



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND JUDICIAL REVIEW APPLICATION NO. 24 OF 2010

**IN THE MATTER OF AN APPLICATION BY JANE MONGERI FOR JUDICIAL REVIEW IN THE
NATURE OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE LAND DISPUTES TRIBUNALS ACT NO.18 OF 1990 (NOW
REPEALED)**

AND

IN THE MATTER OF KISII SOUTH LAND DISPUTES TRIBUNAL CASE NO.128 OF 2009

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN KISII SOUTH LAND DISPUTES TRIBUNAL.....1STRESPONDENT

THE CHIEF MAGISTRATE'S COURT AT KISII.....2NDRESPONDENT

AND

PETER NYANGARESI OMBATI..... INTERESTED PARTY

EX PARTE

JANE MONGERI

JUDGMENT

1. The exparte applicant, **Jane Mongeri** (hereinafter referred to only as “**the applicant**”) brought the application herein dated 6th April, 2010 pursuant to leave that was granted by this court on 17th March, 2010. The application was brought on the grounds set out in the verifying affidavit and supporting affidavit of the applicant sworn on 24th February, 2010 and 6th April, 2010 respectively and the Statement of facts dated 24th February, 2010. The application sought the following main reliefs;

i. An order of certiorari to remove into this court and quash the proceedings and award of the 1st respondent dated 9th November, 2009 in Case No. 128 of 2009 and the decision and decree of the 2nd respondent made on 13th January, 2010 and issued on 15th February, 2010 in Misc. Application No.169 of 2009 adopting the said decision of the 1st respondent as its judgment ;

ii. An order of certiorari to remove into this court and quash the proceedings and a ward and/or decision of the 1st respondent dated 9th November, 2009 in which it decreed that LR No. Wanjare/Bogiakumu/1114 be sub-divided into two portions contrary to the provisions of the Law of Succession ;

iii. An order of prohibition to prohibit the 2nd respondent and the interested party from implementing and/or executing said decision and decree of the 2nd respondent and from in any other manner or way whatsoever interfering with LR No. Wanjare/Bogiakumu/1114.

2. The facts that gave rise to the application are as follows. The applicant was at all material times the widow of one, **Joseph Mongeri Kiyondi**, deceased (hereinafter referred to only as “**the deceased**”). The deceased was the son of one, **Kiyondi Maebi**, deceased (hereinafter referred to only as “**Maebi**”). At all material times, Maebi was the registered proprietor of all that parcel of land known as **LR. No. Wanjare/Bogiakumu/1114** (hereinafter referred to only as “**the suit property**”). Maebi predeceased Joseph Mongeri Kiyondi (“**the deceased**”). After the death of Maebi but before an application was made for the administration of his estate, the deceased is said to have sold to the interested party a portion of the suit property measuring 416 feet by 65 feet (hereinafter referred to as “**the disputed parcel of land**”) in the year 1999. Following this transaction, the interested party took possession of the suit property that is said to have been sold to him planted assortment of tress, coffee and tea. He also put up a semi-permanent house thereon. It is claimed that this transaction took place before the applicant was married. The interested party is said to have lived harmoniously with the deceased during his life time. The deceased died in June, 2009.

3. After the death of the deceased, it is claimed that the applicant stopped the interested party from carrying out any development on the disputed parcel of land on the allegation that the same had only been leased to the interested party by the deceased. The interested party was aggrieved by this action on the part of the applicant and sought the assistance of the 1st respondent to restore him back to the disputed parcel of land. The interested party’s complaint before the 1st respondent was lodged in the year 2009. The 1st respondent heard the interested party and the applicant together with their witnesses and delivered its decision on the interested party’s claim against the applicant on 9th November, 2009. In its decision, the 1st respondent held that the interested party had lawfully purchased the suit property from the deceased and that the applicant was only playing mischief. The 1st respondent declared the interested party to be the lawful owner of the disputed parcel of land. The 1st respondent’s said decision was lodged with the 2nd respondent under the provisions of section 7 of the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) for adoption as a judgment of the court. The 2nd respondent adopted the said decision as a judgment of the court on 13th January, 2010 and a decree was issued accordingly on 15th February, 2010 for execution. It is the said decision of the 1st respondent and its adoption as a judgment of the court by the 2nd respondent that has prompted these proceedings.

