



No. 201

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L JUDICIAL REVIEW APPLICATION NO. 51 OF 2011

**IN THE MATTER OF AN APPLICATION BY ISARANIA ACHUTI FOR JUDICIAL REVIEW IN
THE NATURE OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 (NOW REPEALED)

AND

IN THE MATTER OF SUNEKA LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT KISII

AND

IN THE MATTER OF KISII CHIEF MAGISTRATE MISC. APPLICATION NO. 42 OF 2011

BETWEEN

ISARANIA ACHUTI.....
.....APPLICANT

VERSUS

SUNEKA LAND DISPUTES TRIBUNAL.....
.....1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT, KISII.....
.....2ND RESPONDENT

AND

JUDGMENT

1. The applicant, **Isarania Achuti** (hereinafter referred to only as “**the applicant**”) obtained leave of this court on 17th May, 2011 to bring the application herein which was filed on 6th June, 2011. The application was brought on the grounds set out in the supporting affidavit and verifying affidavit of the applicant both sworn on 16th May, 2011 and the statutory Statement of the same date which were filed pursuant to the provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules together with the application for leave. The applicantsought the following main reliefs;
 - i. **An order of certiorari to remove into this court and quash the proceedings and decision of the 1st respondent dated 26th January, 2011 in Land Dispute Cause No. 78 of 2010 touching on LR. No. Wanjare/Bomorenda/689(hereinafter referred to only as “the suit property”);**
 - ii. **An order of certiorari to remove into this court and quash the proceedings and decision of the 2nd respondent dated 15th April, 2011 made in Misc. Application No. 42 of 2011 touching on and concerning the suit property;**
 - iii. **An order of prohibition directed at the 2ndrespondent prohibiting it from enforcing, executing and/or implementingits decision of 15th April, 2011 aforesaid which touched on and/or concerned the suit property.**
 - iv. **The costs of the application.**
2. The circumstances that gave rise to the application herein can be summarized from the said affidavits and the statement filed herein by the applicant as follows; the applicant was at all material timesthe proprietor of all that parcel of land known as LR. No. Wanjare/Bomorenda/ 689 (“**the suit property**”). The suit property was registered in the name of the applicant on 5th February, 1998. Sometimes in the month of September, 2010, the interested party lodged a claim against the applicant with the 1st respondent over the suit property. The interested party claimed that he had purchased the suit property from the applicant sometimes in the year 1995 at a consideration of Ksh. 60,000.00 and that the applicant had denied him the opportunity to develop the suit property. The interested party claimed that the applicant had cut down the fence he had put up a round the suit property, uprooted the trees that he had planted thereon and started cultivating the same. The interested party sought the assistance of the 1st respondent to stop the appellant from interfering with his activities on the suit property. The interested party also sought a title for the suit property. The 1st respondent after hearing the interested party and the applicant together with their witnesses delivered its decision on the matter on 26th January, 2011. The 1st respondent held that the suit property was purchased by the interested party from the applicant and ordered that the interested party be issued with the title for the suit property. The 1st respondent’s said decision was lodged with the 2nd respondent pursuant to 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 same was adopted by the 2nd respondent as a judgment of the court on 15th April, 2011.The applicant was aggrieved by the said decision of the 1strespondent and its adoption by the 2ndrespondent and decided to bring these proceedings to challenge the same.
3. **The grounds on which the application was brought;**

In summary, the applicants’ application was brought 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 title and/or ownership of land;**
- ii. **that the decision of the 1st respondent was illegal,**

null and void; and

iii. **that the 2nd respondent had no jurisdiction to adopt the said decision of the 1st respondent as a judgment of the court.**

4. The application was not opposed by the respondents. The same was however opposed by the interested party who filed grounds of opposition date 12th October, 2011. The interested party opposed the application on the grounds that the same is fatally defective and lacks merit. On 8th March, 2012, the parties agreed to argue the application by way of written submissions. The applicant filed his submissions on 18th April, 2012 while the interested party filed his submissions on 20th September, 2012. The respondents did not file any submissions. I have considered the applicant's application, the statutory statement and the affidavits filed in support thereof. I have also considered the grounds of opposition filed by the interested party in opposition to the application and the written submissions filed by the advocates for the applicant and the interested party. The issues that present themselves for determination in this application arising from the said pleadings and submissions are as follows;

