



No. 205

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L JUDICIAL REVIEW APPLICATION NO. 128 OF 2009

**IN THE MATTER OF AN APPLICATION BY FLORENCE NYABOKE MACHANI FOR
JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 (REPEALED)

AND

IN THE MATTER OF BORABU DISTRICT LAND DISPUTES TRIBUNAL

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN BORABU LAND

DISPUTES TRIBUNAL.....1ST RESPONDENT

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

AND

STEPHEN OMBUI AMOSI..... INTERESTED PARTY

EX PARTE

FLORENCE NYABOKE MACHANI

(Legal representative of the estate of NAFTTAL MACHANI AMOSI, deceased)

JUDGMENT

1. The ex parte applicant, **Forence Nyaboke Machani** (hereinafter referred to only as “the

applicant) is the legal representative of the estate of **Naftal Machani Amosi**, deceased (hereinafter referred to only as **“the deceased”**). The deceased obtained leave of this court on 12th November, 2009 to bring the application herein which was filed on 30th November, 2009. The deceased died on 23rd June, 2010 while this application is pending and by a written letter of consent dated 13th December, 2012 that was signed by the advocates for all the parties and filed in court on 27th February, 2013, the applicant was substituted in this application in place of the deceased. The application was brought on the grounds set out in the affidavit of the deceased sworn on 27th October, 2009 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 applicant sought the following main reliefs;

- i. **An order of certiorari to remove into this court and quash the proceedings and order given on 28th April, 2009 by the 1st respondent relating to Title No. ISOGE/KINENI/BLOCK I/70 in Land Case No. 3 of 2009;**
 - ii. **An order of prohibition to prohibit the 2nd respondent from adopting the said decision of the 1st respondent;**
2. The circumstances that gave rise to the application herein can be summarized from the said affidavit and statement filed herein by the applicant as follows; the deceased and the interested party are brothers. They are the sons of one, Amos Obaga. The deceased was at all material times the proprietor of all that parcel of land known as **LR. NO. ISOGE/KINENI/BLOCK I/70** (hereinafter referred to as **“the suit property”**). The deceased was registered as the proprietor of the suit property on 14th January, 2004.
 3. Sometimes in April, 2009 or thereabouts, the interested party lodged a complaint against the deceased with the 1st respondent claiming unspecified portion of the suit property. The interested party claimed that he is entitled to a portion of the suit property by virtue of the fact that their father aforesaid had paid some money to Keneni Co-operative Society (**“the society”**) on behalf of his three (3) sons which included, the deceased, the interested party and one, Mogere Amos so that each should be a member of the said society which seems to have been engaged in land buying. Following, this payment, the society allocated land to the deceased’s said father on behalf of his said three (3) sons which land was to be paid for through a loan payable to the society through installments. The interested party claimed that it is the interested party and one of his said brothers, Mogere Amos who paid the loan for the purchase of the said parcel of land that was allocated to their father. The interested party claimed that initially, it was his said brother Mogere Amos who was occupying the said parcel of land but he was later on joined by the deceased. The interested party claimed that after the demise of their father he approached the deceased and the said Mogere Amos with a proposal that they share the said parcel of land that had been allocated to their father by the society but the deceased asked him to wait for some time to allow the deceased to sort out certain issues relating to the said parcel of land. The interested party claimed that he was surprised to learn later that his two brothers, the deceased and Mogere Amos had shared the said parcel of land between them in exclusion of the interested party. It is due to the foregoing that the interested party who claimed to have paid part of the loan for the said parcel of land to the tune of Ksh. 37,199.00 sought the assistance of the 1st respondent to order the deceased to transfer to him a portion of the suit property which he claimed to have been part of the parcel of land that their father had acquired on behalf of the interested party, Mogere Amos and the deceased and which had now been shared only between the deceased and Mogere Amos.
 4. The 1st respondent after hearing the interested party and the deceased together with their witnesses delivered its decision on the dispute on or about 28th April, 2009. In its decision, the 1st respondent found that the interested party had paid part of the loan that was used to purchase the parcel of land that gave rise to the suit property and ordered the deceased to transfer to the interested party a portion of the suit property measuring ten (10) acres. The 1st respondent’s said decision was lodged with the 2nd respondent under 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 on 25th May, 2009. The deceased brought these proceedings before 1st respondent’s said decision

was adopted by the 2nd respondent and obtained at the leave stage an order staying proceedings that been instituted before the 2nd respondent. The deceased was aggrieved by the said decision of the 1st respondent and its filing before the 2nd respondent for adoption as a judgment of the court and decided to bring these proceedings.

5. The grounds on which the application was brought;

In summary, the applicants' application herein 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 deceased as it concerned title and/or ownership of the suit property;**
- ii. that the said decision of the 1st respondent was illegal, null and void on account of want of jurisdiction and the fact that no formal claim was brought before the 1st respondent on the basis of which the said decision could be made; and**
- iii. that the 1st respondent's said decision was against the rules of natural justice.**

6. I have not seen on record an affidavit in reply to the application by either the respondents or the interested party. I have noted however that the interested party appointed the firm of Anyona Mbunde & Co. Advocates to act for him in this matter on 13th February, 2012. It is not clear from the record however whether the said advocates filed any response to the application as there is no reference whatsoever to any such response in the proceedings. On 13th November, 2012, the advocates for the applicant and the interested party agreed to argue the application by way of written submissions. The applicant filed his submissions on 2nd July, 2013 while the interested party filed his submissions on 1st August, 2013. On 18th September, 2013, Miss. Ochwal, litigation counsel who appeared for the respondents notified the court that the respondents did not wish to oppose the application.

7. I have considered the applicants' application, the statutory statement and the affidavit filed in support thereof. I have also considered the respective written submissions filed by the advocates for the applicant and the interested party. In my view the issues that present themselves for determination in this application are as follows;

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

8. The interested party has challenged the competency of the applicant's application on several grounds. The interested party's first ground of attack was that the applicant's application for leave to institute these proceedings was dismissed by Muchelule J. on 2nd November, 2011 and for that reason, this application has been brought without leave thus the same is bad in law. It is true that the applicant's application for leave was refused by the court on 2nd November, 2011. However, the applicant sought a review of that order of 2nd November, 2011. The applicant's application for review was heard by Muchelule J. on 12th November, 2011 and allowed. The judge did set aside the order refusing the application for leave and in place thereof, allowed the application for leave and ordered the leave to operate as a stay. The interested party's objection to the application herein for want of leave in the circumstances lacks merit. The interested party has also contended that soon after the dismissal of the applicant's application for leave, it brought a fresh application before the 2nd respondent on or about 18th November, 2009 seeking the adoption of the 1st respondent's decision which is the subject of this application and that the said decision was accordingly adopted on 15th December, 2009 thereby rendering these proceedings futile.

Again, I find no merit on this ground of objection.

9. As I have stated above, this court issued an order on 12th November, 2009 granting leave to the applicant to bring these proceedings. At the same time, the court ordered that the said leave shall operate as a stay of the 1st respondent's decision and the proceedings that had been instituted by the interested party before the 2nd respondent for the adoption of the said decision of the 1st respondent as a judgment of the court. This order was made before the interested party filed its purported fresh application dated 18th November, 2009. It follows that when the interested party purported to bring fresh application for the adoption of the 1st respondent's decision, the said decision had already been stayed by the court and the 2nd respondent prohibited from adopting it as a judgment of the court. The court having stayed the decision of the 1st respondent and prohibited the 2nd respondent from adopting it in one miscellaneous application, the interested party could not and cannot be allowed to defeat the said court order by instituting a fresh miscellaneous application for the same purpose. The purported second application before the 2nd respondent for the enforcement of the 1st respondent's decision that had been stayed by this court was an abuse of the process of the court and the purported order emanating therefrom is a nullity and of no consequence. It is therefore my finding that these proceedings have not been overtaken by events as claimed by the interested party.
10. The other objection raised by the interested party is that the applicant who is the legal representative of Naftal Machani Amosi cannot legally maintain these proceedings. I am unable to appreciate the gist of this particular objection. I would only wish to observe that Florence Nyaboke Machani was joined in these proceedings as a party in place of her deceased husband, Naftal Machani Amosi by consent of the advocates for the applicant and the interested party. In the circumstances, the interested party cannot challenge Florence Nyaboke Machani's *locus standi* in these proceedings. Due to the foregoing, it is my finding that the applicant's application is properly before this court.
11. On the second issue, 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 deceased. 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.**"
12. 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 also have power to determine succession disputes. In the circumstances, the 1st respondent did not have the power to make a finding that the interested party was entitled to a portion of the suit property and order the deceased to transfer to the interested party 10 acres of the suit property which was registered in the name of the deceased.
13. It has been said that jurisdiction is everything and without it a court or 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 or about 28th April, 2009 were nullities.
14. Now that the decision of the 1st respondent was null and void, was there anything that the 2nd

respondent could adopt 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 Land Disputes Tribunal 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. 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.

15. That leaves the issue as to 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 respondent acted in excess of the jurisdiction conferred upon it by law and as such its decision was a nullity. Equally the 2nd respondent had no jurisdiction to adopt the said decision by the 1st respondent as a judgment of the court as it had been called upon to do by the interested party. I am satisfied that this is an appropriate case to grant the orders sought by the applicant. The order of certiorari would quash the decision that was arrived at by the 1st respondent without jurisdiction while the order of prohibition would prohibit the 2nd respondent from exercising powers that it does not have. The applicant's Notice of Motion application dated 30th November, 2009 is well merited. The same is allowed in terms of prayers 1 and 2 thereof. In view of the relationship between the parties, 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. Momanyi h/b for Bosire for the Applicant

N/A for the Respondents

N/A for the Interested party

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE