanyi advocate appeared for the interested parties when the interested parties were granted leave of 15 days to file a replying affidavit to the application. The court on 12th February 2014 granted further leave of 21 days to both the respondents and the interested parties to file their responses to the Notice of Motion. The court further directed the parties to exchange written submissions. The ex parte applicants filed their written submissions on 3rd June 2014 and inspite of being afforded ample opportunity to file their responses and submissions both the respondents and the interested parties neither filed any responses to the application and/or any submissions. Effectively therefore the ex parte applicants Notice of Motion dated 7th December 2011 is unopposed.
 5. In the present application the court is faced with a unique situation where the ex parte applicants contend that the property the subject of the suit was land that was registered under the **Registered Land Act**, Cap 300 Laws of Kenya and was at the time the dispute was handled before the 1st respondent in the name of the deceased person and thus the interested parties lacked the capacity to institute the proceedings not having obtained grant of letters of administration to the deceased estate. The import of that is that if the land was registered, then the Tribunal lacked the jurisdiction to entertain the dispute as long as it entailed a challenge on the title. If the registered owner was deceased as alleged, equally the interested parties lacked the capacity to institute the proceedings before the Land Disputes Tribunal without the grant of letters of administration. Although the annexed proceedings before the tribunal make reference to Plot No. 26 and Plot No. 27 no supporting documents of ownership were annexed. The ex parte applicants equally have not furnished any evidence and or documents to support the ownership of the disputed property.
 6. I have perused the record of proceedings and the ruling before the Land Disputes Tribunal. From

the proceedings before the Tribunal it is unclear whether there were two references before then and whether the two were being handled simultaneously. There are two rulings, one dated 15th February 2011 and the other dated 26th April 2011 but both said to be forwarded on 29th September 2011. The ruling that mentions the ex parte applicant, Kennedy Onchiri is dated 15th February 2011 yet the notice of hearing of the dispute before the tribunal is dated 19th April 2011 annexed and marked “K0-3” indicated the dispute was to be heard on 26th April 2011 and has a further endorsement that the case would be heard on 10th June 2011. This anomaly has not been explained by the interested party.

7. Evidently from the Tribunal proceedings the dispute concerns the distribution of land left by the deceased father of the interested party and the 1st ex parte applicant. From the record of the proceedings the land the subject of the dispute is registered land and to the extent that the decision of the Tribunal affected the ownership of the land, the tribunal lacked the jurisdiction to hear and determine the dispute as it touched on title.
8. Section 3 (1) of the **Land Disputes Tribunal Act** stipulates the matters that the tribunal had jurisdiction to handle and provides thus:-

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.

9. The interested party and the respondents having not filed any response and/or submissions the ex parte applicants averments remain unchallenged and uncontroverted and the court has no basis to hold that land parcels **Bassi/Bondonya/26** and **27** was not registered land. Indeed I am persuaded this was registered land and that the Land Disputes Tribunal would by virtue of Section 3 (1) of the **Land Disputes Tribunal Act** not have had any jurisdiction to deal with the matter. I hold that the tribunal acted in excess of its jurisdiction and consequently its decision to award the land to the interested party and to order the eviction of the ex parte applicants was null and void and the same is set aside.
10. I accordingly grant the orders of certiorari and prohibition in terms of prayers 1 and 2 of the Notice of Motion dated 7th December 2011. I will make no order for costs and each party will bear its own costs.

Judgment dated, signed and delivered at Kisii this 26th day of February, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the 1st and 2nd ex parte applicants

..... for the 1st respondent

..... for the 2nd respondent

..... for the 3rd respondent

J. M. MUTUNGI

JUDGE