



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

JR. 26 OF 2011

REPUBLIC (EX-PARTE: PHILIP JABER ONYANGO.....)APPLICANT

VERSUS

THE CHAIRMAN SIAYA DISTRICT

LAND DISPUTES TRIBUNAL1ST RESPONDENT

THE PRINCIPAL MAGISTRATE'S COURT AT SIAYA.....2ND RESPONDENT

THE DISTRICT LAND REGISTRAR, SIAYA DISTRICT.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

MONICA ANYONJE ONG'OTE.....INTERESTED PARTY

J U D G M E N T

1. The exparte Applicant herein – **PHILIP JABER ONYANGO** – filed his Notice of Motion here on 27/10/2011 following leave granted to file the same on 19/10/2011. The application is essentially against the interested party – **MONICA ANYONJE ONGOTE** – who had taken a dispute against him to **SIAYA LAND DISPUTES TRIBUNAL** contesting his ownership of land parcel number **NORTH GEM/MALANGA/242**.
2. But there are respondents – **THE CHAIRMAN SIAYA DISTRICT LAND DISPUTE'S TRIBUNAL (1ST RESPONDENT)**, **THE PRINCIPAL MAGISTRATE'S COURT AT SIAYA (2ND RESPONDENT)**, **THE DISTRICT LAND REGISTRAR, SIAYA DISTRICT (3RD RESPONDENT)**, and **THE ATTORNEY GENERAL (4TH RESPONDENT)** – who are brought on board because of the role they have played or are expected to play in the matter.
3. The application is brought under Sections 8 and 9 of the Law Reform Act (Cap 26) and order 53 Rules 3(1) of Civil Procedure Rules, 2010, and other enabling law. The following orders are sought:

(a) An order of **CERTIORARI** to remove to this court for quashing the proceedings of **SIAYA LAND DISPUTES TRIBUNAL CASE NO. SYA/65/2010**.

(b) An order of prohibition prohibiting the 2nd Respondent from reading or adopting the said tribunal's award.

(c) Costs are urged to be in the cause.

4. The application is premised on statement of facts and verifying affidavit brought together with the

earlier application that sought leave to bring this application.

5. From what can be gleaned from the records availed, it appears clear that the **EXPARTE APPLICANT** is the registered owner of Land Parcel **NORTH GEM(MALANGA)242** (hereafter the suit land) but the **INTERESTED PARTY** is living on the land. The **EXPARTE APPLICANT** requested the **INTERESTED PARTY** to move from the land but she refused, claiming ownership on the basis that her late husband had bought the land from the **EXPARTE APPLICANT's** late father. The interested party even went further: she sued the Exparte Applicant at the local Land Dispute's Tribunal and the outcome of the dispute is the subject matter of this contestation.
6. The tribunal awarded the interested party the portion of land she was claiming saying, inter alia, that she was entitled to it because her late husband had bought it and that the long period she had lived on it entitled her to own by adverse possession.
7. The **EXPARTE APPLICANT** felt aggrieved by the tribunal's decision and filed this suit. According to the Exparte Applicant, the tribunal breached fundamental rules of procedure, acted ultra-vires, erred factually in its findings, and abused its powers. It breached procedure, it was said, because there was no formal claim before it and the Exparte Applicant was not served with any formal claim. It acted ultra-vires because of delving into the question of title to land and also purporting to enforce the rights of the interested party as a purchaser. And it was also faulted for making a finding that the interested party was an adverse possessor. Factual errors consist in finding that the interested party had acquired prescriptive right over the land while abuse of power is linked to alleged bad faith, improper motives and unfairness, among others.
8. The interested party filed her response vide a replying affidavit dated 9/5/2012. She denied that there was no formal claim. The Exparte Applicant participated in the dispute, she said, and could not have done so without knowing the claim.
9. And the tribunal did not act ultra-vires because the issue at hand concerned sub-division of land. It was, in any case, a dispute concerning land held in common and the tribunal had power to entertain claim concerning such land whether such land was registered or not.
10. The interested party further faulted the Exparte Applicant for registering the suit land in his name without following the requisite Succession procedure. According to her, the resulting title is void ab-initio.
11. This matter never went for hearing. Submissions were filed instead. The applicants' first submissions were filed on 5/2/2014. The submissions averred that the suit land was not one held in common and the alleged sale of a portion of the suit land to the late husband of the interested party was denied. To the **EXPARTE** Applicant, the interested party is a mere licensee as that is the basis upon which her late husband was living on the land.
12. The interested party could not therefore acquire rights of ownership at all. She is, it was submitted, a licensee and no rights of ownership can accrue to her under customary law or common law.
13. The interested party's submissions were filed on 29/1/2014. The submissions generally reiterate what the replying affidavit contained.
14. There are supplementary submissions from the applicant. Generally, the submissions elaborate on issues covered by the earlier submissions. For instance, it is pointed out that there is no evidence of sale of land availed by the interested party. Such evidence would require a written agreement and failure to avail such agreement runs a foul of Section 3(3) of the Law of Contract Act (Cap 23).
15. Adverse possession was revisited. It was pointed out that entry to the land was by permission, meaning that adverse possession does not lie.
16. The jurisdiction of the tribunal is pelted out in Section 3(1) of the Land Dispute's Tribunal's Act No.18 of 1990. Under that Section, the tribunal is conferred with jurisdiction to decide on

