



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL MISC. CIVIL APP. NO. 101 OF 2009

**IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW IN THE NATURE OF
CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF APPLICATION BY FRANCIS NYAKUNDI ONCHIRI AND GEORGE
MBOGA ONCHIRI**

AND

IN THE MATTER OF MANGA LAND DISPUTES TRIBUNAL

AND

**IN THE MATTER OF NYAMIRA SENIOR RESIDENT MAGISTRATE'S COURT LAND CASE
NO.31 OF 2009**

REPUBLIC APPLICANT

VERSUS

MANGA LAND DISPUTES TRIBUNAL 1ST RESPONDENT

SENIOR RESIDENT MAGISTRATE'S COURT 2ND RESPONDENT

EX PARTE :

FRANCIS NYAKUNDI 1ST EX PARTE APPLICANT

GEORGE MBOGA ONCHIRI 2ND EX PARTE APPLICANT

AND

ORANDI ONCHIRI 1ST INTERESTED PARTY

MORAA ONCHIRI 2ND INTERESTED PARTY

JUDGEMENT

1. At all material times the 1st ex parte applicant herein Francis Nyakundi Onchiri was the registered proprietor of all those parcels of land known as **LR No. Central Kitutu/Mwogeto/1230** and **LR No. Central Kitutu Mwogeto/1294** while the 2nd ex parte applicant, George Mboga Onchiri was registered as the owner of all that parcel of land known as **LR No. Central Kitutu/Mwogeto/1295**. **LR No. Central Kitutu/Mwogeto/1230**, **LR No. Central Kitutu/Mwogeto/1294** and **LR No. Central Kitutu/Mwogeto/1295** are hereinafter together referred to as “**the suit properties**” where the context so admits. The suit properties were registered in the names of the applicants on first registration save for **LR No. Central Kitutu/Mwogeto/1295**. The applicants’ father one, Onchiri Ogeto, deceased had two wives, Kemunto Onchiri, deceased who was the first wife and Moraa Onchiri, the 2nd interested party who was his second wife. The applicants are the children of Onchiri Ogeto with his first wife. Before his death, the applicants’ father had divided his land between his two houses and the sons from each house got their shares of ancestral land from their respective mothers. The applicants acquired the suit properties from the land that was allocated to their mother by their father.
2. Sometimes in the year 2009, the interested parties who are the applicants’ step brother and step mother respectively lodged a complaint with the 1st respondent against the applicants. The interested parties’ complaint was that the applicants who are from Onchiri Ogeto’s first house got a larger share of land during the time when Onchiri Ogeto was dividing his land to his two houses. The interested parties sought the assistance of the 1st respondent to have a portion of land held by the applicants curved out and registered in their names so that there is fairness and equity in the distribution of the late Onchiri Ogeto’s land between his two houses.
3. The 1st respondent heard the applicants and the interested parties and delivered its decision on the applicants’ complaint on 16th June, 2009. In its decision, the 1st respondent made a finding that the applicants who are from Onchiri Ogeto’s first house had acquired a total of 2.6 ha. of Onchiri Ogeto’s land leaving the second house with only 0.728 ha. The 1st respondent ordered that a portion measuring 0.272ha. of the 1st applicant’s parcel of land known as **LR No. Central Kitutu/Mwogeto/ 1230**(hereinafter referred to as “**Plot No.1230**”) be curved out and registered in the name of the 2nd respondent. The 1st respondent’s decision was adopted as a judgment of the court by the 2nd respondent on 2nd September, 2009 pursuant to the provisions of section 7 of the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed). Before lodging her complaint with the 1st respondent, the 2nd interested party had filed a suit in the High Court at Kisii, namely, **Kisii HCCC No. 155 of 2005** claiming that the 1st applicant had fraudulently curved a portion measuring 0.45 ha. from her parcel of land known as **LR No. Central Kitutu/Mwogeto/296** and caused it to be registered in his name of **LR No. Central Kitutu/1230** (“**Plot No.1230**”). The complaint before the 1st respondent was lodged by the interested parties while the said High Court case against the 1st applicant was pending.
4. The applicants were dissatisfied with the said decision of the 1st respondent and its adoption by the 2nd respondent as a judgment of the court as aforesaid and moved this court on 7th October, 2009 for leave to apply for an order of certiorari to remove to this court and quash the proceedings and order that was made by the 1st respondent and subsequently adopted as a judgment of the court by the 2nd respondent on 2nd September, 2009. The applicants’ application for leave was heard and allowed by the court on 8th October, 2009. In addition to granting the leave, the court made a further order that the said leave was to operate as a stay of execution to the 2nd respondent’s judgment dated 2nd September 2009.
5. Following the granting of leave as aforesaid, the applicant brought the present application for judicial review on 27th October, 2009 seeking the following orders, namely:
 - i. **THAT the honourable court be pleased to issue an order of judicial review in the nature of certiorari to remove into this court and quash the proceedings and award made in Manga Land Disputes Tribunal Case No. 07 of 2009 which decision was made a judgment of the court contrary to the provisions of Cap 300 Laws of Kenya.**
 - ii. **THAT the honourable court be pleased to issue an order of prohibition prohibiting the respondents from in any manner howsoever interfering with land parcel Nos. Central**

Kitutu/Mwogeto/1230, Central Kitutu/Mwogeto/1294 and Central Kitutu/Mwogeto/1295 without complying with the due process of the law.

- iii. **THAT the honourable court be at liberty to issue and/or grant such orders or further relief(s) as it may find proper and expedient.**
- iv. **THAT the costs of this application be borne by the respondents.**

6. The application was supported by the verifying affidavit and the statement of facts that were filed together with the application for leave and a supporting affidavit of the 1st applicant sworn on 26th October 2009. The application was premised on grounds among others that the 1st respondent had no power to interfere with the applicants' titles over the suit properties which were registered under the Registered Land Act (Cap 300) Laws of Kenya on a first registration. The applicants contended that the decision of the 1st respondent complained of herein was *ultra vires* the powers that were conferred upon it under the Land Disputes Tribunals Act, No. 18 of 1990 and as such the same was null and void *ab initio*. The applicants contended that following the adoption of the 1st respondent's said decision as a judgment of the court by the 2nd respondent, proceedings were underway before the 2nd respondent to execute the said judgment. The applicants contended that this court has jurisdiction to supervise the actions and decisions of quasi-judicial bodies to ensure that such bodies act within the law.
7. The respondents entered appearance on 13th September, 2013 but did not file a replying affidavit in opposition to the application. On 15th August 2013 the interested parties herein, Orandi Onchiri and Moraa Onchiri sought leave of the court to participate in these proceedings as they had not been joined initially in the application as interested parties although they were the claimants before the 1st and 2nd respondents and in whose favor the decision and judgment complained of by the applicants were made. Although the interested parties were granted leave on the 5th February 2014 to appear and participate in the present application, they also did not file any replying affidavit in opposition to application.
8. When the matter came up for hearing before me on 26th June 2014, I directed that the application be argued by way of written submissions. The advocates for both parties filed their submissions as directed by the court and the same are on record. I have considered the ex parte applicants application together with the supporting affidavit. I have also considered the submissions filed by the advocates for both parties. The issues that arise for determination are namely;
 - a. **Whether the 1st respondent had power to determine the dispute that arose between the interested parties and the applicants and to make the decision complained?**
 - b. **Whether the 2nd respondent had jurisdiction to adopt the 1st respondent's decision as a judgment of the court? and,**
 - c. **Whether the applicants are entitled to the orders sought?**
9. I am in agreement with the applicants' submission that the 1st respondent acted outside its statutory powers when it entertained the interested parties' complaint against the applicants. 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 sets out the disputes over which the 1st respondent had jurisdiction as follows; "**.....all cases of civil nature involving a dispute as to;**
 - (i) **the division of, or the determination of boundaries to, land, including land held in common;**
 - (ii) **a claim to occupy or work land; or**
 - (iii) **trespass to land."**

10. 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 dispute between the interested parties and the applicants concerned ownership and/or title to the suit properties. The interested parties had claimed that they were entitled to portions of the suit properties that were registered in the names of the applicants. The applicants on the other hand contended that they had no such right. The 1st respondent awarded the 2nd respondent a portion of the 1st respondent's parcel of land. I am not in agreement with the interested parties' argument that the dispute between them and the applicants concerned the division of land.
11. Due to the foregoing, the 1st respondent did not have jurisdiction under the Act to entertain the interested parties' claim over the suit properties. The 1st respondent did not also have the power to make an order for the subdivision of Plot No. 1230 and transfer of a portion thereof measuring 0.272 ha. to the 2nd interested party. As rightly submitted by the applicants, under section 143(1) of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) it is only the court that has power to order the rectification of the register by cancellation of any entry therein. The 1st respondent lacked jurisdiction to entertain the interested parties' claim also for another reason. According to the evidence on record, the suit properties were registered in the names of the applicants between 1972 and 1988. This means that as at the year 2009 when the interested parties lodged their complaint with the 1st respondent, the applicants had held the suit properties for a period ranging from 21 to 37 years. The interested parties' claim in respect of the suit properties was therefore time barred under the Limitation of Actions Act, Cap. 22 Laws of Kenya. As correctly submitted by the applicants, section 13(3) of the Act prohibited the 1st respondent from entertaining a claim which is time barred.
12. It is now well settled that jurisdiction is everything and without it a court or tribunal must lay down its tools. See, **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd. [1989] KLR 1 at page 14**. 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 nullities. Having come to the conclusion that the 1st respondent lacked jurisdiction to entertain the claim that was brought before it by the interested parties, it is my further finding that the proceedings before the 1st respondent and its decision made on 16th June, 2009 were nullities. If the decision of the 1st respondent was null and void as I have held, I am of the opinion that it was not open to the 2nd respondent to adopt it as a judgment of the court on 2nd September, 2009. 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”.

13. I am of the opinion that since the decision of the 1st respondent was a nullity, there was nothing that could be filed before the 2nd respondent for adoption as a judgment of the court. Such judgment would equally be a nullity. 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 void decision by the 1st respondent. I am not in agreement with the interested parties' contention that the 2nd respondent was merely performing its statutory duty when it adopted the decision of the 1st respondent as a judgment of the court.
14. The disposal of this point 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 that was conferred upon them by law. Their decisions were therefore nullities. The said decisions are liable to review by this court. I am satisfied that this is an appropriate case to grant the orders sought by the applicants. I therefore allow the applicants' Notice of Motion application dated 26th October, 2009 in terms of prayers 1 and 2 thereof. In view of the relationship between the parties, each party shall bear its own cost of the application.

Delivered, Signed and Dated at Kisii this 20th day of March, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Applicants

N/A for the Respondents

Mr. Agure Odero h/b for Bunde for the Interested parties

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE