



No. 206

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L JUDICIAL REVIEW APPLICATION NO. 36 OF 2010

IN THE MATTER OF AN APPLICATION BY JEREMIAH SALIMO NYAKUNDI 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IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 (NOW REPEALED)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 MOSOCHO LAND DISPUTES TRIBUNAL CASE NO. 13 OF 2010

BETWEEN

REPUBLIC.....
APPLICANT

VERSUS

MOSOCHO LAND DISPUTES TRIBUNAL.....1ST RESPONDENT
THE RESIDENT MAGISTRATE’S COURT AT KISII.....2ND RESPONDENT

AND

MICHAEL BOSIRE MOTURI..... INTERESTED PARTY

EX PARTE

JEREMIAH SALIMO NYAKUNDI

JUDGMENT

1. The application herein which is dated 28th April, 2010 was brought by the exparte applicant, **Jeremiah Salimo Nyakundi** (hereinafter referred to only as “**the applicant**”) pursuant to leave that was granted by this court on 16th April, 2010. The application was brought on the grounds set out in the verifying affidavit, supporting affidavit and supplementary affidavit of the applicant sworn on 15th April, 2010, 28th April, 2010 and 1st November, 2011 respectively and the Statement of facts dated 15th April, 2010. The application sought the following main reliefs;

- i. **An order of certiorari to remove into this court and quash the proceedings and award of the 1st respondent dated 24th March, 2010 made in Land Disputes Tribunal Case No. 13 of 2010 touching and concerning LR. No. West Kitutu/ Bomatara/ 138 (hereinafter referred to as “the suit property”);**
 - ii. **An order of certiorari to remove to this court and quash the adoption proceedings and judgment and/or decree of the 2nd respondent dated 7th April, 2010 and extracted on 8th April, 2010 adopting the proceedings and the decision of the 1st respondent referred to herein above ;**
 - iii. **An order of prohibition directed at the 2nd respondent and the interested party prohibiting them from implementing the 2nd respondent’s decree referred to herein above.**
2. According to the affidavits filed by the applicant in support of the application referred to hereinabove, the applicant was at all material times the proprietor of all that parcel of land known as LR. NO. West Kitutu/Bomatara/138 (“**the suit property**”). The suit property was transferred to the applicant by his deceased father on 23rd June, 2003. The applicant’s father died in the year 2006. Sometimes in the month of March, 2010, the interested party lodged a claim against the applicant with the 1st respondent over the suit property. The interested party claimed that the suit property belongs to him and that the same had been wrongfully transferred to the applicant through tricks with a view to defeat his interest. The interested party claimed that he had purchased the suit property from one, Stephen Onkundi who had earlier purchased the same from the applicant’s deceased father, Charles Nyakundi Onsongo. The interested party claimed that it was mutually agreed that the applicant’s deceased father would transfer the suit property directly into the name of the interested party and that in fact he executed all necessary documents necessary for the said transfer to be effected. The interested party claimed that what remained was for the applicant’s father to surrender the title deed for the property at the Land’s office so that the property can be transferred to the interested party. The applicant’s father however died before he could surrender the said title deed at the Land’s office as aforesaid and when the interested party carried out a search on the title of the suit property sometimes after his death, he discovered that the applicant had caused the suit property to be transferred into his name. The applicant sought the assistance of the 1st respondent to have the suit property transferred to his name. The 1st respondent heard the interested party and the applicant together with their witnesses and delivered its decision on the interested party’s claim against the applicant on 24th March, 2010.
3. In its decision, the 1st respondent held that the applicant had obtained the title to the suit property through trickery and ordered the applicant’s title to the suit property to be cancelled and the suit property transferred to the interested party. 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 March, 2010. The 2nd respondent adopted the said decision as a judgment of the court on 7th April, 2010 and a decree was issued accordingly on 8th April, 2010 for execution. It is the said decision of the 1st respondent and its adoption that has prompted these proceedings.
4. **The grounds on which the application was brought;**

In summary, the applicant has challenged the said decision of the 1st respondent and its adoption by the 2nd respondent 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 the suit property;**
- 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.

