



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND JUDICIAL REVIEW NO. 122 OF 2009

**IN THE MATTER OF APPLICATION BY PETERSON NYAKORA MOGENI FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990

AND

IN THE MATTER OF LR. NO. MAJOG/BOOCHI/1990

AND

IN THE MATTER OF OGEMBO SRM'S MISC.CIVIL APPL. NO. 23 OF 2009

AND

REPUBLIC APPLICANT

VERSUS

OGEMBO LAND DISPUTES TRIBUNAL 1STRESPONDENT

THE SENIOR RESIDENT MAGISTRATE'S COURT AT OGEMBO 2NDRESPONDENT

THE ATTORNEY GENERAL..... 3RDRESPONDENT

AND

MAGONGA CATHOLIC CHURCH INTERESTED PARTY

AND

PETERSON NYAKORA MOGENI EX PARTE APPLICANT

JUDGMENT

1. At all material times, the exparte applicant herein Peterson Nyakora Mogeni (hereinafter referred to only as **“the applicant”** where the context so admits) was the registered owner of all that parcel of land known as **LR No. Majoge/Boochi/1990**(hereinafter referred to as **“the suit property”**)

where the context so admits). Sometimes in the year 1995, the applicant entered into an agreement for sale with the interested party herein whereby the applicant agreed to sell to the interested party a portion of the suit property at a consideration of Ksh.155,000/=. A dispute arose thereafter between the applicant and the interested party over the said agreement. The interested party contended that the applicant had failed to complete the agreement although the interested party was willing, ready and able to complete their part. The applicant on the other hand contended that the interested party had delayed in paying the balance of the purchase price and as such was liable to pay to the applicant interest which interest the applicant had declined to pay resulting in the interested party's refusal to complete the transaction. The interested party referred the dispute to the 1st respondent sometimes in the year 2007 for resolution. The interested party sought the assistance of the 1st respondent to compel the applicant to complete the aforesaid agreement. The 1st respondent heard the interested party and the applicant on the dispute and made its decision on 18th March, 2009.

2. The 1st respondent found that the applicant had sold the suit property to the interested party and declared the suit property to be the property of the interested party. The 1st respondent however for reasons which are not clear referred in its decision to **LR. No. Majoge/Boochi/1998** instead of LR. No. Majoge/Boochi/1990(the suit property). The 1st respondent's decision was adopted as a judgment of the court by the 2nd respondent on 3rd September, 2009 pursuant to the provisions of section 7 of the Land Disputes Tribunals Act, No. 18 of 1990(now repealed).
3. The applicant was aggrieved by the said decision of the 1st respondent and its adoption as a judgment of the court by the 2nd respondent and commenced these proceedings through Chamber Summons application dated 4th November 2009. In the application, the applicant, sought the following prayers:-
 - i. **THAT the Honourable Court be pleased to certify this application as urgent and the same be disposed of expeditiously.**
 - ii. **THAT this Honourable Court be pleased to grant leave to the ex parte applicant to apply for an order of certiorari and (sic) to remove and bring into the High Court for purposes of quashing the decision of the Resident Magistrate's court at Ogembo vide Ogembo SRM Court Misc. Civil Application No. 23 of 2009 dated 15th June 2009(emphasis mine).**
 - iii. **THAT this Honourable Court be pleased to grant the ex parte applicant leave to apply for order of prohibition prohibiting interested parties(emphasis mine)from implementing the orders made by the Resident Magistrate Hon. Koech on the 3rd September 2009.**
 - iv. **THAT this Honourable Court be pleased to order that leave to apply for orders of certiorari and prohibition do operate as a stay of implementation of the decision dated 3rd September 2009.**
 - v. **THAT costs of this application be in the cause.**

The application was heard by Musinga J. on 18th November 2009 who allowed the same as prayed (emphasis mine)in terms of prayers 2, 3 and 4 thereof. The effect to the orders that were granted by Musinga J. (as he then was) was that the applicant was granted leave to apply for;-

- a. **An order of certiorari to remove and bring before this court for the purposes of being quashed, the decision of the Resident Magistrate's court at Ogembo, the 2nd respondent herein, made on 15th June 2009 in Misc. Civil Application No. 23 of 2009 and;**
 - b. **An order of prohibition to prohibit the interested party from implementing the orders that were made by the 2nd respondent on 3rd September 2009.**
4. Following the granting of leave as aforesaid, the applicant filed judicial review application by way of Notice of Motion dated 8th December 2009. In this application, the applicant sought the following relief;-
 - i. **An order of certiorari to remove into the High Court and quash the proceedings and the**

decision delivered by the 1st respondent (emphasis mine) in Gucha (sic) Land Disputes Tribunal No. 6 of 2007.

- ii. **An order of certiorari to remove and bring to the High court for the purposes of quashing the decision of Ogembo Senior Resident Magistrate's court delivered on the 3rd day of September 2009 (emphasis mine) in Misc. Civil Application No. 23 of 2009.**
- iii. **An order of Prohibition prohibiting the 1st and 2nd respondents(emphasis mine), the interested party by his (sic) agents and/or servants from implementing the orders made on the 3rd September 2009.**

5. It is apparent on the face of the Notice of Motion application filed by the applicant that the applicant sought reliefs in respect of which no leave was granted by the court. In his first prayer, the applicant has sought an order of certiorari to quash the proceedings and decision of the 1st respondent. The applicant never sought leave to apply for an order of certiorari to quash the decision of the 1st respondent and no such leave was granted by Musinga J. on 18th November 2009 when he allowed the applicant's application for leave. In the second prayer, the applicant has sought an order of certiorari to remove and bring before the court for quashing the decision of the 2nd respondent made in Misc. Civil Application No. 23 of 2009 on 3rd September 2009 (emphasis mine). Again no leave was sought by the applicant to apply for an order of certiorari to quash the decision of the 2nd respondent that was made on 3rd September 2009. The leave that was sought and granted by the court was for the applicant to apply for an order of certiorari to quash the decision of the 2nd respondent that was purportedly made on 15th September 2009 (emphasis mine). This decision cannot be the same as the decision that was made on 3rd September 2009 which is sought to be quashed in the Notice of Motion application before me. In his final prayer in the Notice of Motion, the applicant has sought an order of prohibition to prohibit the 1st and 2nd respondents and the interested party from implementing the orders that were made by the 2nd defendant on 3rd September 2009. In his application for leave, the applicant sought and obtained leave to apply for an order of prohibition only as against the interested party; no leave was sought to apply for an order of prohibition against the 1st and 2nd respondents and none was granted.
6. Order 53 rule 1 (1) of the Civil Procedure Rules provides that no application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted. An application for the said orders made without leave of the court is incompetent and bad in law. There is no doubt from the application for leave that was made by the applicant and the orders that were granted by the court that leave was not granted to the applicant to apply for the orders of certiorari and prohibition sought in the application before me. Consequently, the application before me is incompetent, null and void. I would wish to add that the interested party is a private entity and as such, it is not subject to the supervision of this court through judicial review. It follows therefore that although the applicant had obtained leave to apply for an order of prohibition to prohibit the interested party from implementing the orders made by the 2nd respondent on 3rd September 2009, the order cannot issue.
7. In conclusion, it is my finding that the Notice of Motion application dated 8th December 2009 is incompetent and bad in law. I have considered whether the application can be saved pursuant to the provisions of Article 159(2)(d) of the Constitution and have decided against it for two reasons. First, the issues raised above are not of a technical or procedural nature. The applicant has breached substantive provisions of the law. Failure to obtain leave before instituting an application for judicial review is not a procedural lapse which can be overlooked by the court for the sake of substantive justice. Secondly, I have noted that, while extracting the orders for leave that were granted by the court on 18th November, 2009, the applicant came up with completely new orders that were not given by the court. This was after he realized that there were errors in the prayers that he had sought in his application for leave. Instead of going back to court for review of the said orders of 18th November, 2009 or filing a fresh application for leave, the applicant chose to defraud the court by coming up with orders for leave that were never granted. A party who engages himself in this kind of conduct cannot expect the court to exercise discretion in his favour.

In the circumstances, I am left with no alternative but to strike out the application dated 8th December, 2009 which I hereby do. Since the issue of the competency of the application was raised by the court of its own motion, each party shall bear its own costs.

8. Before concluding, I wish to apologize to the parties for the delay in the delivery of this judgment. This was occasioned by the inadvertent return of the court file to the registry on 13th February, 2014 after I had given an order that I will deliver judgment in the matter on notice. The file remained in the registry until 7th April, 2015 when it was retrieved and brought to my chambers by the court clerk following an inquiry that was made by one of the parties at the registry as to why the judgment had taken so long to be delivered.

Delivered, Signed and Dated at Kisii this 24th day of April, 2015.

S. OKONG'O

JUDGE

In the presence of:

Mr. Agure Odero holding brief for Onyango	for the applicant
N/A	for the 1 st to 3 rd respondents
N/A	for the Interested Party
N/A	for the Ex parte applicant
Mobisa	Court Clerk

S. OKONG'O

JUDGE