4. **The grounds on which the application was brought;**

In summary, the applicant has challenged the said decision of the 1st respondent and its adoption by the 2nd respondent on the following main grounds;

i. That the 1st respondent had no jurisdiction to entertain the dispute that existed between the interested party and the applicant as it concerned issues relating to succession and title to and/or ownership of land;

ii. That the interested party and the applicant had no capacity to sue and be sued respectively in relation to the disputed parcel of land;

iii. That the decisions of the respondents were null and void for being contrary to law; and

iv. That the 2nd respondent had no jurisdiction to adopt the said decision of the 1st respondent as a judgment of the court.

5. The applicant's case is that the suit property was at all material times registered in the name of Maebi who was deceased at the time the interested party lodged his claim against the applicant before the 1st respondent. The applicant contended that no grant of letters of administration had been taken in respect of Maebi's estate either by the interested party or the applicant or at all. The applicant contended that since she was not a legal representative of the estate of Maebi, she had no capacity to be sued. The applicant contended that the interested party's claim over the suit property should have been lodged in succession proceedings under the Law of Succession Act, Cap. 160 Laws of Kenya and not before the 1st respondent who had no jurisdiction to deal with disputes over properties of deceased persons. The applicant contended that the interested party's claim that was lodged before the 1st respondent and the 1st respondent's award in favour of the interested party amounted to intermeddling in the estate of a deceased person contrary of the provisions of section 45 of the Law of Succession Act, Cap.160 Laws of Kenya.

6. The applicant contended that since the interested party's claim involved a property that was registered in the name of a deceased and it concerned ownership or title to such property, the 1st respondent lacked jurisdiction under, the Law of Succession Act, Cap. 160 Laws of Kenya, the Land Disputes Tribunals Act, No. 18 of 1990(now repealed) and the Registered Land Act, Cap.300 Laws of Kenya (now repealed) to preside over the same.The application was opposed by the 1strespondent and the interested party. The 1st respondent filed a replying affidavit sworn by one, Zebedeo Matoke Onkundi on 17thJune, 2011. The interested party on the other hand filed a replying affidavit on 23rd April, 2010 sworn on the same date. The interested party also filed notice of preliminary objection of the same date.In its reply to the application, the 1st respondent contended that its decision of 9th November, 2009 was arrived at after giving both parties and their witness an opportunity to be heard. The 1st respondent contended that it had jurisdiction to deal with the matter and that there is no error apparent on the face of its proceedings or award as claimed by the applicant.

7. In his notice of preliminary objection, the interested party contended that the application herein is defective and should be expunged from the court record on account of the fact that the same was brought in the name of the Republic as the applicant. The interested party contended further that the applicant has no **locus standi** to institute the present application. Finally, the interested party contended that the decisions of the respondents herein were arrived at procedurally and as such there is no basis upon which the same should be disturbed.In his replying affidavit, the interested party denied that the suit property was registered in the name of a deceased person by the time he lodged his claim against the applicant before the 1st respondent. He stated that the suit property was and is still registered in the name of one, **Thansirao Otero Kiyondi** as the owner. He was registered as such on 10th July, 2008. The interested party denied the applicant's contention that she was not served with the complaint before the 1st respondent or the application for the adoption of the 1st respondent's decision by the 2nd respondent. The interested party contended that he did not need to obtain letters of administration before lodging his claim against the applicant before the 1st respondent. The interested party contended that the applicant's application has no basis.

8. When the application came up for hearing on 29th April, 2013, the advocates for the parties agreed to argue the application by way of written submissions. The applicant filed his submissions on 2nd August, 2013 and further submissions on 25th April, 2014 while the interested party filed his submissions, further submissions and additional submissions on 26th February, 2014, 26th March, 2014 and 11th August, 2014 respectively. I have considered the applicants' application, the statutory statement and the affidavits filed in support thereof. I have also considered the affidavits and notice of preliminary objection filed by the interested party and the 1st respondent in opposition to the application and the written submissions by the advocates for the applicant and the interested party. I am of the opinion that the main issues that present themselves for determination in this application are as follows;

i. Whether the applicant's application is properly before the court?

ii. Whether the 1st respondent had jurisdiction to determine the dispute that was referred to it by the interested party and, to make the decision complained of?

iii. Whether the 1st respondent's decision aforesaid was valid?

iv. Whether the 2nd respondent had jurisdiction to adopt the 2nd respondent's decision aforesaid as a judgment of the court?

v. Whether the applicant is entitled to the reliefs sought against the respondents and the interested party?

9. The interested party has challenged the competency of the application herein on two grounds. The first objection was that the applicant party had no **locus standi** to institute these proceedings as she has no interest in the property in dispute. I find no merit at all in this objection. The claim that was lodged by the interested party before the 1st respondent was against the applicant. The award by the 1st respondent that was adopted as a judgment of the court by the 2nd respondent was against the applicant. The only person who could be aggrieved by the said decision is the applicant. The applicant therefore has every right to challenge the same in these proceedings. The other objection by the interested party concerned the form of the Notice of Motion application. The interested party was of the view that it should have been brought in the name of the applicant rather than the Republic. This objection is misconceived but coming from a litigant in person no offence need to be taken regarding the same. It is a standard rule of procedure that applications for judicial review are instituted in the name of the Republic. For the foregoing reasons, it is my finding that the applicant's application is properly before the court.

10. This paves the way for consideration of the applicant's application on merit. The dispute between the applicant and the interested party revolved around the ownership of a portion of the suit property ("the disputed parcel of land"). The applicant stopped the interested party from dealing with the disputed parcel of land contending that the same had only been leased but not sold to the interested party by the deceased. The interested party on the other hand maintained that the disputed parcel of land was sold to him by the deceased and not leased to him as the applicant had contended. The issue that was before the 1st respondent for determination therefore was whether the interested party purchased the suit property from the deceased and as such was the owner thereof and entitled to use the same without any interference from the applicant. The 1st respondent determined this issue in the affirmative and declared the interested party to be the owner of the disputed property.

11. I am in agreement with the applicant's submission that the 1st respondent acted outside its jurisdiction when it entertained the interested party's complaint against the applicant. As submitted by the applicant's advocates, the 1st respondent was established under the Land Disputes Tribunals Act, No.18 of 1990 (now repealed) (hereinafter referred to only as "**the Act**"). The powers of the 1st respondent were clearly spelt out in the said Act. The 1st respondent could not exercise or assume powers outside

those conferred by the Act. Section 3(1) of the Act that the applicant and the 1st respondent have referred to sets out the disputes over which the 1st respondent had jurisdiction as follows; “.....**all cases of 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.”**

12. It is clear from the foregoing that the 1st respondent did not have jurisdiction to determine disputes over ownership and/or title to land. The 1st respondent did not therefore have the power to declare the interested party as the owner of the disputed parcel of land. It has been said that jurisdiction is everything and without it a court or tribunal must lay down its tools. See, the judgment of Nyarangi JA in the case of **Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd. [1989] KLR 1**. Jurisdiction cannot be assumed neither can it be conferred by agreement. As was stated in the case of **Desai-vs-Warsama(1967)E.A.351**, no court can confer jurisdiction upon itself and where a court assumes jurisdiction and proceeds to hear and determine a matter not within its jurisdiction, the proceedings and the determination are a nullity. Having come to the conclusion that the 1st respondent had no jurisdiction to entertain the claim that was brought before it by the interested party, it is my further finding that the proceedings before the 1st respondent and its decision made on 9th November, 2009 were all nullities.

13. I have also noted that the interested party's claim was made against a wrong party. The applicant was not the registered proprietor of the suit property as at the time the interested party's claim was lodged against her. The declaration made by the 1st respondent relating to the ownership of the suit property could not therefore bind her. I am therefore in agreement with the applicant's contention that there was an element of procedural impropriety in the proceedings before the 1st respondent which is apparent on the face of the proceedings. If the decision of the 1st respondent was null and void as I have already held above, I am of the opinion that it was not open to the 2nd respondent to adopt it as a judgment of the court on 13th January, 2010. If any authority is required to support that position, I would refer to the famous case of **Macfoy-vs-United Africa Co. Ltd.(1961) 3 All E.R 1169**, in which Lord Denning stated as follows concerning an act which is a nullity at page 1172;

“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 to 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”.

I am of the opinion that since the decision of the 1st respondent was a nullity, there was nothing in law that could be filed before the 2nd respondent for adoption as a judgment of the court. Such judgment would equally be a nullity.

14. I am of the view that, Section 7 of the Act pursuant to which the decision of the 1st respondent was lodged with the 2nd respondent for adoption envisaged a lawful decision by the 1st respondent. The 2nd respondent had no jurisdiction under section 7 of the Act aforesaid to adopt and annul a void decision by the 1st respondent. Since the decision of the 1st respondent was a nullity for want of jurisdiction, there was nothing, on the basis of which the 2nd respondent could enter judgment and issue a decree that was issued on 15th February, 2010. The disposal of this issue brings me to the last issue namely, whether this is an appropriate case to grant the orders of certiorari and prohibition sought by the applicant. This court has power under section 13(7) (b) of the Environment and Land court Act, 2011 to grant the prerogative orders sought. As I have already concluded herein above, the 1st and 2nd respondents acted in excess of the jurisdiction conferred upon them by law. Their decisions were therefore nullities. Both decisions are liable to review by this court. I am not in agreement with the contention by the interested party in his notice of preliminary objection that, since the decision of the 1st respondent had been adopted by the 2nd respondent as a judgment of the court, the execution thereof cannot be prohibited by this court.

15. As I have stated above, the adoption of the 1st respondent's decision by the 2nd respondent was null and void for want of jurisdiction and as such liable to review by the court. That said, I am of the opinion that the interested party is not subject to the supervisory jurisdiction

of this court through judicial review. The order of prohibition sought against the interested party is therefore not available to the applicant. Save as aforesaid as concerns the order sought against the interested party, I am satisfied that this is an appropriate case to grant the orders sought by the applicant. The applicants' Notice of Motion application dated 6th April, 2010 is well merited. I allow the same in terms of prayers (a) and (c) thereof save that the order of prohibition shall only issue as against the 2nd respondent. I have declined to grant prayer (b) of the application because neither the 1st respondent nor the 2nd respondent made an order for the sub-division of the suit property. If there was such an order, the same was not produced before the court. The court cannot therefore quash an order or decision that is non-existent.

16. As I have observed above, the applicant is not the registered owner of the suit property. The applicant therefore had and has no right to prevent or deny the interested party access to the disputed parcel of land. In the circumstances, for the avoidance of doubt, I would like to clarify that I have not in any way determined the legality or otherwise of the interested party's claim over the disputed parcel of land. The orders made herein should not therefore be taken to authorize the applicant or anyone else to evict the interested party from the disputed property if at all he is in possession thereof as at the date of this judgment without following the due process. Since the applicant has not succeeded in all her prayers, the applicant shall have half (1/2) the cost of the application to be paid by the interested party only. Orders shall issue accordingly.

Delivered, dated and signed at Kisii this 13th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Mose L.	for the Applicant
N/A	for the Respondents
N/A	for the Interested party
Mr. Mobisa	Court Clerk

S. OKONG'O

JUDGE