5. The application was opposed by the 1st respondent and the interested party. The 1st respondent filed a replying affidavit sworn by one, Fabiano M. Morira on 13th May, 2010. The interested party on the other hand filed a replying affidavit on 25th October, 2011 sworn by the interested party on 24th October, 2011. In its reply to the application the 1st respondent contended that the 1st respondent had established that the applicant had acquired title to the suit property irregularly and fraudulently and that the applicant was a trespasser on the suit property. The 1st respondent contended that it had jurisdiction to entertain the dispute and that it followed all relevant provisions of the law in handling the dispute. On his part, the interested party contended that it was not his business to ascertain whether the 1st respondent had jurisdiction to entertain the complaint that he had against the applicant.
6. According to the interested party, that was the business of the 1st respondent. The interested party contended further that the decision of the 1st respondent having been adopted by the 2nd respondent, the same was not available for review. The interested party contended further that the order of prohibition sought against him cannot issue because he is not charged with the role of implementing the decisions of the respondents herein and that in any event he is not a public body against which an order of judicial review can be directed.
7. When the application came up for hearing on 25th October, 2011, the advocates for the parties agreed to argue the application by way of written submissions. The applicant filed his submissions on 30th November, 2011 while the interested party filed his submissions on 20th February, 2012. I have considered the applicants' application, the statutory statement and the affidavits filed in support thereof. I have also considered the affidavits filed by the interested party and the 1st respondent in opposition to the same and the written submissions of the advocates for the applicant and the interested party. I am of the opinion that the main issues that present themselves for determination in this application 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 2nd respondent's decision aforesaid as a judgment of the court.**
 - iv. **Whether the applicant is entitled to the reliefs sought against the respondents and the interested party.**
8. I am in agreement with the applicant's submission that the 1st respondent acted outside its jurisdiction when it entertained the interested party's complaint against the applicant. As submitted by the applicant's advocates, 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 clearly 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 that the applicant has referred to 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."**
9. It is clear from the foregoing 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 the 1st interested party as the owner of the suit property and to order the cancellation of the applicant's title and the transfer of the same to the interested party. All the authorities cited by the applicant support this position. 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. As was stated in the case of **Desai -vs- Warsama (1967)E.A.351**, 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.

10. 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 my further finding that the proceedings before the 1st respondent and its decision made on 24th March, 2010 were all nullities. If the said decision of the 1st respondent was null and void as I have already held, I am of the opinion that it was not open to the 2nd respondent to adopt it as a judgment of the court on 7th April, 2010. If any authority is required to support that position, I would refer to the famous case of **Macfoy -vs- United Africa Co. Ltd. (1961) 3 All E.R 1169**, in which 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”.

11. I am of the opinion 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 and 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 that was issued on 8th April, 2010. The disposal of this issue brings me to the last issue namely, 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.

12. 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 nullities. Both the decisions of the 1st and the 2nd respondents are liable to review by this court. I am not in agreement with the submission by the interested party that, once the decision of the 1st respondent was adopted by the 2nd respondent, it was not open for review. As I have held above, the adoption proceedings were null and void for want of jurisdiction and as such liable to review by the court. I however accept the submission by the interested party that the interested party is not subject to the supervisory jurisdiction of this court through judicial review. The order of prohibition sought against the interested party is therefore not available to the applicant. Save as aforesaid as concerns the order sought against the interested party, I am satisfied that this is an appropriate case to grant the orders sought by the applicant. The applicants' Notice of Motion application dated 28th April, 2010 is well merited. I allow the same in terms of prayers 1, 2 and 3 thereof save that the order of prohibition shall only issue as against the 2nd respondent. The applicant shall have the costs of the application to be paid by the interested party.

Dated, signed and delivered at Kisii this 24th day of January 2014.

S. OKONG'O

JUDGE

In the presence of:

Mr. Momanyi for the Applicant

N/A for the Respondents

Mr. Soire h/b for Minda for the Interested party

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE