REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L JUDICIAL REVIEW APPLICATION NO. 99 OF 2009

IN THE MATTER OF AN APPLICATION BY MUSA OWAGA OBUNGA FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO.18 OF1990 (NOW REPEALED)

AND

IN THE MATTER OF MIGORI SPMC. MISC. APPL. NO.13 OF 2009

BETWEEN

REPUBLIC……..……..……APPLICANT

VERSUS

CHAIRMAN MIGORI DISTRICT LAND

DISPUTES TRIBUNAL (SUBA EAST DIVISION)…….RESPONDENT

AND

PITALIS OKAL NYANGOR……. INTERESTED PARTY

EXPARTE

MUSA OWAGA OBUNGA

JUDGMENT

1. The application herein which is dated 5th October, 2009 was brought by the ex parte applicant, **Musa Owaga Obunga** (hereinafter referred to only as **"the applicant"**) pursuant to leave that was granted by this court on 18th September, 2009. The application was brought on the grounds set out in the verifying affidavit and supporting affidavit of the applicant sworn on 14th September, 2009 and 5th October, 2009 respectively and the Statement of facts dated 14th September, 2009. The application sought the following main reliefs;

i. **An order of certiorari to remove into this court and quash the award of therespondent which**

was adopted as a decree by the Senior Principal Magistrate's Court at Migori on 12th August, 2009 in Miscellaneous Application No. 13 of 2009, Peterlis Okal Nyangor vs. Musa Owaga Obunga that cancelled the registration of the ex parte applicant as the proprietor of LR. No. Suna East/Kakrao/ 1040 (hereinafter referred to as "the suit property") and awarded 4 hectares thereof to the interested party;

ii. **An order of prohibition directed against the Land Registrar Migori/Rongo Districts prohibiting him from implementing the said decree dated 12th August, 2009 issued by the Senior Principal Magistrates Court in Miscellaneous Application No. 13 of 2009 following the adoption of the respondent's award dated 16th June, 2009;**

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. Suna East/Kakrao/ 1040 ("**the suit property**") which measured 6.0 hectares. The applicant inherited the suit property from his deceased father, one, Dishon Obunga Owaga who died on 9th March, 1995. The applicant's deceased father purchased the suit property from the interested party in the year 1977. The suit property was a portion of a former larger parcel of land known as LR. No. Suna East/Kakrao/698 (hereinafter referred to as "**Plot No. 698**"). After the sale, Plot No. 698 was sub-divided into two portions namely, LR. Nos. Suna East/Kakrao/1039 ("**Plot No. 1039**") and Suna East/Kakrao/1040 (the suit property). The interested party transferred the suit property to the name of the applicant's deceased father and retained Plot No. 1039 in his name.
3. After the death of his father, the applicant was appointed as the legal representative of his father and caused the suit property to be transferred to his name on 27th May, 2008 after the grant of letters of administration that was issued to him was confirmed on 9th November, 2005. Sometimes in the month of May, 2009, the interested party lodged a claim against the applicant with the respondent over the suit property. The interested party claimed that he had only sold to the defendant's deceased father a portion measuring 5 acres (2 hectares) of Plot No. 698 which measured 19.5 hectares. The interested party claimed that when he went to collect his title deed for Plot No. 1039 in the year 2009 after the sub-division of Plot No.698, he discovered that instead of Plot No. 1039 measuring 17.5 hectares, it was only measuring 13.5 hectares. On the other hand, the suit property which was supposed to measure 2 hectares only was measuring 6 hectares. The interested party's conclusion was that during the subdivision of Plot No. 698, the applicant's father caused 4 hectares more to be transferred to his name instead of the agreed 2 hectares. The interested party sought the assistance of the respondent to recover 4 hectares from the suit property which is registered in the name of the applicant.
4. The 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 16th June, 2009. In its decision, the respondent held that the surveyors who sub-divided Plot No. 698 had made a mistake as a result of which the said plot was sub-divided into 13.5 hectares and 6 hectares for Plot No. 1039 and the suit property respectively instead of 17.5 hectares and 2 hectares for Plot No. 1039 and the suit property respectively. The respondent therefore awarded the interested party a portion measuring 4 hectares of the suit property and directed that the necessary sub-division be done so that the said portion of the suit property is transferred to the interested party. The respondent's decision was filed at the Senior Principal Magistrate's Court at Migori for adoption as a judgment of the court pursuant to the provisions of the section 7 of the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) and the same was adopted as such on 12th August, 2009 and a decree was issued accordingly on 28th August, 2009 for execution. It is the said decision of the respondent and its adoption that has prompted these proceedings.
5. **The grounds on which the application was brought**;

In summary, the applicant has challenged the said decision of the respondent and its adoption as a judgment of the court on the following main grounds;

i. **that the 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 respondent was illegal, null and void ; and**

The application was opposed by the interested party. The respondent did not respond to the application. The interested party filed a replying affidavit in opposition to the application sworn on 16th November, 2009. The interested party contended that the dispute which he had with the applicant and which he referred to the respondent for determination concerned the sub-division of land and trespass. The interested party claimed that during the sub-division of Plot No. 698 which measured 19.5 hectares, the mutation was wrongly prepared that resulted in the suit property being indicated as measuring 6 hectares and Plot No. 1039 as measuring 13.5 hectares. The interested party contended that he sold to the applicant's father land measuring 2 hectares only and that was supposed to be the measurement of the suit property while Plot No. 1039 was supposed to measure 17.5 hectares. The interested party contended that the application for land control board consent and the consent letter that was issued by the Migori Division Land Control Board showed that the interested party had sold to the applicant's father land measuring 2 hectares only. The interested party contended further that on the ground, the applicant occupies land measuring 2 hectares while the interested party occupies 17.5 hectares. The interested party claimed that the dispute between the parties arose out of this erroneous sub-division of the original plot No. 698 and the interested party's claim against the applicant was based on trespass the applicant having exceeded the boundary of what was sold to his deceased father to the interested party's Plot No. 1039. The interested party claimed that the respondent had jurisdiction to determine the dispute that the interested party had with the applicant.

6. When the application came up for hearing on 17th June, 2013, the court directed that the application be argued by way of written submissions. The applicant filed his submissions on 27th June, 2013 while the interested party filed his submissions on 4th September, 2013. I have considered the applicants' application, the statutory statement and the affidavits filed in support thereof. I have also considered the affidavit filed by the interested party in opposition to the same and the written submissions by 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 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 respondent's decision aforesaid was valid;**
iii. **Whether the applicantis entitled to the reliefs sought against the respondent and the District Land Registrar, Migori District.**

I am in agreement with the applicant's submission that the respondent acted outside its jurisdiction when it entertained the interested party's complaint against the applicant. As submitted by the applicant's advocates, the 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 respondent were clearly spelt out in the said Act. The respondent could not exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act that the applicant has referred tosets 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."**

7. It is clear from the foregoing that the respondent did not have jurisdiction to determine disputes over ownershipand/or title to land. The respondent did notalso have jurisdiction to make an order for the rectification of the register of land or to cancel a title to land. I am in agreement with the submission by the advocate for the interested party that the respondent had jurisdiction to determine a dispute over division or boundary to land. I disagree however that the dispute that was

before the respondent concerned division or boundary to land. The dispute was over ownership of and/or title to land. The interested party had claimed that the applicant had colluded with the surveyor who sub-divided Plot No. 698 to acquire additional 4.0 hectares of the said plot that he was not entitled to as the same was not sold to his deceased father. The interested party sought from the applicant the recovery of the said 4.0 hectares and this is what the respondent granted him. Under section 143 of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed), only the court has jurisdiction to order the rectification of the register of land registered under that Act on account of fraud or mistake.

8. It follows therefore that if the interested party was aggrieved that the applicant got more land than was sold to his deceased father as a result of fraud involving the applicant and the surveyor who carried out the survey over Plot No. 698 or through innocent mistake by the said surveyor, his recourse lied in the High Court for the rectification of the register of the suit property. The respondent had no jurisdiction to grant such relief. The respondent therefore had no jurisdiction to order the sub-division of the suit property and the transfer of a portion thereof measuring 4 ha. 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.
9. Having come to the conclusion that the 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 respondent and its decision made on 16th September, 2009 were all nullities. If the said decision of the respondent was null and void as I have already held, I am of the opinion that it could not be adopted as a judgment of the court. 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"**.

10. Since the decision of the respondent was a nullity, there was nothing in law that could be filed before the Senior Principal Magistrate's Court at Migori for adoption as a judgment of the court. Such judgment would equally be a nullity. The disposal of this issue brings me to the last issue namely, 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. As I have already concluded herein above, the respondent acted in excess of the jurisdiction that was conferred upon it by law. Its decision was therefore a nullity. The said decision is liable to review by this court. I am satisfied that this is an appropriate case to grant the orders sought by the applicant. I will however not grant the orders sought against the District Land Registrar, Migori/Rongo Districts. The applicant did not make the District Land Registrar, Migori/Rongo Districts as a party to this judicial review application. No order can therefore be issued against a non-party to these proceedings.
11. I have noted that although the applicant obtained leave of the court to institute an application for judicial review against three (3) respondents, the Notice of Motion application was only brought against one (1) respondent only. The principal reliefs were also reduced from five (5) to two (2) only. This I presume was with a view to save on costs. In conclusion, the applicant's Notice of Motion application dated 5th October, 2009 is allowed in terms of prayer 1. Each party shall bear its own costs of the application.

Delivered, dated and signed at Kisii this 23rd day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Applicant

N/A for the Respondent

N/A for the Interested party

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE