



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

J/R 14 OF 2011

JOICE OGINYA GANDA.....1ST APPLICANT

JORAM ONDITI.....2ND APPLICANT

VERSUS

SENIOR RESIDENT MAGISTRATE HOMABAY.....1ST RESPONDENT

PROVINCIAL LANDS DISPUTE TRIBUNAL KISUMU.....2ND RESPONDENT

DISTRICT LANDS DISPUTE'S TRIBUNAL – HOMABAY DIVISION.....3RD RESPONDENT

PATTS MESHACK AKUMU ODIRA.....4TH RESPONDENT

AND

JOYCE OGINYA GANDA & JORAM ONDITI

(Administrators of estate of SAMUEL GANDA OTIENO).....EXPARTE APPLICANTS

JUDGMENT

1. The Ex-parte applicants herein – **JOICE OGINYA GANDA** and **JORAM ONDITI GANDA** (who are the legal administrators of the estate of the late **SAMUEL GANDA OTIENO**) filed this application here on 13/4/2011 against four parties – **SENIOR RESIDENT MAGISTRATE, HOMABAY** (1st respondent), **PROVINCIAL LANDS DISPUTE TRIBUNAL KISUMU** (2nd respondent), **DISTRICT LANDS DISPUTE'S TRIBUNAL – HOMABAY DIVISION** (3rd respondent) and **PATTS MESHACK AKUMU ODIRA** (4th Respondent)

2. The application is dated 12/4/2011 and was filed pursuant to leave granted by the Court on 4/4/2011.

3. In essence, the following orders are sought:-

(i) **CERTIORARI** to remove to this Court and quash the judgment of Senior Resident Magistrate, Homabay made on 19/1/2011 in Misc Application No.46 of 2010.

(ii) **PROHIBITION** to remove to this Court and prohibit further proceedings pending before the Provincial Land Disputes Tribunal in Appeal No.034/2010

(iii) an order condemning the respondent to pay costs.

4. The application is backed up with grounds, verifying affidavit and statement of fact that accompanied the application for leave. The application however sets out grounds on the face of it purporting reliance on them. I hasten to strike out the grounds for Section 9 (c) of Law Reform Act (Cap 26) envisages that the grounds, facts and verifying affidavit to be relied on are those filed together with the application for leave. The exception would be where leave of court is sought to rely on other grounds. Such striking out however does not affect the application as grounds accompanying the application for leave still stand.

5. The verifying affidavit, statement of fact (styled Statutory Statement), and grounds accompanying application for leave, contain some history and antecedents. It is clear that the suit land belonged to **SAMWEL OTIENO GANDA**, who is now deceased. The suit land is parcel NO. **KANYADA/K'OTIENO/"A" 993**. Samwel died in 1996, some two years after inheriting the land from Onditi Akeyo who had died in 1994. Samwel left behind 4 wives and 11 children, all sons.

6. Then in 2010 **PATT MESHACK OKUMU** (4th Respondent) filed a claim before land Disputes Tribunal, Homabay (3rd Respondent) against **JORAM ONDITI GANDA** claiming ownership of the suit land. He claimed to have bought the land from Onditi Akeyo in 1995. The tribunal awarded the land to **PATT**. It would appear that the objector sued, **JORAM GANDANA ONDITI**, was not the administrator of the estate of Onditi Akeyo.

7. **JORAM**, who is one of the Exparte applicant's appealed before the 2nd Respondent – **PROVINCIAL LAND DISUTES TRIBUNAL KISUMU**. It is an appeal he now desires not to proceed with and would have the court issue a prohibition order stopping the proceedings.

8. During the pendency of the appeal, the 1st Respondent, **SENIOR RESIDENT MAGISTRATE'S COURT – HOMABAY**, adopted the decision/award of 3rd Respondent as its own judgment. That is why the 1st Respondent is enjoined in these proceedings.

9. The Exparte applicants posit that the 3rd Respondent acted ultra – vires, which also logically follows that the appeal before the 2nd Respondent is also ultra – vires. By adopting the award of 3rd Respondent as its own decision, the 1st Respondent was adopting a void decision.

10. The 1st, 2nd and 3rd Respondents conceded to the application. The 4th Respondent, who ideally should be the interested party, did not. Instead, he filed his grounds of opposition on 27/3/2012. From the said grounds, it appears that the 4th respondent perceives that an order of **MANDAMUS** is sought. This is not the case. Issue is also taken with the **EXPARTE** Applicants for treating the 4th Respondent as respondent while he should be an interested party.

11. Other arguments advanced is that both 1st and 3rd Respondents were mandated by Statutory law to act they way they did and the 4th respondent himself is described as a purchaser for value without notice while the applicants are merely trying to fraudulently defeat his title.

12. The Court has submissions from both the Exparte applicants and 4th Respondent. The submissions of the Exparte Applicants are dated 18/1/2012. They were filed on the same date. The submissions mainly re-state what is contained in the grounds, verifying affidavit and statement of facts filed together with the application for leave. It was pointed out that the person sued at the tribunal was not the administrator of the suit property. The tribunal itself was not the forum to handle matters pertaining to title to land and the tribunal acted outside of its statutory mandate in making the award it did.

13. In doing all this, the tribunal's action were said to violate Section 45(1)2(2) of Succession Act Cap 160 which, inter alia, prohibits inter-meddling with a deceased's estate. It also violated S.159 of Registered Land Act (Cap 300) which vests matters of title to land to High Court and finally, violated its own governing statute – Land Disputes Tribunal's Act – which does not confer on it power to deal with matters of title to land.

14. The submissions of 4th respondent fault the Exparte Applicants for seeking two alternative remedies at the same time.

The argument is that you do seek an order of **CERTIORARI** where you are also pursuing an alternative remedy. It is not clear whether it is prohibition or appeal which is regarded as alternative remedy but it is necessary to point out that it is usual to seek prohibition and **CERTIORARI** at the same time as the two orders do not serve the same purpose. If it is the appeal, suffice it to say that the Exparte Applicants are not pursuing it and are actually seeking a prohibition order to stop it.

15. It was also argued that even if the decision of SRM's Court, Homabay, is quashed, the Land Tribunal's decision remain as it is not addressed in the prayer made in the application. The proceedings in the Land Appeals Committee would stand too because an order of **CERTIORARI** is not prayed for to quash them.

16. The SRM's Court, HomaBay, was also said to have been possessed of the necessary jurisdiction to adopt the award of the tribunal. Its legal mandate was donated by Section 7 of Land Disputes Tribunal's Act (Act No.18 of 1990). The Land Appeals Committee was also said to be seized of the requisite jurisdiction to entertain the appeal filed, its mandate clearly deriving from Section 8 of Land Disputes Tribunal's Act (Supra). And by filing the appeal there, the Exparte Applicant's were said to have submitted themselves to its jurisdiction.

17. Ultimately, the orders sought, if granted, would lead to absurd results while the parties dispute would still remain unresolved.

18. A good starting point in this matter is to consider what is challenged. That is easy. The application filed here is challenging the order of Senior Resident Magistrate Court, HomaBay, adopting the decision of Land Dispute's Tribunal – HomaBay, as its own judgment. It is also challenging the appeal filed at Provincial Land Appeals Committee, Kisumu.

19. Then it is necessary to consider the nature of the order that the Court at HomaBay adopted as its judgment. It was actually an order to do with change of title to the suit land. According to Section 3(1) of the Land Disputes Tribunal's Act (Act No.18 of 1990) the tribunal only had mandate to decide on:-

(i) Division of, or determination of boundaries to land, including land held in common.

(ii) A claim to work and occupy land

(iii) Trespass to land

It is clear then that the tribunal had no power to delve into issues of title to land. What the tribunal did therefore was null and void. This decision was a bad decision made without any backing of law. To accept it is to accept an illegality.

21. Counsel for the 4th respondent says that even if the decision of the court is quashed, the decision of the tribunal will still stand. Logically, this would appear to be the case as the decision of the tribunal is not targeted for quashing. But that is only so in a very narrow sense. In a broader perspective, it is easy to see that the decision the court adopted was the decision of the tribunal. The tribunal itself sent its decision to court to be adopted as the judgment of the Court. Was the tribunal then left with any other decision? The answer is NO. And even if it was left with one, that decision amounts to nothing not only because it was a void decision but because also the completeness of tribunal's decision consisted in its adoption as a judgment of the Court. Without such adoption, such a decision is a dead letter. It has no value in law and is not capable of being enforced.

22. It is therefore hard to see which decision of the tribunal counsel thinks will be left standing. There is still more to the decision. The tribunal handed down a decision concerning land belonging to a

deceased person. It did not bother to find out whether the Exparte Applicants were the administrators of that estate. It would appear therefore that even if the decision was not void, it would still be an incompetent decision for this reason.

23. The 4th Respondents counsel tried to point out some procedural flaws in the application herein. Suffice it to observe that we are now living at a time when technicalities of procedure cannot be allowed to be the bane of substantive justice. Article 159 (d) of our constitution precisely enjoins that justice shall be administered without undue regard to procedural technicalities. This same approach is to be found in Section 19 of Environment and Land **COURT ACT**. The argument concerning procedure therefore does not avail much. In general, the submissions of the 4th Respondent approach the whole issue with some measure of legal ingenuity meant to obscure the patently bad and void decision rendered by the tribunal.

24. It is for this reason that the Courts finds the prayer for an order of **CERTIORARI** meritorious. That order is granted as prayed.

25. There is then the prayer for an order of prohibition against the appeal said to have been lodged at Provincial Land Appeals Committee. Before coming to our decision, a few things need to be pointed out. First, it is the Exparte Applicants themselves who filed the appeal. Did they attempt to withdraw it or mark it abandoned before seeking an order of prohibition? It would appear that the applicants are blaming the Provincial land appeals Committee for entertaining the appeal yet it is them who took the appeal there. And instead of taking simple steps like withdrawing or formally abandoning it, they want an order of prohibition. That sounds funny.

26. But there is still another thing: The appeal Tribunal no longer exists. It appears too it had not made any decision. So what would an order of prohibition serve against a non-existent tribunal? Nothing at all. It would be an order made in vain. Bearing all this in mind, an order of prohibition is deemed inappropriate to grant and the prayer for it is therefore rejected.

27. Costs of the application are awarded to the Exparte Applicants and the 4th Respondent alone should bear the costs.

A.K. KANIARU – JUDGE

21/1/2014

21/1/2014

A.K. Kaniaru – Judge

Diang'a George – C/C

No party – Present

Interpretation: English/Kiswahili

Mwamu for Exparte Applicants

Orengo M. for 4th Respondents

Momanyi (absent) for Exparte Applicant

M/s Eredi (Absent) for 1st, 2nd and 3rd Respondents

COURT: Notice to deliver this judgment today is already in the Court file. It is dated 14/1/2014. Accordingly this judgment is read and delivered in open **COURT**. Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

21/1/2014

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