



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**JUDICIAL REVIEW NO.27 OF 2010**

**REPUBLIC.....APPLICANT**

**EXPARTE.....LEONARD ORENKO**

**VERSUS**

**CHAIRMAN KSM DISTRICT LAND DISPUTES TRIBUNAL.....1ST RESPONDENT**

**THE CHIEF MAGISTRATE COURT AT KISUMU.....2ND RESPONDENT**

**THE PRINCIPAL MAGISTRATE WINAM COURT.....3RD RESPONDENT**

**DISTRICT LANDS REGISTRAR, SIAYA DISTRICT.....4TH RESPONDENT**

**THE ATTORNEY GENERAL.....5TH RESPONDENT**

**JAMES ODONGO OMER.....INTERESTED PARTY**

**J U D G M E N T**

1. On 29/6/2010, the Exparte Applicant herein filed a Notice of Motion dated 24/6/2010 against 5 respondents and one interested party. The respondents are **CHAIRMAN KISUMU DISTRICT LAND DISPUTES TRIBUNAL** (1st Respondent), **THE CHIEF MAGISTRATE'S COURT AT KISUMU** (2nd Respondent), **THE PRINCIPAL MAGISTRATE'S COURT AT WINAM** (3rd Respondent), **DISTRICT LAND REGISTRAR, KISUMU DISTRICT** (4th Respondent) and **THE ATTORNEY GENERAL** (5th Respondent). The interested party is **JAMES ODONGO OMER**.

2. The application is a logical sequel to an earlier application, a chamber summons, which sought leave to file this application and laid grounds and reasons to justify it. The leave sought was granted on 17/6/2010.

3. The application herein is seeking the following orders:

(a) That this Court do issue an order of prohibition prohibiting Kisumu Land Dispute Tribunal from causing the decision of the said tribunal to be filed in the magistrates for adoption.

(b) That the Court be pleased to issue an order prohibiting the Chief Magistrate's Court, Kisumu, or Principal Magistrate's Court at **WINAM** from entering judgment in accordance with the said decisions of the tribunal.

(c) That pending the hearing of this application there be a stay of proceedings to stay the Chairman of the tribunal from initiating proceedings for adoption of the said decisions by the Magistrate's **COURT** at Kisumu.

(d) That costs of this application be provided for.

4. The premise of the application is that the Kisumu Land Dispute's Tribunal (hereafter the tribunal) acted ultravires its jurisdiction and powers conferred on it under S.3(1) of Land Disputes Tribunal's Act No.18 of 1990; that it delved into matters relating to title; and proceeded to make order amounting to cancellation of title, which it did not have power to do. The tribunal was also accused of making a decision based on irrelevant consideration and it failed also to give reasons for its decisions.

5. Some history emerges from the statement of facts availed. The applicant, it was stated, is the registered proprietor of land parcels **KISUMU/KODERO GOT NYABONDO/1530** and **1531**.

And land parcel No.**KSM/GOT NYABONDO/1527** is the applicant's ancestral home. It is registered in the name of the late Andrea Omer Oloo, who is both the father of the applicant and the interested party. The interested party is said to have gone to the tribunal and filed two cases. The tribunal deliberated and awarded the interested party **KISUMU/KODERO/GOT NYABONDO/1531** and portions of **KSM/KODERO NYABONDO/1525**. That would happen upon subdivision and subsequent registration by the Land Registrar.

6. It is that award that is being contested. The tribunal is said to have been biased against the applicant. The award is said to have been in excess of the tribunal's jurisdiction. Irrelevant considerations were said to have been at play in making the award and no reasons were given for the award made. To date the award has not been adopted by any magistrate's court.

7. The interested party filed a replying affidavit on 10/11/2010. The application was said to be incompetent. The tribunal was said to have the mandate to move to court for adoption and the court in turn has a mandate to adopt the decision. And in the unlikely possibility that the tribunal didn't have jurisdiction, the applicant should have moved to ask for an order of prohibition to stop its proceedings or apply for an order of certiorari to quash its decision. But the applicant did not do that. He participated fully in the proceedings. It is now rather late in the day, so thinks the interested party, for the applicant to turn around and bring this application.

8. The court was told to try and find out if the Chairman of the Tribunal and the two magistrate's Courts targeted for issuance of prohibition order are served with this application.

9. The application never went to full hearing. Submissions were filed instead. The applicant's submissions were filed on 26/7/2011. The submissions for the interested party were filed on 30/5/2011. The respondents side conceded to the application.

10. The applicant submitted, inter alia, that the subject matter remains land registered in the name of a deceased person. The deceased person is the late father of the applicant and the interested party. No person has yet been appointed as the administrator of the estate of the deceased. The interested party then brought a case to the tribunal asking that the suit land be taken from the possession of the applicant and be sub divided, with a portion going to him in accordance with Luo Customary law.

11. The applicant submitted that the tribunal usurped the jurisdiction of the Succession Court by trying to distribute the estate of the deceased before any grant of Letters of Administration was obtained. By so doing, the tribunal was said to have violated various provisions of Succession Act (Cap 160).

