



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CONST. APP. NO. 85 OF 2011**

**IN THE MATTER OF TRANSITIONAL AND CONSEQUENTIAL PROVISIONS RULE 19 OF THE  
6<sup>TH</sup> SCHEDULE OF CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND  
PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUAL) HIGH COURT  
PRACTICE AND PROCEDURE RULES 2006 PART I RULES 2, 3, 4, 5 AND 6**

**AND**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (3) (A, B AND C) AS READ WITH  
ARTICLE 22 (1) AND (2) AND ARTICLE 23 (3) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

AMALA OWII SARWA .....APPLICANT

**AND**

PAUL OBONYO ODONGO .....1<sup>ST</sup> RESPONDENT

PIUS OPONDO ACHIRA .....2<sup>ND</sup> RESPONDENT

CHAIRMAN RIANA DIVISION LAND

DISPUTE TRIBUNAL, HOMABAY .....3<sup>RD</sup> RESPONDENT

SENIOR RESIDENT MAGISTRATE, HOMABAYCOURT .....4<sup>TH</sup> RESPONDENT

THE HON. ATTORNEY GENERAL .....5<sup>TH</sup> RESPONDENT

**JUDGMENT**

1. Sometimes in the month of January 2009, the 1<sup>st</sup> respondent herein, Paul Obonyo Odongo (herein

referred to only as “the 1<sup>st</sup> respondent”) lodged a claim against the applicant with the 3<sup>rd</sup> respondent. The 1<sup>st</sup> respondent’s claim aforesaid against the applicant related to two parcels of land known as LR. No. Kabuoch/Kachieng/939 (hereinafter referred to as “**Plot No. 939**”) which was then registered in the names of Asienyo Orwa and Ondiko Orwa and LR. No. Kabuoch/Kachieng/948 (hereinafter referred to as “**Plot No. 948**”) which at the material time was and is still registered in the name of the applicant. Plot No. 939 and Plot No. 948 share a common boundary. In his complaint against the applicant before the 3<sup>rd</sup> respondent, the 1<sup>st</sup> respondent had contended that his uncle (or father), one Wilseng Achira had given Plot No. 939 to one, Orwa and that Orwa caused the said parcel of land to be registered in the names of his two sons, Asienyo Orwa and Ondiko Orwa. The 1<sup>st</sup> respondent claimed that the whereabouts of Asienyo Orwa and Ondiko Orwa who were the registered proprietors of Plot No. 939 was unknown and that the applicant had entered into Plot No. 939 and commenced cultivation thereof forcefully without any right to do so.

2. The 1<sup>st</sup> respondent contended before the 3<sup>rd</sup> respondent that in the absence of the two sons of Orwa namely, Asienyo Orwa and Ondiko Orwa in whose names the said parcel of land namely, Plot No. 939 was registered, the persons who were entitled to occupy and use the said parcel of land should be those from the family of his uncle, Wilseng Achira and not the applicant herein who has no relationship whatsoever with the Orwa’s family. The 1<sup>st</sup> respondent sought the assistance of the 3<sup>rd</sup> respondent to stop the applicant from continuing with cultivation on Plot No. 939. According to the record of the proceedings before the 3<sup>rd</sup> respondent, the applicant was served with the summons to appear before the 3<sup>rd</sup> respondent to answer the 1<sup>st</sup> respondent’s claim against him but the applicant failed to do so as a result of which the said claim was heard in the absence of the applicant. In its decision that was rendered on 8<sup>th</sup> February 2009, the 3<sup>rd</sup> respondent ruled that Plot No. 939 belongs to Orwa’s family and that the said parcel of land was given to Orwa’s family by the family of Wilseng Achira. The 3<sup>rd</sup> respondent ordered the land registrar to stop the applicant from cultivating, renting or leasing out Plot No. 939 to third parties. The 3<sup>rd</sup> respondent made a further order that the applicant should pay survey fees so that a surveyor may come to the ground and reinstate the boundary between Plot No. 939 and Plot No. 948 that the applicant had allegedly destroyed. The 3<sup>rd</sup> respondent’s decision aforesaid was filed with the 4<sup>th</sup> respondent on 25<sup>th</sup> March 2009 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 was accordingly adopted as a judgment of the court on 10<sup>th</sup> December 2009 in the presence of both the applicant herein and the 1<sup>st</sup> respondent.
3. Following the adoption of the said decision of the 3<sup>rd</sup> respondent by the 4<sup>th</sup> respondent, the 4<sup>th</sup> respondent issued a decree on 30<sup>th</sup> December 2009 for execution. The applicant did not appeal against the said decision by the 3<sup>rd</sup> respondent to the Provincial Land Disputes Appeals Committee as provided for under Section 8 of the Land Disputes Tribunals Act No. 18 of 1990 (now repealed). The applicant also failed to take the necessary steps if he was aggrieved by the said decision to seek the review of the same by the High Court through an application for Judicial Review. The said decision by the 3<sup>rd</sup> respondent and the decree by the 4<sup>th</sup> respondent that followed its adoption as a judgment of the court remain in force. As I have already stated above, the decision by the 3<sup>rd</sup> respondent was made on 8<sup>th</sup> February 2009 and the same was adopted as a judgment of the court by the 4<sup>th</sup> respondent on 30<sup>th</sup> December 2009.
4. What is now before me, is an application brought by the applicant under Article 165 (3) (a), (b), and (c) as read with Article 22 (1) and (2) and Article 23 (3) of the Constitution of Kenya 2010. The application has been brought by way of Originating Notice of Motion dated 21<sup>st</sup> September 2011 and the same is supported by the affidavit of the applicant that was sworn on the same date. The said application was amended on 27<sup>th</sup> October 2011. The amended application is supported by the same affidavit sworn by the applicant on 21<sup>st</sup> September 2011. In his application, the applicant is seeking an order to quash the decision of the 3<sup>rd</sup> respondent that was made on 8<sup>th</sup> February 2009 and which was adopted by the 4<sup>th</sup> respondent on 10<sup>th</sup> December 2009. The applicant is also seeking an order to set aside the judgment that was entered on 10<sup>th</sup> December

- 2009 by the 4<sup>th</sup> respondent upon the adoption of the said decision by the 3<sup>rd</sup> respondent. The applicant has also sought an order directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents to remove the boundary marks that they have placed on the applicant's parcel of land namely, Plot No. 948 and compensation for damaged sugar cane. Lastly, the applicant has sought the cost of the application.
5. The application is based on the grounds set out in the body thereof and in the supporting affidavit of the applicant that I have already mentioned hereinabove. The applicant contended that the 1<sup>st</sup> respondent who had lodged a claim against the applicant before the 3<sup>rd</sup> respondent was not the registered owner of Plot No. 939 and as such had no right to lodge any claim against the applicant with the 3<sup>rd</sup> respondent in relation to the said parcel of land. The applicant also contended that he was not given adequate time to appear before the 3<sup>rd</sup> respondent to defend himself against the 1<sup>st</sup> respondent's claim. The applicant contended further that the 1<sup>st</sup> and 2<sup>nd</sup> respondents became registered as proprietors of Plot No. 939 on 1<sup>st</sup> November 2011 and as such they could not have known the exact boundaries between Plot No. 939 and Plot No. 948. The applicant also contended that the adoption of the decision of the 3<sup>rd</sup> respondent by the 4<sup>th</sup> respondent as a judgment of the court was irregular, null and void on account of the fact that the registered owners of Plot No. 939 were reported to have died in the year 1971. The applicant also took issue with the decision given by the 3<sup>rd</sup> respondent which was adopted by the 4<sup>th</sup> respondent in that the said decision by the 3<sup>rd</sup> respondent and the decree that was issued by the 4<sup>th</sup> respondent did not specify the actual parcel of land to which it relates. The applicant claimed that following the adoption of the decision of the 3<sup>rd</sup> respondent by the 4<sup>th</sup> respondent as aforesaid, the 1<sup>st</sup> and 2<sup>nd</sup> respondents entered into a substantial portion of his parcel of land namely, Plot No. 948 after destroying the boundary marks between said parcel of land and Plot No. 939 and caused serious damage to mature sugar cane plants that were growing on the said portion of Plot No. 948. The applicant assessed the damage caused by the 1<sup>st</sup> and 2<sup>nd</sup> respondents at Kshs. 150,000/=. The applicant has contended that this court has supervisory power over the 3<sup>rd</sup> and 4<sup>th</sup> respondents and that this is a suitable case in which the court should exercise the said powers and grant the reliefs sought.
  6. The applicant's application was opposed by the respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit sworn by the 2<sup>nd</sup> respondent on 18<sup>th</sup> November 2011. On their part, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents did not file any replying affidavit to the application neither did they file any grounds of objection. In his replying affidavit, the 2<sup>nd</sup> respondent deposed that Plot No. 939 was initially registered in the names of Asienyo Orwa and Ondiko Orwa as joint proprietors and that the said Asienyo Orwa died on 11<sup>th</sup> April 1995 while Ondiko Orwa died on 21<sup>st</sup> August 2000. The 2<sup>nd</sup> respondent deposed further that he petitioned for grant of Letters of Administration in respect of the estates of the said Asienyo Orwa and Ondiko Orwa at Homa-Bay SRM's court in Succession Cause No. 79 of 2009. The 2<sup>nd</sup> respondent deposed that he was issued with the grant of Letters of Administration with regard to the said estates which grant was duly confirmed on 7<sup>th</sup> January 2010 by the said court. The 2<sup>nd</sup> respondent deposed further that, following the confirmation of the said grant of Letters of Administration, the 2<sup>nd</sup> respondent was registered on 11<sup>th</sup> January 2010 as the absolute proprietor of Plot No. 939 and the title deed therefor duly issued in his name. The 2<sup>nd</sup> respondent deposed further that the dispute that was before the 3<sup>rd</sup> respondent between the 1<sup>st</sup> respondent and the applicant concerned the boundaries of Plot No. 939 and Plot No. 948 and according to him, the decision made by the 3<sup>rd</sup> respondent was in accordance with the law. The 2<sup>nd</sup> respondent termed the applicant's application herein as lacking in merit and bad in law.
  7. On 23<sup>rd</sup> January 2013 the court directed that the applicant's application herein be heard by way of written submissions. The applicant filed his written submissions on 30<sup>th</sup> January 2013, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their written submissions on 14<sup>th</sup> March 2013 and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents filed their written submissions on 13<sup>th</sup> March 2013. At the request of the applicant, the court granted the applicant leave to file replying submissions to the submissions filed by the respondents. In this regard the applicant filed a reply to the submissions by the 1<sup>st</sup> and 2<sup>nd</sup>

respondents on 20<sup>th</sup> March 2013 and another reply to the written submissions by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents on the same date. I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the affidavit in reply filed in opposition to the said application by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Finally, I have considered the written submissions filed by all the parties together with the authorities cited.