(a) Division of, or determination of boundaries to land, including land held in common.

(b) A claim to work or occupy land

(c) Trespass to land.

It is clear from this that the tribunal has no power to deal with issues of ownership.

17. From both the findings and the ruling of the tribunal, it is clear that the interested party was awarded the land both by virtue of purchase and adverse possession.

To that extent, the tribunal acted without jurisdiction. It does not suffice to say the issue was division of land. The tribunal did not limit itself to that. It awarded the land to the interested party. This alone would make me allow this claim but there are other issues raised.

18. The procedure followed by the tribunal was faulted. It was alleged that the ex parte applicant was not served with a formal claim. But records show that the Ex parte Applicant participated in the proceedings and articulated his position well. It is hard for me to believe that he could do so without knowing the claim. If this was the only ground upon which this claim was brought, I wouldn't allow it. It is clear to me that both parties knew why they were before the tribunal.

19. The tribunal was also faulted for its findings on adverse possession. Adverse possession is a matter of evidence and a look at the proceedings does not show that the interested party adduced such evidence. Adverse possession is also an issue of ownership and, as we have seen, the tribunal had no power to deal with the issue of ownership. I think the Ex parte Applicant makes a good point here. He also makes a good point regarding the issue of purchase. There should have been evidence of written agreement. The proceedings on record do not show that such agreement was availed.

20. But allegations of improper motives and bad faith on the part of the tribunal are not borne out by any concrete evidence. The Applicant has not substantiated them well. It appears to me that the tribunal only had the wrong appreciation of its mandate in law. It misapprehended its jurisdiction and acted outside its powers.

21. Overall however, the case is about the tribunal's purported award of the land to the interested party. As I have observed earlier, the tribunal had no jurisdiction to do that. It didn't have powers to delve into matters of title to land.

22. In **R VS NYAMAIYA Land Dispute's Tribunal and 3 others EXPARTE BENARD ONDIEKI: HCC MISC.APPL. NO.1/09, KISII**, the 1st Respondent had purported to cancel a title. The applicant, Benard Ondieki, went to court arguing that the 1st Respondent acted ultra-vires. The court found for him and quashed the decision.

In **R V THE CHAIRMAN MERU CENTRAL DISPUTES TRIBUNAL EXPARTE JAPHET KINYUA MUTHAMA: HCC NO.187/05, MERU** again the tribunal delved into the issue of ownership. Its decision was quashed.

23. It cannot be countenanced by a court of law that a decision made without jurisdiction can stand. Such a decision is void and a nullity. And as **LORD DENNING** observed in **MACFOY VS UNITED AFRICA COMPANY LTD 3 AL ER 1169**

“...if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.....”

24. In the local context, the Court of Appeal made its stand in **KARAJA VS ATTORNEY GENERAL: HCC NO.310/1997, NYERI**, when it observed:

“.....any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn it into a valid order...”

25. The tribunal was a creature of statute. It could only exercise such powers as were conferred on it

by the law. It had no inherent jurisdiction and its jurisdiction could not be implied from the circumstance before it however attractive it may have appeared to it to infer such jurisdiction.

Accordingly, I make a finding that the exparte Applicant herein must get the prayers in his application. In the upshot, the orders of **CERTIORARI** and **PROHIBITION** are granted as prayed. **BUT** I hesitate to award costs to the applicant. It is the respondent, not the interested party, who goofed. Because of this, let each party bear his/her own costs.

A.K. KANIARU – JUDGE

29/1/2015