



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW 36 OF 2010**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KISUMU LANDS TRIBUNAL DISPUTE.....1ST RESPONDENT**

**CHIEF MAGISTRATE COURT AT KISUMU.....2ND RESPONDENT**

**SOSPETER KITOTO OSUDO**

**ROSELYNE ATIENO KITOTO.....EX-PARTE APPLICANT**

**ABUBAKAR MOHAMED SHEIKH.....INTERESTED PARTY**

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

1. The exparte Applicants herein – **SOSPETER KITOTO OSUDO** and **ROSELYNE ATIENO OSUDO** – filed this suit against the respondents – **THE KISUMU EAST LAND TRIBUNAL** (1st Respondent) and **THE CHIEF MAGISTRATE COURT AT KISUMU** (2nd Respondent) on 1/10/2010. The suit was filed vide a Notice of Motion dated 28/9/2010. And **ABUBAKAR MOHAMED SHEIKH** is named as **INTERESTED PARTY**.
2. The suit was filed pursuant to leave to file it granted on 16/9/2010. In essence, three prayers are sought viz:

**(a) That this honourable court be pleased to issue an order of *CERTIORARI* to remove to the court the 1st Respondent's proceedings and ruling dated 22/7/2010 in tribunal case No.3/2010 for purposes of it be quashed and upon hearing the same be quashed.**

**(b) That this honourable court be pleased to issue an order of *CERTIORARI* to remove to the court the 2nd Respondent proceedings and ruling dated 3/9/2010 adopting the tribunal finding in Land Case No.19/2010 for purposes of it being quashed and upon hearing the same be quashed.**

**(c) That costs of this application be provided for.**

3. The application is premised on the grounds, inter alia, that the 1st respondent overstepped its mandate by making a decision outside the provisions of Section 3(1) of the Land Disputes Tribunal's Act; that the 1st Respondent lacked mandate to deal with registered interests in land; that the 2nd respondent should not have adopted such decision and the adoption that subsequently followed was void; that the decisions were made in breach of the principles of natural justice and were oppressive, unreasonable and made without due process; that there was no due diligence and

- there was improper exercise of discretion by the respondents; and that the Exparte Applicants have valid and recognized legal interests to protect and their constitutional rights have been violated.
4. The verifying affidavit provides some background and history. The Exparte Applicants, it was deponed, are the registered owners of land Parcel no. **KISUMU/KOGONY/1412** (hereafter the suit land), having bought it from **JOAN ADHIAMBO OLUOCH**. They have been in peaceful use and occupation, they said, and were surprised to be served with a notice to attend proceedings at the land tribunal where the interested party was claiming their land.
  5. The matter proceeded at the tribunal and a portion of the suit land was ordered to be hived off. That decision was then adopted by the 2nd Respondent on 3/9/2010. During hearing, the interested party claimed that the portion in issue was part of land parcel **KISUMU/KOGONY/1405** which belonged to his late father. It would appear that the tribunal accepted this, hence its decision.
  6. The interested party filed grounds of opposition in response to the suit. According to him, the Court has no jurisdiction to grant the orders sought and the exparte Applicants are estopped from challenging the legality of the proceedings and the decision. The application was said to lack merit and misconceived. I will revert later to this form of response.
  7. The two respondents conceded to the application on 10/10/2013.
  8. Submissions were filed in lieu of hearing and there was highlighting of the submissions on 3/3/2014. The Exparte Applicants submitted, inter alia, that the tribunal exceeded jurisdiction by awarding a portion of the suit land to the interested party; that the interested party himself lacked locus as he didn't own the pieces of land mentioned; that the decision of the tribunal was oppressive, arbitrary, unreasonable and an abuse of the due process of law; and that the Expart Applicants constitutional rights under articles 40 and 47 of the Constitution were violated.
  9. The Exparte Applicants sought to rely on the decided case of **ASTHMAN MALOBA WEPHUKULU & ANOTHER VS FRANCIS M. BIKETI C.A 157/01, KISUMU** and **JOTHAM AMUNANI VS CHAIRMAN, SABATIA DIVISION LAND DISPUTES TRIBUNAL & ANOTHER: C.A NO.256/02, KISUMU**. The first decision, Asthman's case, was an appeal against a decision of the high court quashing a decision of land tribunal that had been made without jurisdiction. The Court of Appeal dismissed the appeal and upheld the High Court's decision. The second case, Jotham's case, also faulted the land tribunal for making a decision without jurisdiction.
  10. The submissions of the interested party are multi-pronged. First, the applicants were faulted for not spelling out the orders they were seeking in the statement that accompanied their application for leave. Then the issue of estoppel was raised. The argument here is that the Exparte Applicants submitted to the jurisdiction of the tribunal and are therefore estopped from contesting the validity and legality of the decision made. According to the interested party, it is unconscionable and inequitable for the applicants to turn around and fault the jurisdiction of the tribunal, having participated actively in its proceedings.
  11. The decision of the tribunal was also said to have focused on boundary, an issue it had jurisdiction to handle.
  12. On the issue of estoppel, the interested party cited the provisions of Section 120 of Evidence Act (Cap 80) and availed two decided cases viz:

**(i) TAYLOR FASHIONS LTD VS LIVERPOOL VICTORIA TRUSTEES CO. LTD, OLD & CAMPBELL LTD VS LIVER POOL VICTORIA TRUSTEES CO. LTD: (1981) IALL E.R 897**

**(ii) AMALGAMATED INVESTMENT & PROPERTY CO. LTD (in liquidation) VS TEXAS COMMERCE INTERNATIONAL BANK LTD (1981) ALL E.R 923**

The principle that emerges from these decisions is that where a party so acts or represents to the others that he consents to a transaction to which he might have very legally objected, he cannot then turn around to question the legality of the transaction as against persons who acted on the basis that the transaction was legal.

13. This is the same position that emerges in Section 120 of Evidence Act which provides as follows:-

***“S.120: When one person has, by declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person to deny the truth of that thing.”***

Simply put, estoppel is a rule of exclusion. It makes evidence of a relevant fact inadmissible. It is a rule whereby a party is excluded by some previous act or conduct to which he was privy or party from asserting or denying a fact.

14. The parties then highlighted submissions. The highlight from both sides however was a summation of what the submissions contain. A repeat here would be a superfluous exercise.
15. I have read and considered the material availed by both sides. The decision sought to be quashed was as follows:

**“That the Northern portion of Land Parcel No. KISUMU/KOGONY/1405 from the road (footpath) upto the trench (Counter) and measuring 85 foot steps long (252 ft approximately in the middle of land No.1405) is awarded to the plaintiff – Abubakar Mohammed Sheikh.**

**The District Land Surveyor is called upon to go to the site of the land and adjust the mistake on the ground between land parcels NOS. KISUMU/KOGONY/1405 and 1412 according to this ruling”.**

16. Quite clearly, the order is giving a portion of land to the plaintiff, who is the interested party here. The requirement of the land surveyor to visit the site was meant purely to give effect to that award. When the interested party then says that the matter concerned boundary, he is being less than honest. He is being economical with truth. The tribunal delved into the issue of ownership.
17. The enabling law giving tribunals jurisdiction to handle land matters is Section 3(1) of the now repealed Land Dispute's Tribunal Act. (Act No.18 of 1990). The Section provided 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”**

For information, the Section 4 mentioned is the one that established the various Land Disputes Tribunal's in the Country. It clearly spelt out the membership or composition of the tribunals.

18. It can clearly be seen that the tribunal was not mandated to deal with ownership. It couldn't decide who gets what piece of land.
19. The interested party argued that estoppel should be invoked against the Exparte Applicant. The main reason for this is that the Exparte Applicants submitted to the jurisdiction of the tribunal. I disagree with this argument and here is why: The Exparte Applicants did not take anybody to the tribunal; they were taken. The interested party himself went to the tribunal and filed his dispute against the Exparte Applicants. He then ensured service of the claim. Once served, the Exparte applicants were bound to respond. The act of filing the claim and then serving was actually a representation by the interested party to the Exparte Applicants that there was a body, nay a tribunal, with jurisdiction to entertain the case. The fact that the tribunal itself entertained the claim was also communication to the Exparte Applicants that it had jurisdiction to do so.
20. It was not therefore the Exparte applicants who made representations about jurisdiction of the tribunal to the interested party or anybody else. It was actually the other way round. Both the

interested party and the tribunal itself made the Exparte Applicant submit to non-existent jurisdiction. And the whole mess started with the interested party himself. He filed his claim at the wrong forum. That forum itself assumed powers it did not have. The end result was that the exparte Applicants were duped into submitting to a process which was illegal ab-initio.

21. The arguments about estoppel and the legal authorities availed to support it are all misplaced as they are based on the wrong premise.
22. There is a strong factor reinforcing the exparte Applicants case namely: The respondents conceded to the application. By conceding, the respondents are saying they didn't have jurisdiction to make the decisions or issue the orders they did. They are also saying that the Exparte Applicants can be granted the orders they are seeking. The interested party cannot then turn around and purport to cloth the respondents with jurisdiction they already admit they didn't have. When the situation is as it is, the interested party's case is a lost cause. The central players in proceedings like these are the decision makers – in this case the respondents. There is virtually nothing anybody can do when the decision makers freely admit they did not have jurisdiction.
23. An issue was raised concerning lack of intimation of the clear orders being sought in the statement accompanying the Exparte Applicant's Application for leave. In the Court file, I see an amended statement which contains the reliefs sought. I expected word on it from the interested party's counsel during highlight of submissions. Nothing was said however. It is clear to me that the reliefs sought are clear on the face of the application and are also clear on the face of the amended statement.
24. The authorities availed by the Exparte Applicants were attacked by the counsel for interested party. I have looked at the authorities. Both deal extensively with the issue of jurisdiction. They have great bearing on the issue at hand. I therefore don't accept the arguments raised by counsel. Jurisdiction was the central issue in the availed authorities. Jurisdiction is the central issue here.
25. Lastly, I pointed out earlier that I would come back to the form of response given to the application by the interested party. I do so because if I pass it over in silence, that may be construed to mean concurrence. The fact is that I don't agree with that kind of response and here is why.
26. What governs the process of judicial review proceedings is contained in the Law Reform Act (Cap 26) and Order 53 of Civil Procedure Rules, 2010. The rules in order 53 are not made under the Civil Procedure Act (Cap 21). They are made under the Law Reform Act (Cap 26). When the Court is undertaking Judicial Review proceedings, it is not sitting under civil or criminal jurisdiction; it is sitting under a special jurisdiction. The law applicable does not anticipate filing of grounds of opposition; it anticipates filing of affidavits as a mode of response.
27. In **R V COMMISSIONER OF CO-OPERATIVES Exparte FRANCIS N. KUBIA & Another (2005) eKLR**, (Nyamu J. as he then was) quoted with approval the case of **NDETE VS CHAIRMAN LAND DISPUTES TRIBUNAL & Another: (2002) IKLR 392** where Ringera J (as he then was) held that order 53 of Civil Procedure is a special jurisdiction not derived from Civil Procedure Act.
28. Further, in **WELAMONDI VS THE CHAIRMAN ELECTORAL COMMISSION (2002) I KLR 486**, Ringera J again observed that in exercising powers under order 53 the court was exercising neither civil nor criminal jurisdiction. It was exercising jurisdiction sui generis.
29. In recognition of this legal position, Wendo J in **R V KYALO & ANOTHER EXPARTE KYALO** observed as follows:

**“Order 53 of Civil procedure rules does not make any provision for the filing of grounds of opposition in proceedings for judicial Review under the said order. All that Order 53 rules 4 & 3 provide is that one can file as many affidavits as are necessary to prove his case provided they are served on the other party”.**

30. In **R V CHAIRMAN LAND DISPUTE TRIBUNAL & 2 others Exparte SHIUMA JACOB MUKALAMA Justice GBN KARIUKI** ( as he then was) observed as follows:

**“Order 53 of the Civil Procedure Rules does not contain provision for grounds of opposition.**

**A party to judicial review proceedings must file an affidavit. The provisions for grounds of opposition in order 50 Rule 36(1) of Civil Procedure apply to civil litigation but not to judicial Review which is a special jurisdiction under part VI of Law Reform Act Chapter 26 of the laws of Kenya. Although order 53 of the Civil Procedure Rules is bound with Civil Procedure Rules, this is done due to convenience as it applies exclusively to judicial review and ought to be self-contained.”**

31. More recently, this same position was articulated in the case of **JOSEPH MUTUNGU NJUGUNA VS MUNICIPAL COUNCIL OF KARATINA (2011)** eKLR. Wakianga J. took a similar position and held that grounds of opposition were not an appropriate response as it was not provided for in the applicable law.

32. I am constrained therefore to reject the response made by the interested party in this case. The response as filed therefore counts for nothing.

33. And now the final word. What I have said so far can only lead to one conclusion namely: The application should be allowed. And the application is hereby allowed. The orders sought are therefore granted. But there is the issue of costs. Each party wants costs to go his way. I realize that parties used to have no entitlement to representation at the tribunal. Costs were incurred but each side was genuinely seeking justice. I don't see any need to condemn one side to pay costs to the other. Accordingly, let each side bear its own costs.

**A.K. KANIARU – JUDGE**

**19/3/2015**

**19/3/2015**

Before A.K. Kaniaru – Judge

Diang'a G. - Court clerk

No party present

Ogone for Olel for Applicant

M/s Aliongo (A.G's Office) for Respondent

Otieno R. (Absent) for interested party

**COURT:** Judgment read and delivered in open **COURT.**

Right of Appeal – 30 days

**A.K. KANIARU – JUDGE**

**19/3/2015**

**AKK/vaa**