



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APPL. NO. 69 OF 2011 (JR)

REPUBLIC

APPLICANT

VERSUS

KIOGORO LAND DISPUTES TRIBUNAL 1ST
RESPONDENT

THE CHIEF MAGISTRATE’S COURT AT KISII 2ND
RESPONDENT

AND

ZADOCK MOREMA MOCHACHE

EVANS ONCHOMBA NYAIGOTI INTERESTED
PARTIES

AND

MARY KERUBO OGOTI EX PARTE
APPLICANT

AND

ENVIRONMENT AND LAND MISC. CIVIL APPL. NO. 70 OF 2011 (JR)

REPUBLIC

APPLICANT

VERSUS

KIOGORO LAND DISPUTES TRIBUNAL 1ST
RESPONDENT

THE CHIEF MAGISTRATE’S COURT AT KISII 2ND
RESPONDENT

AND

MARY KERUBO ONDIEKI INTERESTED
PARTY

AND

MARY KERUBO OGOTI EX PARTE
APPLICANT

CONSOLIDATED JUDGMENT

1. The background

The ex parte applicant in the two (2) applications herein, **Mary Kerubo Ogoti** (hereinafter referred to only as “**the applicant**”) was married to one, **Mariko Ogoti Kinaro**, deceased. Mariko Ogoti Kinaro was the son of, **Alexina Bosibori Kinaro** and **Kinaro Ogowanji** both deceased, who were the applicant's mother in-law and father in-law respectively. At all material times the applicant was registered as the proprietor of all those parcels of land known as **L.R Nos. Nyaribari Chache/B/B/Boburia 9154, 9155 and 9156** (hereinafter referred to as “**Plot No. 9154**”, “**Plot No. 9155**” and “**Plot No. 9156**” respectively). Plot Nos. 9154, 9155 and 9156 aforesaid were sub-divisions of the original parcel of land known as **L.R. No. Nyaribari Chache/B/B/ Boburia/6776** (hereinafter referred to as “**Plot No. 6776**”). Plot No. 6776 in turn is said to have originated from the original parcel of land known as **L.R No. Nyaribari Chache/B/B/Boburia/1429** (hereinafter referred to as “**Plot No. 1429**”). The Interested Parties in the two (2) applications, **Zadock Morema Mochache** and **Evans Onchomba Nyaigoti** (in Misc. Civil Application No. 69 of 2011) (who brought the claim on behalf of one, **Isaac Onchomba Nyaigoti**) and, **Mary Kerubo Ogoti** (in Misc. Civil Application No. 70 of 2011) (together hereinafter referred to only as “**the Interested Parties**”) claimed that they had purchased portions of Plot No. 1429 from the applicant’s said deceased mother in law, Alexina Bosibori Kinaro and the applicant’s said deceased husband, Mariko Ogoti Kinaro sometimes in the year 1979. The interested parties claimed that Plot No. 1429 was initially registered in the name of the applicant’s said father in law, Kinaro Ogowanji, deceased. The Interested Parties claimed further that they purchased the said portions of Plot No. 1429 after the death of the applicant's said father in-law but before grant of letters of administration was issued with respect to his estate. The interested parties claimed that the applicants said mother in law applied for grant of letters of administration with respect to the estate of Kinaro Ogowanji, deceased, in **Kisii High Court Succession Cause No. 95 of 1989** (hereinafter referred to as “**the succession cause**”) and that the assets of the estate of Kinaro Ogowanji, deceased, included Plot No. 1429 and the interested parties were included among the beneficiaries of the said estate on account of the fact that they had purchased identifiable portions of the said Plot No. 1429. The Interested Parties claimed that the applicant’s said mother in law obtained grant of letters of administration of the estate of Kinaro Ogowanji and that the said grant was confirmed on 11th December, 1989 by V. V. Patel J. The Interested Parties claimed that their interests in the said estate were noted by the judge during the confirmation of the grant aforesaid. The Interested Parties claimed that under the said grant, the applicant’s said mother in law had a duty to administer the estate of Kinaro Ogowanji which included transferring to the Interested Parties the portions of Plot No. 1429 that the said mother in law and the applicant’s said deceased husband had sold to the Interested Parties. After the confirmation of grant as aforesaid, Plot No. 1429 is said to have been sub-divided into two portions namely, Plot No. 6776 and **L.R No. Nyaribari Chache/B/B/Boburia/6939** (“**Plot No. 6939**”). Of the two subdivisions, Plot No. 6776 is said to have been transferred to the applicant’s said deceased husband. On dates which are not clear from the material before the court, the applicant’s said mother in law and husband died. As at the time their respective deaths, they had not transferred to the Interested Parties the portions of the original Plot No. 1429 that they are said to have sold to the Interested Parties in the year 1979. After the death of the applicant’s said mother in law and husband, the applicant caused the said Plot No. 6776 and Plot No. 6939 (the sub-divisions of Plot No. 1429) to be transferred to her name. In the year 2010, the applicant proceeded to sub-divide Plot No. 6776 into four portions namely, Plot No. 9153 and, Plot Nos. 9154, 9155 and 9156 which are the subject of the applications herein. After the said subdivision, the Interested Parties became apprehensive that the

applicant was going to dispose of the said portions of Plot No. 6776 namely, Plot Nos. 9153, 9154, 9155 and 9156 to third parties before transferring to them the portions that had been sold to them by the applicant's deceased mother in law and husband aforesaid.

2. The proceedings at the Kiogoro Land Disputes Tribunal:

In the month of October 2010, the Interested Parties filed separate claims against the applicant at the Kiogoro Land Disputes Tribunal, the 1st respondent herein with Zadock Morema Mochache and Evans Onchomba Nyaigoti, filing, **claim No. 7 of 2010** and Mary Kerubo Ondieki, **claim No. 2 of 2010**. Zadock Morema Mochache and Evans Onchomba Nyaigoti sought from the 1st respondent; an order compelling the applicant to transfer to them a portion of Plot No. 1429 and damages. Mary Kerubo Ondieki on the other hand, sought an order from the 1st respondent compelling the applicant to transfer to her a portion of Plot No. 6939 and any other relief the 1st respondent would deem fit to grant. The 1st respondent heard the Interested Parties and the applicant on the two claims. In a ruling delivered on 2nd March 2011 for claim No. 7 of 2010, the 1st respondent held that Isaac Nyaigoti Onchomba on behalf of whose estate Zadock Morema Mochache and Evans Onchomba Nyaigoti had brought the claim had purchased a portion of Plot No. 1429 from the applicant's said deceased mother in law and husband and ordered that the applicant do transfer to Evans Onchomba Nyaigoti Plot No. 9155 and Plot No. 9156 failure to which the executive officer of the court should execute all documents as may be necessary for the transfer the said parcels of land to the said Evans Onchomba Nyangoti to be effected. With regard to claim No. 2 of 2010 by Mary Kerubo Ondieki, the 1st respondent in a ruling delivered on 26th May, 2011 again held that applicant's said deceased mother in law and husband had also sold a portion of Plot No. 1429 to Mary Kerubo Ondieki and ordered the applicant to transfer to Mary Kerubo Ondieki Plot No. 9154 forthwith failure to which the executive officer of the court should execute all documents as may be necessary to transfer the said parcel of land to Mary Kerubo Ondieki. The decisions of the 1st respondent in the two claims were lodged at the Chief Magistrate's Court, Kisii, the 2nd respondent herein, on or about 27th June, 2011 for adoption as a judgment of the court pursuant to section 7 of the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) and the same were adopted on the same day in the 2nd respondent's, Land Disputes Tribunal Case Nos. 66 of 2011 and 63 of 2011 respectively.

3. The applications before this court:

The applicant was aggrieved by the said decisions of the 1st respondent and their adoption by the 2nd respondent and decided to institute the applications herein to challenge the same. The applications were originated by two separate chamber summons both dated 12th July 2011 for leave to apply for an order of certiorari to quash the said decisions of the 1st respondent made on 2nd March 2011 and 26th May, 2011 and the adoption thereof by the 2nd respondent on 27th June 2011. The applicant also sought leave to apply for an order of prohibition to prohibit the 1st respondent from hearing and deliberating further on the issue of the ownership of Plot nos. 9155, 9156 and 9154 and the 2nd respondent from further hearing, deliberating and adopting the decisions of the 1st respondent of 2nd March 2011 and 26th May 2011 aforesaid. The applicant also sought an order that leave aforesaid if granted should operate as a stay of the said proceedings and decisions of the 1st and 2nd respondents pending the hearing and determination of the judicial review applications that were to follow. The applicant's said applications for leave were both heard by Sitati J. on 13th July 2011 who granted leave as prayed and directed that the applications for judicial review be filed within 21 days from the date of that order for leave. The court however declined to grant to the applicant the stay of proceedings that she had sought.

4. The applications for judicial review:

For reasons which are not clear, the applicant decided to lodge the Notice of Motion applications for judicial review together with the applications for leave. Like the chamber summon applications for leave, the Notice of Motion applications were also dated 12th July, 2011. The court receipt numbers 1486585 and 1486584 both dated 12th July 2011 leave no doubt that the said Notice of Motion applications for

judicial review were filed in court on 12th July 2011 together with the applications for leave. The said applications for judicial review were supported by the statements of facts dated 12th July, 2011 and, verifying and supporting affidavits of the applicant both sworn on 12th July, 2011. The applications were brought on the grounds that the 1st respondent had no jurisdiction to determine the dispute that existed between the applicant and the Interested Parties. The applicant contended that the 1st respondent's decisions referred to hereinabove were *ultra vires* the powers that were conferred upon the 1st respondent under Section 3(1) of the Land Disputes Act, No. 18 of 1990 (now repealed). The applicant contended further that the 1st respondent had no jurisdiction to determine a dispute over ownership of land and as such, its said decisions were illegal, null and void. The applicant contended further that since the 1st respondent's said decisions were made without jurisdiction and as such were nullities, the 2nd respondent had no jurisdiction to adopt the same as judgments of the court. The applicant contended that the 2nd respondent also acted without jurisdiction in adopting the said decisions of the 1st respondent. The applicant contended further that the 1st respondent's said decisions were made contrary to the provisions of the Registered Land Act, Cap. 300 Laws of Kenya (RLA) (now repealed), the Succession Act Cap. 160 Laws of Kenya and in breach of the rules of natural justice. The applicant annexed to her verifying affidavits the contentious proceedings and decisions of the 1st respondent sought to be quashed, the decrees by the 2nd respondent, a certificate of official search for Plot No. 9156 and a certificate of official search for Plot No. 9154 both dated 6th July 2011.

5. The opposition to the applications:-

The applications for judicial review were not opposed by the respondents. The same were however opposed by the Interested Parties. The Interested Parties filed Notices of Preliminary Objection dated 6th September, 2011 and replying affidavits sworn on 7th September 2011. The Interested Parties opposed the applications on the grounds that the same were incurably defective, overtaken by events and lacked any merit. On the technical aspect of the objection, the Interested Parties contended that the applications were filed without leave of the court contrary to the provisions of the Civil Procedure rules and as such the same were not maintainable. The Interested Parties contended that the applications were filed on 12th July 2011 while leave was granted on 13th July 2011. On the merit of the applications, the Interested Parties argued that the decisions sought to be quashed had already been executed and as such stood spent. The Interested Parties annexed copies of the title deeds for Plots Nos. 9155, 9156 and 9154 in their names to confirm that the said properties had already been transferred to them pursuant to the said decisions by the 1st and 2nd respondents. The said title deeds showed that the said properties were transferred to the Interested Parties on 11th August 2011. The Interested Parties also contended that the 1st and 2nd respondents were within their powers to make the decisions complained of and that the said decisions were proper and lawful.

6. The submissions by the parties:

On 6th March 2013 the advocates for the parties agreed to argue the two applications by way of written submissions. The applicant filed her submissions on 17th May 2013 in the two applications while the Interested Parties filed their submissions on 9th July 2013 and 2nd July 2013 in the two applications respectively. I have considered the two applications together with the affidavits and statements of facts filed in support thereof. I have also considered the notices of preliminary objection and replying affidavits filed by the Interested Parties in opposition of the applications. In addition, I have considered the respective submissions by the advocates for the parties and the authorities cited. In my view the issues that present themselves for determination in the two applications are as follows:-

- i. Whether the applications are defective and incompetent?**
- ii. Whether the applications have been overtaken by events?**
- iii. Whether the 1st respondent had jurisdiction to determine the complaints that were brought before it by the Interested Parties?**

- iv. **Whether the decisions by the 1st respondent were legal?**
- v. **Whether the 2nd respondent had jurisdiction to adopt the said decisions by the 1st respondent?**
- vi. **Whether the applicant is entitled to the reliefs sought?**

a. Issue No. (i):

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. There is no dispute from the material before me that the applications herein for orders of certiorari and prohibition were filed on 12th July 2011. There is also no dispute that the leave of the court was not granted to the applicant to bring the said applications until on 13th July 2011. It is therefore plain beyond argument that the applications herein were filed without leave of the court. Leave as a pre-condition to the bringing of applications for the orders that were sought herein is a statutory requirement. The rule aforesaid requiring leave to be obtained prior to the filing of an application for mandamus, certiorari and prohibition is donated by section 9 of the Law Reform Act, Cap. 26 Laws of Kenya. The same cannot therefore be waived as it is not a procedural technicality which this court can overlook pursuant to the provisions of Article 159 (2) (d) of the Constitution of Kenya. Although I was not called upon to determine the issue, I am of the opinion that the leave that was granted to the applicant herein on 13th May, 2011 cannot act retrospectively so as to save the applications herein which were filed on 12th May, 2011 before the said leave was granted. Due to the foregoing, I am fully in agreement with the submission by the advocates for the Interested Parties that the applications herein were filed without leave of the court and as such the same are incurably defective and incompetent.

b. Issue No. (ii):

I have no doubt from the documents attached to the Interested Parties' affidavits in opposition to the applications herein that the 1st and 2nd respondents orders sought to be quashed and prohibited herein have been fully executed. As I have stated at the beginning of this judgment, the 1st respondent's decisions were made on 2nd March 2011 and 26th May 2011 respectively and both decisions were adopted by the 2nd respondent on 27th June 2011 before these proceedings were instituted on 12th July 2011. When the applicant applied for leave to institute the applications herein she also sought an order that leave if granted should operate as a stay of the execution of the said decisions of the 1st and 2nd respondents. In her submissions, the applicant argued that there is no way in which the 1st and 2nd respondent's decisions aforesaid could have been executed because the court had granted to the applicant orders staying execution of the same which orders were duly served upon the respondents. I have perused the court records of 13th July 2011 when the applicant sought and obtained leave to bring applications herein for judicial review. I have also perused the extracted court orders for leave which were issued on 26th August 2011 and 17th August 2011 respectively. It is clear from the proceedings of 13th July 2011 and from the formal orders that were extracted from the said proceedings that Sitati J. expressly declined to grant orders of stay of proceedings to the applicant. In the absence of such orders, the Interested Parties and the respondents were at liberty to proceed with the execution of the decisions of the 1st and 2nd respondents the subject of these proceedings. The decrees that were issued by the 2nd respondent provided that if the applicant declined to execute documents necessary to transfer Plot Nos. 9154, 9155 and 9156 to the Interested Parties, the executive officer of the court was at liberty to do so. From the documents annexed to the Interested Parties' affidavits, the executive officer in charge of Kisii Law Courts executed instruments of transfer transferring Plot Nos. 9154,

9155 and 9156 to the Interested Parties on 1st August 2011 in accordance with the said decrees of the 2nd respondent. The Interested Parties thereafter proceeded to obtain consent of the Land Control Board and had the said properties transferred and registered in their respective names on 11th August 2011. The registration of the said parcels of land in the names of the Interested Parties marked the end of the execution process of the decisions of the respondents herein. The decisions of the 1st and 2nd respondents sought to be quashed herein have therefore been executed fully and are spent. Once again, I am in agreement with the submission by the Interested Parties that the applicant's applications herein have been overtaken by events. This court cannot quash decisions which have been fully executed. The same applies to the order of prohibition. The court cannot prohibit the execution of decisions which have already been executed.

c. Issues Nos. (iii), (iv) and (v):

The two issues that I have determined above are enough to dispose of the applications herein. The court having held that the applications herein are incurably defective, incompetent and have been overtaken by events, it is not necessary at all to consider issues numbers iii, iv and v above that deal with the merit of the applications. For completeness of this judgment however, I would like to state that if not for the improper manner in which the applications herein were brought and the fact that the same have been overtaken by events, the two applications had merit. I am fully in agreement with the submissions by the applicant's advocates that the 1st respondent acted without jurisdiction in determining issues concerning ownership and/or title of Plot Nos. 9154, 9155 and 9156. The 1st respondent's decisions aforesaid were therefore illegal, null and void and could not be adopted by the 2nd respondent as judgments of the court. I am fully in agreement with the decisions in the cases of, **Sara Wambui Mugo –vs- Land disputes Tribunal Maragua & 2 Others [2007] eKLR**, **Samuel Chacha Rioba –vs- George Joseph Kigingwa & 2 Others [2010] eKLR** and **R-vs- The Chairman Awendo Division Land Disputes Tribunal & 4 Others** that were cited by the applicant which were all to the effect that the Land Disputes Tribunal had no jurisdiction under the Land Disputes Tribunals Act No. 18 of 1990 (now repealed) to determine disputes over title or ownership of land.

d. Issue No. (vi):

As I have already stated above, the applications herein are incurably defective, incompetent and have been overtaken by events. In the circumstances, the orders sought in the applications cannot be granted.

7. Conclusion:-

The upshot of the foregoing is that the applications before me are bad in law and are not maintainable. The Notice of Motion application dated 12th July 2011 in, **Kisii High Court Misc. Civil Application No. 69 of 2011 (JR)** and the Notice of Motion application dated 12th July 2011 in, **Kisii High Court Misc. Civil Application No. 70 of 2011 (JR)** are hereby struck out. In view of the fact that the applications have not been determined on merit but to a large extent on technicalities, the parties shall bear their own costs.

Delivered, dated and signed at KISII this 28th day of February 2014.

S. OKONG'O

JUDGE

In the presence of:

Mr. Kaburi for the Applicant

N/A the Respondents

Mr. Soire h/b for Sagwe for the interested parties

Mr. Mobisa court clerk

S. OKONG'O

JUDGE