12. According to the applicant, the provisions violated have to do with intermeddling with deceased's estate, distribution of the assets of the deceased's estate, and use of customary law instead of Succession Act to govern deceased's estate. The courts, not the tribunal, were also said to be the only forum to deal with matters concerning the estate of a deceased person.

13. Various decided cases were availed to guide the Court in its decision. They were:

- (i) JOHN NDERITU NGATIA VS SOSPETER MWANGI WAMBUGU & ANOTHER: HCC A NO.127/1999, NYERI.**
- (ii) REPUBLIC VS NANDI DISTRICT LAND DISPUTES TRIBUNAL (KIPKARREN) & OTHERS HCC: MISC.O.134/03, ELDORET**
- (iii) REPUBLIC VS THE CHAIRMAN LAND & HON. ATTORNEY GENERAL: HCC:MISC.APP.NO 85/03, MACHAKOS.**
- (iv) REPUBLIC VS THE RESIDENT MAGISTRATE MWINGI & ANOTHER: HCC:MISC.APP.NO.294/2000, MACHAKOS**
- (v) REPUBLIC VS THE FUNYULA LAND DISPUTES TRIBUNAL & OTHERS:HCC:MISC.APP.NO.78/03, BUSIA**
- (vi) HERBERT MWADHI MULEWA VS THE KILIFI LANDS DISPUTES TRIBUNAL:HCC.MISC.APP.NO.117/2004, MOMBASA**
- (vii) GICHOBI KITHAE VS KABUKO GITHER & OTHERS HCC NO.1/1998, NYERI**
- (viii) STEPHEN KORIRI VS KIPSANG BITOK: HCCA NO.29/1998, ELDORET.**

14. In all these matters, Justices Mary Kasango, Jean Gacheche, Alnashir Visram, R.V Wendoh, J.W. Mwera (as he then was), J.K. Sergon, D.K Maranga (as he then was), H.M Okwengu (as she then was) and J.N. Khaminwa, who presided over the cases singly in different periods, handed over decisions that granted the prerogative orders sought because the tribunal concerned had acted either without or in excess of jurisdiction. These decisions are very useful here.

15. The interested party submitted that the order sought is not available to the applicant. The 1st Respondent, it was said, is clothed with statutory power to move the court to adopt the tribunal's decision.

16. The applicant is also said to have acquiesced to the jurisdiction of the tribunal by willingly participating in its proceedings thus giving its jurisdiction to make decision. He can not, it was submitted, now turn around to deny that jurisdiction.

17. The courts sought to be prohibited from adopting the decision are also said to be vested with the necessary jurisdiction. Besides, no applications have so far been filed in these courts to adopt the decision.

18. According to the interested party, the applicant should have moved fast to prohibit the tribunal from conducting proceedings or apply for an of certiorari to quash the tribunal's decision now that proceedings have already been conducted and a decision thereof made.

19. The applicant is also said to be guilty of laches and is faulted too for not serving the courts intended to be prohibited.

20. It seems to me that that the tribunal approved an already marked boundary and decided that the interested party should occupy the right side while the applicant would go to the left. This land belonged to the parties late father, the parties themselves being brothers. No letters of Administration had been taken out before the interested party went to the tribunal. This is the basis of the applicant's submissions that succession law was violated.

21. The apportionment itself was done according to Luo customary law and this provides the basis for the applicant's submission that it is the Succession Act (Cap 160), and not customary law, that should apply in this matter.

22. There was also an award to the interested party of some land said to be to the north. That is the land said to have been the home of interested party's late son, Onyango. This award is said to have conferred ownership, which the tribunal had no power to do.

23. And the whole decision seems to be an exercise in distribution of the properties of the parties

deceased father. The applicant submits that it is only court's of law that have the mandate to do that.

24. Now looking at what was availed, what is up for determination is whether the tribunal had jurisdiction; whether succession law was violated; whether the order of prohibition should issue; whether the applicant is guilty of laches; and whether the courts enjoined in the matter were served. Of course costs will also be considered.

25. It is necessary now to look at the issues now. The first issue is jurisdiction. The interested party's argument on this is that by willingly participating in the proceedings before the tribunal, the applicant submitted to it and conferred it with jurisdiction. The Applicant himself argued that the tribunal delved into issues that the law had not given it mandate to handle. Such issues had to do with succession and ownership matters.

26. Jurisdiction must be conferred by law. No party can confer jurisdiction merely by participating in proceedings before a tribunal that lacks jurisdiction in the first place. The interested party's argument is therefore wrong. But did the tribunal have jurisdiction? The jurisdiction of the tribunal was contained in **Section 3(1) of the now repealed Land Dispute's Tribunal's Act (Act No.18 of 1990). That section provided as follows:-**

**3(1) subject to this Act, 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 work or occupy land; or**

**(c) trespass to land**

**Shall be heard and determined by tribunal established under Section 4.**

For clarity, Section 4 is the one that established the Land disputes Tribunal.

27. From the foregoing, its clear the tribunal can only deal with issues of land division, determination of land boundaries, claims of working on or occupying land and trespass. The tribunal has no mandate to decide who owns what. It has no business ordering anybody to alter, cancel or interfere with title to land. When the tribunal therefore purported to award the interested party some land, it did so without jurisdiction.

28. But the aspect of jurisdiction goes further. The tribunal is said to have usurped the role of the courts when it purported to distribute or divide the land of the parties deceased father. It is true that it is only courts of law that have the requisite mandate to handle matters dealing with the properties of a deceased person. It is such courts that get involved in the distribution of such properties. In this suit it appears that letters of Administration had not been issued or applied for. The land belonged to deceased father of the parties. It is the courts that should have handled the matter. To be fair to the tribunal, it recommended that parties obtain letters of administration. But that is not how it should have been done. The said letters should have been obtained first. And it is during proceedings to obtain such letters that the issue of deceased's land should have been raised and acted upon. Here again, the tribunal goofed. It acted without jurisdiction. Succession law was therefore violated.

29. Is the applicant guilty of laches? The application I am dealing with is a Notice of Motion filed here on 29/6/2010. The application for leave was granted on 17/6/2010. The law provides for a maximum period of 21 days between granting leave and filing an application like this. The applicant therefore was perfectly within time, having filed the application within 12 days only.

30. But just in case the allegation of laches arise because the application for leave was filed outside the 6 months from the making of the tribunals decision, then I have to say that a different judge granted leave. I can't take it upon myself to decide on the appropriateness of that leave. To do so is like sitting on

appeal on a decision of a fellow judge. But if I may make some observations, there is a decided case namely, **R V MASENO UNIVERSITY STAFF DISCIPLINARY COMMITTEE & ANOTHER; HCC:MISC.APPL. NO.963 OF 2007, NAIROBI**, where it was decided that for matters where the decisions being challenged are a nullity the time aspect for their review with a view to issuing prerogative orders does not count. That decision itself followed earlier similar decisions in **R V JUDICIAL COMMISSION INTO THE GOLDENBERG AFFAIR EX PARTE MWALULU: MIS:APP:NO.1279/04** and **KENYATTA NATIONAL HOSPITAL VS MINISTER FOR LABOUR: MISC APP. 880/04**.

31. In this matter, we have already found that decisions were made without jurisdiction. They are therefore a nullity. It is not easy then to successfully raise the issue of laches. I therefore reject this argument of the interested party.

32. And finally, can an order of prohibition issue in this matter. To the interested party the answer is No. the applicant, it was argued, should have applied for such an order when the tribunal's proceedings were still going on, not when they are already concluded. If there is any order that the applicant should have applied for once the tribunal's decision was out, that should have been that of **CERTIORARI** to quash that decision. According to the interested party, the order of prohibition is inappropriately applied for.

33. But the applicant has a different view. The decision has still to go to the courts to be adopted as judgment and the order sought is therefore necessary to stop that.

34. As I understand it, these arguments call for an appreciation of how the orders of prohibition and certiorari operate. Prohibition is future-focused. Certiorari is past-focused. Certiorari issues to quash a decision already made. Prohibition however is never too late so long as there is something left to operate upon. It can issue, for instance, to forestall an intended action. It is an order which is issued to prohibit an inferior tribunal from continuing to exceed its jurisdiction, for example by entertaining a case which falls outside its powers.

35. In this case, it is certain that the decision of the tribunal would end up in one of the courts sought to be prohibited. The proceedings had therefore not concluded. There was the remaining bit that the courts were mandated by law to undertake. The order sought is directed at this aspect of the proceedings. It is an aspect that would take place at some future time. It really does not matter in my view whether the courts had been served with the decision or not. What matters is the certainty that the decision would end up there. Once that certainty is guaranteed, prohibition can issue.

36. It follows then that the applicant was right to apply for the order. The argument of the interested party that the order does not lie is fallacious. In short, prohibition is an appropriate remedy in the circumstances of this case. Having found that, and in light of the court's findings on the other issues, it follows that the applicant is entitled to the orders of prohibition as sought in prayers 1 & 2 of the application herein. The said prayers are granted.

37. Then, lastly, there is the issue of costs. This matter involves two brothers. It is a delicate family issue. They are tussling over the land of their deceased's father. Bearing all this in mind, let each party bear his own costs.

**A.K. KANIARU – JUDGE**

**29/5/2014**

**29/5/2014**

A.K. Kaniaru – Judge

Diang'a G – Court Clerk

No party – Present

Interpretation: English/Kiswahili

Ochieng for Kopot for Exparte Applicant

Lore (absent) for interested party

M/s Aliongo for Respondents

**COURT:** Judgment read and delivered in open COURT.

Right of Appeal – 30 days.

**A.K. KANIARU – JUDGE**

**29/5/2014**