



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**JR MISC APPLICATION NO.9 OF 2012**

**MICHAEL JUMA OUTA.....APPLICANT**

**VERSUS**

**1. THE CHAIR, KISUMU EAST DISTRICT**

**LAND DISPUTE TRIBUNAL**

**2. THE DISTRICT LAND REGISTRAR.....RESPONDENTS**

**J U D G M E N T**

1. The Judicial review application herein was filed on 27/2/2012 by the Exparte Applicant – **MICHAEL JUMA OUTA**. Essentially the legal tussle is between the Exparte Applicant and the interested party – **JOSEPH ORIENY ODENY**. The respondents – **THE CHAIR, KISUMU EAST DISTRICT LAND DISPUTE TRIBUNAL** (1st Respondent) and **THE DISTRICT LAND REGISTRAR, KISUMU** (2nd Respondent) – are enjoined because of the role they have played, or might play, in resolving the dispute.
2. The application was brought pursuant to leave granted on 16/2/2012. The leave itself was granted after hearing an application to grant it filed on 15/2/2012.
3. Essentially, three (3) prayers are sought as follows:
  - (a) That the court be pleased to grant the applicant an order of judicial review in the nature of certiorari, removing into this court the award by 1st Respondent in **KISUMU EAST LAND DISPUTE TRIBUNAL** case 12 of 2010 decided on 1/11/2011 and orders issued thereto in **KISUMU CMCC LAND CASE NO.91/2011** on 21/12/2011 for purposes of being quashed.
  - (b) That the Court be pleased to grant to the applicant an order of Judicial Review in the nature of prohibition directed at 2nd Responds or his employees, assigns or any other person acting under his directive prohibiting him/her from executing the orders of **KISUMU EAST DISTRICT LAND TRIBUNAL CASE NO.12/2010** and adopted in **KISUMU CMCC LAND CASE NO.91/2011**.
  - (c) Costs of this application be provided for.
4. The application has grounds on which it is based on the face of it. It also has a supporting affidavit. I will say more about these two later.
5. The interested party responded by way of grounds of opposition. Such grounds were filed on 27/3/2013. Essentially, the interested party faults the application herein for having a supporting affidavit. The Exparte Applicant is also said not to have lodged a copy of the decision sought to be quashed. Further, the Exparte Applicant is said not to have complied with other mandatory

- requirements of Civil Procedure Rules thus rendering the application incompetent and invalid.
6. Submissions were filed in lieu of hearing. The applicant's submissions begin by delving into the appropriateness of bringing judicial review proceedings. It was pointed out that the decision made by the respondents was illegal and did not take into consideration any provisions of law. The 1st respondent was said not to have jurisdiction to determine issues of title. It is also said to have acted unfairly towards the applicant by awarding the title of the suit property to the interested party.
  7. The applicant's constitutional right to own property was said to have been violated. The action of the respondents was said to be in blatant disregard of the law. It occasioned injury to the Exparte Applicant and the remedies sought are meant as redress to the injury.
  8. It was also submitted that it was not proper for the interested party to respond by way of grounds of opposition. The decided case of **JOSEPH MUTUNGU NJUGUNA VS MUNICIPAL COUNCIL OF KARATINA (2011)** eKLR was availed to buttress this point.
  9. The respondents conceded to the application on 26/6/2014. Indeed, the respondents neither filed a response to the application nor filed submissions.
  10. The submissions of the interested party largely focuses on the issue of the supporting affidavit that accompanied the application. According to the interested party such affidavit should not have been availed as it has no basis in law. The decided cases of **PATRICK NALIANYA WANYONYI & PHINIAS NGAIRA VS ELDORET MUNICIPAL COUNCIL (Eldoret HCC MISC. APP.NO.205/04)** and **JULIUS KIBORO NJOGOO MITUGO VS THE MINISTER FOR LANDS AND SETTLEMENT & 2 OTHERS (NAIROBI) HCC MISC APP. NO.572/04** were availed to reinforce the point.
  11. There are technical objections raised by each side and it is appropriate now to deal with them. According to the Applicant, the response made by the interested party is inappropriate as the law does not provide for such a response. Order 53 Rule 4 envisages that affidavits should be filed as a response. In this regard therefore, the decided case availed by the applicant – **JOSEPH MUTUNGU's** case (supra) – is illustrative and illuminating. The position then is that I reject the response filed by the interested party as such response is incompetent.
  12. The interested party faulted the Applicant for filing a supporting affidavit together with the application. This concern by the interested party is in order. Again order 53 rule 4 envisaged that only the statement of facts together with the grounds contained in the statement will be relied on by the court. The verifying affidavit accompanying such statement can also be used. In fact, such statement of facts and verifying affidavit are required to accompany the application and to be served together with it.
  13. Counsel for the interested party is therefore right to fault the applicant for availing a supporting affidavit. Counsel should have gone further and faulted the applicant for spelling grounds in support of the remedies sought on the face of the application. There is no room in law for such grounds. The court is only enjoined to rely on the grounds spelt out in the statement of facts. I therefore agree with the observations made in the decided authorities availed by the counsel for interested party. In other words **PATRICK NALIANYA's** case (supra) and **JULIUS KIBORO's** case (supra) correctly articulate the legal position on this issue.
  14. Accordingly, I hereby strike out the supporting affidavit and the grounds spelt out on the face of the application. But it needs pointing out that the application is not left hanging in the air or without feet. The problem that striking out may cause is cured by the fact that counsel for the applicant has availed the statement of facts and verifying affidavit. These two are together with the application. The application therefore still stands.
  15. As can be seen now, the Exparte Applicant's application is without a response, having found that the response was incompetent.
  16. It needs to be appreciated also that the respondents conceded to the Applicant's case. This admission by the respondents is significant. The essence of the applicant's complaint concerns decisions made by the respondents. The respondents main argument is that the respondents did not have jurisdiction and treated him unfairly. By conceding, the respondents are saying they did not have jurisdiction and they didn't handle the applicant fairly. When this is borne in mind, it can be appreciated that no arguments by the interested party will convert the respondent's decisions into legal decisions. Indeed, the admission by the respondents make the case of the interested party irredeemable.

17. But a look at the law will make the situation clearer. The mandate of the tribunal to handle the case is contained in Section 3(1) of the Land Disputes Tribunal's Act (Act No.18 of 1990) which provides as follows:

**“Section 3(1) subject to this Act, 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 work or occupy land; or**

**(c) trespass to land**

shall be heard and determined by a Tribunal established under Section 4.

18. It is necessary to point out here that a tribunal established under Section 4 is the Land Disputes Tribunal like the one that handled this matter. It can be seen clearly that under S.3(1) stated above, the tribunal is not mandated to deal with the issue of ownership. Put differently, the tribunal could not determine who owns what yet the decision of the tribunal in this case was as follows:-

**“In view of the above cited facts in both findings/site visitation observations the panel of elders, the tribunal court has unanimously awarded the land parcel No.KSM/KODHIAMBO/3329 to Joseph Odeny Orieny”**

19. Quite clearly, the tribunal made a decision it had no power to make. It couldn't award the land to the interested party. Its decision clearly addressed the issue of ownership. The tribunal goofed by purporting to exercise powers it didn't have.

20. In light of all the forgoing, the inescapable conclusion is that the applicant's case is sound and deserving. Accordingly, the orders of certiorari and prohibiting as sought in the application are hereby granted. Each party however will bear his own costs.

**19/3/2015**

Before A.K. Kaniaru – Judge

Diang'a – C/C

No party present

No counsel present

Interpretation: English/Kiswahili

**Court:** There is a Notice dated 10/3/2015 for delivery of the judgment herein.

Accordingly, judgment on Notice of Motion dated 21/2/2013 and filed on 26/2/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days.

**A.K. KANIARU – JUDGE**

**19/3/2015**

**AKK/vaa**