- i. **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;**
- ii. **Whether the 1st respondent's decision aforesaid was valid;**
- iii. **Whether the 2nd respondent had jurisdiction to adopt the 1st respondent's said decision as a judgment of the court.**
- iv. **Whether the applicant's application is competent.**
- v. **Whether the applicant is entitled to the reliefs sought against the respondents.**

I am in agreement with the applicant's contention that the 1st respondent acted outside its jurisdiction when it entertained the interested party's claim against the applicant. 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 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;**

- 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."**

From the foregoing, it is clear 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 that the interested party had purchased the suit property from the applicant and to order that the interested party be issued with a title to the suit property. It has been said that jurisdiction is everything and without it a court or a tribunal must lay down its tools. Jurisdiction cannot be assumed neither can it be conferred by agreement. In the case of **Desai -vs- Warsama (1967) E.A.351**, it was held that, 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 also my finding that the proceedings before the 1st respondent and its decision made on 26th January, 2011 were all nullities. If the decision of the 1st respondent was null and void as I have found herein above, was it open for the 2nd respondent to adopt it as a judgment of the court? In the case of **Macfoy -vs- United Africa Co. Ltd. (1961) 3 All E.R 1169**, 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 view 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. 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 annul and 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. The interested party has only challenged the application herein on technical grounds. The first technical point raised by the interested party in his grounds of opposition and written submissions is that the applicant's application has been brought in the wrong form and as such the same is not properly before the court consequent to which the reliefs sought are not available to the applicant. I am in agreement with the submission of the interested party's advocate that the application herein was brought in the wrong form. The law is settled that an application for judicial review must be brought in the name of the Republic. In this case, the application was brought in the name of the applicant which was a procedural flaw. I am of the view however that this procedural blunder alone cannot defeat the applicant's application herein which is otherwise proper in all other material and substantive respects. I am in agreement with the holdings in the two cases that were cited by the interested party. The law has however changed since the two cases were decided. Under Article 159 (2) (d) of the Constitution of Kenya, this court is enjoined to dispense justice without undue regard to procedural technicalities. The objection raised herein as to the form of the present application is purely procedural. The interested party has not indicated any prejudice that it has suffered by the applicant's omission to institute the present application in the name of the Republic. I will therefore pursuant to the said provisions of the constitution overrule this objection. The other technical objection that was raised by the interested party was that the applicant had failed to comply with the provisions of Order 53 rule 7 of the Civil Procedure Rules in that the orders sought to be quashed were not lodged with the court. I find no merit at all in this objection. The decisions that were made by the 1st and 2nd respondents which are sought to be quashed herein were annexed to the Verifying Affidavit of the applicant that was filed in support of the application for leave. It was not necessary to furnish the court once again with copies of the said decisions. This objection is also overruled. The last ground that was raised by the interested party in opposition to the application herein was that the application lacks merit because the applicant had a right of appeal against the decision of the 1st respondent which right it did not utilize. Once again, I must say that the law is now settled that the existence of a right of appeal is not a bar to an application for judicial review. The application herein cannot therefore be said to be lacking in merit merely because the applicant had failed to appeal against the decision which is being challenged. I find no merit in this objection. Having disposed of all the grounds that were raised in opposition to the application herein, the issue that is now left for consideration is 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 null and void. 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 June, 2011 is well merited. The same is allowed in terms of prayers 2, 3 and 4 thereof. Due to the peculiar circumstances that gave rise to this application, each party shall bear its own costs.

Delivered, dated, and signed at Kisii this 24th day of January 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Odhiambo h/b for Sagwe for the Applicant

N/A for the Respondents

N/A for the Interested party

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE