



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. JR E003 OF 2021**

**IN THE MATTER OF SIAYA DISTRICT LAND DISPUTE TRIBUNAL**

**AND**

**IN THE MATTER OF PROVINCIAL LAND APPEAL COMMITTEE-NYANZA**

**AND**

**IN THE MATTER OF PRINCIPAL MAGISTRATE'S COURT-SIAYA**

**IN THE MATTER OF AN APPLICATION BY MAGISTRATE ALOO OBINGE**

**(Personal Representative of the estate of OBINGE NYMWANDA(DECEASED))**

**FOR ORDER OF JUDICIAL REVIEW IN THE MATTER OF**

**NATURE OF AN ORDER OF CERTIORARI**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CHAIRMAN LAND DISPUTE TRIBUNAL SIAYA.....RESPONDENT**

**AND**

**LEONIDA APAT OKELLO.....INTERESTED PARTY**

**AND**

**MARGARET ALOO OBINGE (Personal Representative of the Estate of**

**OBINGE NYMWANDA(DECEASED).....EX-PARTE APPLICANT**

**RULING**

**BRIEF FACTS**

**MARGARET ALOO OBINGE** filed a Notice of Motion Application for orders that this Application be certified as urgent to be heard ex-parte in the first instance(spent). That this Honourable court be pleased to set aside the order dated 19<sup>th</sup> July 2016 dismissing the judicial review application herein for hearing and determination. Costs of this Application be provided in favour of the ex-parte Applicant. The Application was based on grounds that sometimes in July 2011, the ex-parte Applicant herein instituted the Judicial Review Application herein praying for orders of certiorari to quash the proceedings and decision of Siaya Lands Dispute Tribunal Case No. 643 /1999 and the proceedings of the subsequent Nyanza Provincial Land Appeal Committee case No. 2006/2000 all adopted by the Siaya Principal Magistrate

Court on 3<sup>rd</sup> August 2000 and 10<sup>th</sup> May 2011 respectively in Land Case No. 58 of 2000 ORDERING THT A PORTION OF Land parcel no. SOUTH SAKWA/MIGWENA/615 be transferred to the interested party herein.

The Ex parte applicant had run into financial difficulties and was unable to further instruct the Advocate on record and while looking for funds, the Judicial Review Application herein was dismissed for want of prosecution. That the Ex-parte Applicant's Advocate on record was not served with the notice of dismissal of the Judicial Review Application and therefore was not aware that the matter was coming up for hearing of the notice of dismissal on 19<sup>th</sup> July 2016.

**LEONIDA APAT OKELLO** the Interested Party herein filed a Replying Affidavit where she stated that the Ex-parte Applicant has not come to court with clean hands and the Application herein is misconceived, bad in law, improper before the Honourable Court, malicious and defective.

She stated that this Honourable court had already made a decision in this matter by dismissing the suit for want of prosecution in 2016 and therefore the court became functus officio. The matter had been litigated by the Ex-parte Applicant's late husband OBINGE NYAMWANDA against the Interested Party at the Principal Magistrate's Court at Siaya, Misc. Civil No. 58 of 2008.

It is stated that by a letter dated 5<sup>th</sup> November 2020 from the Siaya Lands Office through the Surveyor in charge the necessary parties for re-survey purposes. That the Nyanza Land Dispute Appeals Committee through case No. 26 of 2000 examined the proceedings from the District Tribunal and gave the finding that both parties, being the late Ex-parte Applicant's husband OBINGE NYAMWANDA and the interested Party herein had stayed in occupation and usage of their lands for over 40 years and further the Ex parte Applicant's husband had agreed that the Interested Party's family had buried her two generations on her portion of the Land to which the Nyanza Land Dispute Appeals Committee upheld the ruling of the District Land Tribunal.

It is stated that in abusing the court's process, the Ex Parte Applicant filed a suit of similar facts alongside the Notice of Motion to be litigated at the Principal Magistrate's court, Bondo ELC No. E7/2021 whereupon the Interested Party filed a Notice of Preliminary Objection to have the same struck out for being res judicata.