8. The applicant is aggrieved with the decision that was made by the 3<sup>rd</sup> respondent on 8<sup>th</sup> February 2009 and its adoption as a judgment of the court by the 4<sup>th</sup> respondent on 30<sup>th</sup> December 2009. The decisions complained of were made before the promulgation of the Constitution of Kenya 2010 under which the present application has been brought. I am in agreement with the submissions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the provisions of the Constitution of Kenya 2010 cannot be invoked retrospectively. In this regard, I am in agreement with the decision of Makhandia J. (as he then was) in the case of **Florence Atieno Ongore vs. Migori Lands Disputes Tribunal & 3 Others, Kisii High Court, Constitutional Petition No. 5 of 2011** in which after citing the Court of Appeal case of, **David Njoroge Macharia vs. Republic [2011] eKLR**, he held that “ *To that extent therefore that the complaints of the petitioner relates to the period prior to the promulgation of the constitution they are unsustainable if they are hinged on the current provision of the constitution as indeed they are.*” It follows therefore that the applicant herein cannot invoke the provisions of Articles 165 and 22 of the Constitution of Kenya 2010 to challenge the decisions of the 3<sup>rd</sup> and 4<sup>th</sup> respondents that were made prior to the promulgation of the current constitution. Due to the foregoing, I am in agreement with the submissions by the respondents that the application before me is misconceived and bad in law.
9. Even if I am wrong in the conclusion that I have arrived at hereinabove, I am of the opinion that the orders sought by the applicant cannot be granted for other reasons even if the application is considered on merit. The applicants' application has been brought under Articles 22 and 23 of the Constitution of Kenya 2010. The applicant's contention is that the respondents have violated his rights guaranteed in the Bill of Rights and as such this court should in exercise of its powers under Article 165 of the Constitution to grant the orders sought. It has been held in several decided cases and I will repeat here that it is not enough just to make an allegation of denial, violation, infringement or threat to human rights. A party seeking enforcement of rights in the Bill of rights must specify the rights violated and the manner in which the said violation has been carried out. I am not persuaded that the applicant has discharged this burden. The dispute that was before the 3<sup>rd</sup> respondent between the 1<sup>st</sup> respondent and the applicant concerned a boundary between Plot No. 939 and Plot No. 948 and alleged trespass on Plot No. 939. There is evidence on record that the applicant was notified of the proceedings before the 3<sup>rd</sup> respondent and the decision that was made by the 3<sup>rd</sup> respondent. The applicant was present in person when the 3<sup>rd</sup> respondent's decision was adopted by the 4<sup>th</sup> respondent as a judgment of the court. The 3<sup>rd</sup> respondent had jurisdiction to determine disputes over boundaries and alleged trespass to land. The fact that the 1<sup>st</sup> respondent was not the registered proprietor of Plot No. 939 did not divest the 3<sup>rd</sup> respondent of that jurisdiction. The 4<sup>th</sup> respondent similarly had jurisdiction to adopt as a judgment of the court the decision that was made by the 3<sup>rd</sup> respondent. Under the provisions of the Land Disputes Tribunals Act No. 18 of 1990 (now repealed), the applicant had a right of appeal to the Provincial Appeals Committee against the decision of the 3<sup>rd</sup> respondent. The applicant had a right of a second appeal to the High Court from the decision of the Provincial Appeals Committee on points of law. In addition to the said remedies, the applicant had a right to move to the High Court to challenge the said decisions by way of an application for Judicial Review. The applicant did not take any of these steps. I am unable to see in what manner the respondents herein can be said to have violated or infringed on the applicants' constitutional rights. The applicant was given an opportunity to appear before the 3<sup>rd</sup> respondent to defend himself which opportunity he did not make use of. The fact that the time that was given to him to make such appearance was too short was not an excuse for his failure to appear before the 3<sup>rd</sup> respondent. Furthermore, the applicant had a right to raise these issues of short notice that was given to him by the 3<sup>rd</sup> respondent and lack of *locus standi* on the part of the 1<sup>st</sup> respondent on appeal to the Provincial Land Disputes Appeals Committee. The issue of short notice could also be raised by the applicant as aground for

judicial review in the High Court. I am not satisfied therefore that a case has been shown to warrant the granting of the orders sought based on the alleged infringement of the applicant's constitutional rights by the respondents.

10. Secondly, this court has been urged to exercise its supervisory jurisdiction over the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The applicant's complaint herein relates to decisions that were made by the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The applicant has sought among other reliefs the quashing of the said decisions. Under the legal regime pursuant to which the said decisions were made, the 3<sup>rd</sup> and 4<sup>th</sup> respondents are *functus officio*. This court cannot direct the 3<sup>rd</sup> and 4<sup>th</sup> respondents to take any further action with regard to the said decisions. The said decisions can only be subject to an appeal or review by this court. I am of the opinion that in the circumstances of this case the applicant should have invoked the supervisory jurisdiction of this court conferred under Article 165 of the Constitution by way of an application for judicial review under sections 8 and 9 of the Law Reform Act, Cap. 32, Laws of Kenya and Order 53 of the Civil Procedure Rules and not through Originating Notice of Motion under Rules 2 and 3 of the Constitution of Kenya (Supervisory Jurisdiction) High Court Practice Rules, 2006(now repealed). As I have stated above, the decisions herein could only be challenged by way of an appeal or through judicial review. Whereas the court has power to issue judicial review orders in exercise of its supervisory jurisdiction under Article 165 of the Constitution, such jurisdiction can only be invoked either through a Petition under Articles 22 and 23 of the Constitution of Kenya or through an application for Judicial review brought pursuant to the provisions of sections 8 and 9 of the Law Reform Act, Cap. 32, Laws of Kenya and Order 53 of the Civil Procedure Rules. The provisions of Rule 2 of the Constitution of Kenya (Supervisory Jurisdiction) High Court Practice Rules, 2006(now repealed) under which the applicant herein had invoked the supervisory jurisdiction of the court provided that the procedure therein would only be used provided among others that the matter is not specifically provided for under any law. The said rule in my view therefore saved the exercise of the court's supervisory jurisdiction provided for under the Law Reform Act, Cap. 32, Laws of Kenya. It was not open for the applicant therefore to seek orders of judicial review by way of Originating Notice of Motion under Rules 2 and 3 of the Constitution of Kenya (Supervisory Jurisdiction) High Court Practice Rules, 2006(now repealed). I am of the opinion that the court could only exercise its supervisory jurisdiction under Rules 2 and 3 of the Constitution of Kenya (Supervisory Jurisdiction) High Court Practice Rules, 2006 (now repealed) in cases where proceedings are ongoing or where the makers of the decision(s) complained of could be directed to deal further with the matter. In cases like the one before me where the 3<sup>rd</sup> and 4<sup>th</sup> respondents whose actions the court has been called upon to exercise supervision are *functus officio*, the applicant should have employed the provisions of sections 8 and 9 of the Law Reform Act, Cap. 32, Laws of Kenya and Order 53 of the Civil Procedure Rules as aforesaid. I have noted that the applicant may have been reluctant to follow this route because he was already time barred in seeking an order of certiorari. Unfortunately, the hands of the court are tied. Unless the court is moved either through a petition under Articles 22 and 23 of the Constitution of Kenya or through an application for judicial review under sections 8 and 9 of the Law Reform Act, Cap. 32 Laws of Kenya and Order 53 of the Civil Procedure Rules as aforesaid, the court cannot grant orders of judicial review in exercise of its supervisory jurisdiction under article 165 (6) of the Constitution of Kenya. The orders sought herein which seek the quashing of the decisions that were made by the 3<sup>rd</sup> and 4<sup>th</sup> respondents are therefore not available to the applicant.

11. The other issue worth noting is that, this court has no supervisory jurisdiction over private persons. It follows therefore that the reliefs sought against the 1<sup>st</sup> and 2<sup>nd</sup> respondents cannot be granted by the court in exercise of its supervisory jurisdiction under Article 165 (6) of the Constitution of Kenya. Finally, the applicant has sought orders to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents to remove some boundary features that they have put up on Plot No. 948. In addition, the applicant has sought an award of damages. As rightly submitted by the respondents, these claims are of a civil nature and the same are not available to the applicant under Article 165 (6) of the Constitution of Kenya.

9. In conclusion, I find no merit in the applicant's amended Originating Notice of motion dated 26<sup>th</sup> October 2011. The same is accordingly dismissed. Each party shall bear its own costs of the application.

**Delivered, dated and signed at Kisii this 16<sup>th</sup> day of May 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

N/A for the Applicant

N/A for the Respondents

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**