



IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APPLICATION NO. 40 OF 2011(JR)

IN THE MATTER OF AN APPLICATION BY SAMSON OTIENO OLOO FOR ORDERS OF JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)

AND

IN THE MATTER OF LAND DISPUTES TRIBUNALS ACT, NO. 18 OF 1990

AND

IN THE MATTER OF RIANA MAGINA LAND DISPUTES TRIBUNAL

BETWEEN

REPUBLIC

APPLICANT

VERSUS

RIANA MAGINA LAND DISPUTES TRIBUNAL 1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE’S COURT, HOMABAY..... 2ND RESPONDENT

AND

JANE ACHIENG OCHIENG

PETER OTIENO OWUOR INTERESTED PARTIES

EX -PARTE

SAMSON OTIENO OLOO

JUDGMENT

1. Pursuant to the leave that was granted by Makhandia J. on 20th April 2011, the ex parte applicant herein, **Samson Otieno Oloo**(hereinafter referred to only as “**the applicant**”) moved this court by a Notice of Motion application dated 20th April, 2011 filed on the same date seeking the following orders;
 - a. **An order of judicial review in the nature of certiorari to remove into this court and quash the proceedings and decision of the 1st respondent dated 7th December, 2010 in Land Case No. 326 of 2010 touching and/or concerning ownership of or title to the applicant’s parcel of**

land known as LR. No.Kabuoch/Kobita/Kawuor/172 (hereinafter referred to as “the suit property”).

- b. **An order of judicial review in the nature of prohibition to prohibit the 2nd respondent from adopting and/or ratifying the proceedings and decision of the 1st respondent dated 7th December, 2010 and in any other manner whatsoever proceeding with the adoption proceedings through Homa Bay SRMCC MISC.APPLICATION NO. 49 OF 2011 touching and/or concerning ownership of the suit property.**
- c. **Cost of the application.**

2. The applicant’s application was supported by the verifying affidavit and supporting affidavit sworn by the applicant on 19th April, 2011 and 20th April, 2011 respectively and statement of facts dated 19th April, 2011. The facts giving rise to the present application as set out the two affidavits filed herein by the applicant are as follows. At all material times, the applicant was and still is the registered proprietor of the suit property. The suit property was purchased by the applicant from the 1st interested party who transferred the same to the applicant on 6th October 2010. The suit property was initially registered in the name of one, Genga Olith, deceased (hereinafter referred to only as “Genga”) who died on 23rd July 1990. The 1st interested party applied for and obtained grant of letters of administration in respect of the estate of Genga in Homa-Bay SRMCC Succession Cause No. 6 of 2010.
3. It was upon obtaining the said grant of letters of administration that the 1st Interested Party sold the entire parcel of land comprised in the title of the suit property to the applicant through an agreement for sale which was reduced into writing. The 1st Interested Party thereafter sought for and obtained consent of the relevant land control board to transfer the suit property to the applicant. The said consent was subsequently issued and the suit property was lawfully transferred and registered in the name of the applicant as aforesaid. The applicant was duly issued with a title deed for the suit property on 6th October 2010.
4. For reasons unknown to the applicant, the 1st Interested Party changed her mind and started disputing the sale of the suit property to the applicant. The interested party instructed the firm of M/s Owade & Co. Advocates to issue a demand notice to the applicant contending that the transfer and registration of the suit property in his name was fraudulent. In view of this turn of events, the applicant filed a suit against the 1st interested party in Kisii HCCC No. 346 of 2010. Instead of the 1st interested party filing a defence to the applicant’s said suit, the 1st and the 2nd interested parties decided to lodge a complaint against the applicant with the 1st respondent contesting the sale of the suit property to the applicant which complaint was never served upon the applicant.
5. The applicant came to know of the interested parties complaint that was lodged with the 1st respondent on 14th April 2011, when he was served with a hearing notice in respect of Homa Bay SRMCC Misc. Application NO. 49 of 2011 indicating that the said matter was scheduled for hearing on 21st April 2011. The applicant proceeded to Homa Bay Law Courts and applied for and was supplied with copies of proceedings and documents in the court file relating to the said Homa Bay SRMCC Misc. Application No. 49 of 2011. It is from those proceedings and documents that the applicant discovered that there had been a complaint before the 1st respondent made by the 1st and 2nd interested parties against the applicant and that the 1st respondent had already made a decision on that complaint in favor of the 1st interested party which had now been lodged before the 2nd respondent for adoption as a judgment of the court. The applicant noted that the complaint lodged with the 1st respondent concerned the acquisition of the suit property by the applicant and that in its determination of the said complaint the 1st respondent addressed and/or dealt with issues concerning fraud, ownership and title to land.
6. The applicant was left with no alternative but to institute these proceedings. The applicant has contended that the 1st respondent acted in excess of its statutory jurisdiction in entertaining the interested parties’ complaint against the applicant. The applicant has contended that the 1st respondent had no jurisdiction to deal with a claim pertaining to the rectification of the register of land registered under the Registered Land Act, Chapter 300 (now repealed). The applicant has

- contended that by addressing issues concerning alleged fraud and cancellation of title in respect of the suit property, the 1st respondent acted without jurisdiction and its proceedings and decision made on 7th December, 2010 constitutes or amounts to abuse of the due process of law.
7. The applicant has contended further that the decision of the 1st respondent made on 7th December 2010, contravened the provisions of section 143 (1) of the Registered Land Act Chapter 300 laws of Kenya which forbids rectification of title obtained pursuant to a first registration. The applicant has contended further that the panel of elders who presided over the proceedings of the 1st respondent were neither appointed nor gazetted by the District Commissioner as required by law and as such the entire proceedings and decision by the 1st respondent herein was a nullity ab initio and consequently, the same was void for all intents and purposes including lodgment thereof before the 2nd respondent for adoption as a judgment of the court.
 8. The respondents did not enter appearance but appeared through counsel and addressed the court in the course of these proceedings. The interested parties appointed the firm of Tom Mboya & Co. Advocates to act for them in this matter. The said firm of advocates filed a notice of appointment of advocates on 15th April 2013. They however did not file a replying affidavit in opposition to the application. When the matter came before me on 11th June 2013, Mr. Kisera advocate held brief for Miss. Ochwal, State Counsel in the Attorney General's Chambers and informed the court that the Attorney General for the respondents did not intend to oppose the application. He urged the court not to condemn the respondents on costs. He also requested that further appearance by the Attorney General in the proceedings be dispensed with. There was no appearance by the interested parties on that day. I dispensed with further appearance by the Attorney General, directed that the application be heard by way of written submissions and set the matter down for mention on 26th September, 2013 for a judgment date. When the matter came up for mention on 26th September, 2013, the parties had not put in their written submissions. The matter was adjourned to 10th December, 2013 for a judgment date. When the matter came up on 10th December, 2013, only the applicant had filed his written submissions. The interested parties had not done so. I ordered that the judgment on the matter would be delivered on notice. To date, the interested parties have not filed their written submissions.
 9. I have considered the applicant's application, the affidavits filed in support thereof and the statutory statement. I have also considered the submissions filed by the applicant's advocates. In my view, there are three issues for determination in this application, namely, first, whether the 1st respondent acted within its jurisdiction in entertaining the interested parties' complaint against the applicant and purporting to award the 1st interested party a portion of the suit property, secondly, whether the 2nd respondent had jurisdiction to adopt the 1st respondent's said decision as a judgment of the court, and lastly, whether the applicant is entitled to the orders sought.
 10. I am in agreement with the submissions by the applicant that the 1st respondent acted in excess of its jurisdiction when it purported to determine a dispute concerning ownership and/or title to land. Section 3 (1) of the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) sets out the disputes over which the tribunal 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”**

According to the proceedings of the 1st respondent, the 1st respondent made an award in favour of the 1st interested party on the following terms:-

“In view of the above issues summarized, a portion of land of approximately 50 feet x 100 feet from parcel No. 172 is hereby awarded to Samson Otieno Oloo the objector. The rest of the remaining portion of parcel No. 172 remains for Jane Achieng Ochieng the claimant (1) because the land belongs to her late husband Genga Olith.”

The 1st respondent then ordered the applicant to appear before the Land Control Board Ndhiwa to transfer the portion of the suit property that it awarded to the 1st interested party to her and in default the executive officer, Homa Bay Law court to execute the necessary documents to ensure that the said portion of the suit property is transferred to the 1st interested party.

11. In the case of **Jotham Amunavi vs. The Chairman Sabatia Divisional Land Disputes Tribunal & Another** C. A No. 256 of 2002 (unreported) the Court of Appeal expressed itself as follows:-

“It is clear that the proceedings before the Tribunal related to both title to land and beneficial interest in the suit land. Such a dispute is not in our view within the provisions of section 3 (1) of the Land Disputes Tribunal Act. By section 159 of the Registered Land Act such a dispute can be tried by the High Court or by the Resident Magistrate’s court in cases where the latter had jurisdiction.”

In **Republic vs. Provincial Appeals Committee & 6 Others Ex parte Peter Gaitimu Kanyo** [2014] eKLR my brother, Olao J observed that:

“However the law as demonstrated in the Amunavi Case (Supra) and many other cases is that where the dispute involves registered land, a Tribunal has no jurisdiction to entertain such a dispute and whatever decision such a tribunal renders, becomes a nullity and certiorari is about quashing nullitiesa court exercising judicial review jurisdiction has inherent powers to quash a decision that was arrived at by an inferior court or tribunal acting in excess of its jurisdiction. A decision arrived at in the absence of jurisdiction cannot be allowed to stand. It follows therefore that the decision of the Tribunal as adopted by the Senior Resident Magistrate’s court and the appeals committee were all in excess of jurisdiction and must be quashed.

There is no doubt from the foregoing that the 1st respondent had no jurisdiction to entertain the interested parties’ complaint against the applicant. The 1st respondent’s proceedings and decision made on 7th December, 2010 were therefore null and void. When a decision is null and void it is bad for all intents and purposes and nothing valid can come from or arise from it. It follows that there was nothing that could be placed before the 2nd respondent for adoption as a judgment of the court pursuant to section 7 of the Land Disputes Act, No. 18 of 1990. The 2nd respondent has no jurisdiction to adopt a null and void decision as a judgment of the court.

12. The upshot of the foregoing is that the applicant’s application is well founded. The 1st respondent’s decision which was arrived at without jurisdiction cannot stand. The 2nd respondent cannot also be allowed to entertain proceedings with respect to which it has no jurisdiction. I therefore allow the Notice of Motion application dated 20th April, 2011 in terms of prayers 1 and 2 thereof. Each party shall bear its own costs of the application.

Delivered, dated and signed at Kisii this 29th day of May 2014

S.OKONG’O

JUDGE

In the presence of

Mr. Oguttu for the Applicants

N/A for the Respondents

N/A for the Interested parties

Mr. Mobisa Court Clerk

S.OKONG'O

JUDGE