MARY ALOO OBINGE filed a further Affidavit where she stated that the Interested Party herein has not provided evidence to the contrary that she underwent financial difficulties that made here unable to instruct her Advocate to on record and that the decision by this Honourable Court to dismiss the Judicial Review Application for want of prosecution was not merited based on the fact that this Court has jurisdiction on this matter.

It is further stated that the Land Disputes Appeals Committee's decision referred to by the Interested Party Issuing to her part of the suit property is null and void since it has no jurisdiction to issue such orders. That the Interested Party has encroached on the suit property and is cultivating therein.

The Ex parte Applicant further stated that the Interested Party has buried her two generations on land parcel no. SOTH SAKWA/MIGWENA/618 and not SOTH SAKWA/MIGWENA/615 and that Honourable Justice E.N. Maina who dismissed the suit herein was not an Environment and Land Court Judge and therefore had no jurisdiction to do so. That pending the hearing and determination of this suit, she instructed her Advocate on record to make an Application of an order of stay of proceedings in BONDO PMELC E 7/2020 which application was allowed and she stands to suffer irreparable loss and damage if the application herein is not allowed since the Interested Party stands to obtain ownership of part of the suit property.

The Application was canvassed by way of written Submissions.

#### **Ex Parte Applicant's Written Submissions**

The Ex Parte Applicant filed her submissions on 21<sup>st</sup> May 2021 and the following issues were raised for determination:

- a) Whether the Applicant's Advocate was served with the notice to show cause dated 30.6.2016.**
- b) Whether the learned judge had jurisdiction to her and determine the suit herein.**
- c) Whether this court is functus officio.**
- d) Whether the Applicant is entitled to the prayers sought.**
- e) Who is entitled to the costs of this Application.**

On the issue of whether the Applicant's Advocate was served with the notice to show cause, the Applicant submitted that she ran into financial difficulties and was unable to further instruct the advocate on record. Further, her Advocate was not served with the notice to show cause and therefore was condemned unheard.

On the issue of whether the learned judge had Jurisdiction to hear and determine the suit herein, the Applicant submitted that the Judicial Review Application raises issues regarding a land dispute and as a result, any decision regarding the same suit ought to be made by a judicial officer gazetted and mandated to make judicial decisions regarding land matters. That the said dismissal was null and void as the learned judge was not mandated as an Environment and Land Court Judge.

On whether this Honourable Court is functus officio, the Ex parte Applicant relied in the case of **Telkom Kenya Limited vs John Ochanda (2014) eKLR** where the court stated as follows:

***“The doctrine of functus officio is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”***

The Ex parte Applicant submitted that the suit herein was dismissed for want of prosecution and not on merit. That there was no judgment issued with regards to the issues raised in the Judicial Review Application and therefore this court is not functus officio as alleged by the Interested Party.

As to whether the Applicant is entitled to the Prayers sought, the ex-parte Applicant submitted that this court should allow the prayers sought since the Ex Parte Applicant stands to suffer irreparable loss and damage since the Interested Party stands to transfer a portion of the suit property into her name.

On the issue of who should be entitled to the costs of this Application; the Ex parte Applicant submitted that she should be entitled to the costs based on the provisions of section 27 of the Civil Procedure Act.

**I have considered the application and the rival submissions and do find that the application was dismissed for want of prosecution on the 19<sup>th</sup> July 2016 however, there is no evidence that the exparte applicant was served and therefore this court will exercise its discretion by granting an order of review. Moreover, the application was dismissed by the High Court Judge who did not have jurisdiction to entertain a dispute revolving on land Ownership. This court cannot be functus officio because the dismissal was not based on hearing on merit.**

The upshot of the above is that this Honorable court hereby sets aside the order dated 19<sup>th</sup> July 2016 dismissing the judicial review application herein and the same is to be set for hearing and determination. Costs of this Application be in the cause.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 24<sup>th</sup> DAY OF FEBRUARY, 2022.**

**ANTONY OMBWAYO**

**JUDGE**

**THIS RULING HAS BEEN DELIVERED TO THE PARTIES BY ELECTRONIC MAIL DUE TO MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN THE LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON 15TH MARCH 2020.**

**ANTONY OMBWAYO**

**JUDGE**