REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L JUDICIAL REVIEW APPLICATION NO. 143 OF 2009

IN THE MATTER OF AN APPLICATION BY JULIUS MAKORI NYAMARI FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ETAGO DIVISION LAND DISPUTES TRIBUNAL CASE NO. 26 OF 2008

AND

IN THE MATTER OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT OGEMBO, MISC. CIVIL APPL.NO.26 OF 2009

BETWEEN

REPUBLIC……..……...……..……APPLICANT

VERSUS

ETAGO DIVISION LAND DISPUTES TRIBUNAL…….....1ST RESPONDENT

JAMES MOGOI OMARI…….…….2ND RESPONDENT

SENIOR RESIDENT MAGISTRATE-OGEMBO…….…….3RD RESPONDENT

EXPARTE

JULIUS NYAMARI,CHAIRMAN RUORA

D.E.B PRIMARY SCHOOL

JUDGMENT

1. What I have before me is the application by the ex parte applicant, **Julius Nyamari** (hereinafter referred to only as **"the applicant"**) dated 4th January, 2010 seeking; an order of certiorari to remove into this court and quash the decisions of the 1st and the 3rd respondents made on 20th June, 2009 and 17th September, 2009 respectively, an order of prohibition to prohibit the district land registrar, Kisii and the 1st and 3rd respondents from executing or implementing the decisions referred to above and, an order of prohibition to prohibit the 1st and 3rd respondent's from entertaining, maintaining and/or otherwise

hearing and/or determining the issues touching on the parcel of land known as LR. No. South Mugirango/Nyataro/748 (hereinafter referred to as "**Plot No.748**"). The application was supported by the verifying affidavit of the applicant sworn on 11th December, 2009 and the statutory Statement of the same date which were filed pursuant to the provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules together with the application for leave. The facts giving rise to the application can be summarized from the contents of the said affidavit and the statement as follows; at all material times, Rwora D.E.B primary school(hereinafter referred to only as "**the school**") of which the applicant was at all material times the chairman of the Parents and Teachers Association was in occupation of a portion of Plot No. 748 (the said portion is hereinafter referred to as "**the suit property**"). Plot No. 748 was at all material times registered in the name of one, Obure Onchoka, deceased(hereinafter referred to only as the "**deceased**") as the owner thereof. The suit property was donated to the school by one of the sons of the deceased, one, Charles Keen Obure. Sometimes in the year, 2008, the 2nd respondent lodged a claim against the applicant and the school with the 1st respondent seeking the assistance of the 1st respondent to restrain the school from occupying the suit property. The 2nd respondent contended before the 1st respondent that he had purchased the suit property from the children of the deceased namely, John Nyamwange Obure, Charles Keen Obure and Gilbert Samuel Obure. The 1st respondent heard the 2nd respondent's claim and made a decision on 20th June, 2009. In its decision, the 1st respondent made a finding that the suit property the ownership of which was in dispute between the 2nd respondent and the school, belongs to the 2nd respondent and recommended that the land registrar proceeds to the site of Plot No. 748 for the purposes of demarcating the suit property and validating the 2nd respondent's title over the same. The 1st respondent made a further order that in the event that the registered owner of the suit property fails to execute the necessary instrument of transfer in favour of the 2nd respondent, the executive officer should proceed to do so. The 1st respondent's decision aforesaid was lodged with the 3rd respondent for adoption as a judgment of the court on or about the 29th day of July, 2009 and the 3rd respondent adopted the same as a judgment of the court on 17th September, 2009.

2. In the present application, the applicant has challenged the 1st respondent's decision aforesaid and its adoption by the 3rd respondent on several grounds. The applicant has contended that the 1st respondent had no jurisdiction to determine the dispute that existed between the 2nd respondent and the applicant as it concerned the ownership of and/or title to the suit property. The applicant has contended further that the 1st respondent had no jurisdiction to entertain a dispute over land registered in the name of a deceased person. The 1st respondent also contended that the 3rd respondent had no jurisdiction to adopt the decision of the 1st respondent as a judgment of the court. The applicant contended that the said decisions of the 1st and 3rd respondents were illegal and should be quashed.

3. The application was not opposed by the 1st and 3rd respondents. The same was however opposed by the 2nd respondent who filed a replying affidavit filed in court on 28th June, 2011. The 2nd respondent deposed in his affidavit that the 1st and 3rd respondents had jurisdiction to make the decisions complained of by the applicant and that the applicant's application has no basis and is an abuse of the process of the court. The 2nd respondent contended that the applicant failed to lodge an appeal against the said decisions and as such has not right to complain about the same.

4. On 4th March, 2014, the advocates for the parties agreed to argue the application herein by way of written submissions. The applicant filed her written submissions on 1st April, 2014 while the 2nd respondent filed his written submissions on 25th June, 2014. In his submission, the applicant reiterated the contents of his verifying affidavit and statutory statement and contended that the decision of the 1st respondent was made without jurisdiction and as such was null and void. The applicant contended further that in purporting to adopt the said decision, the 3rd defendant presided over a nullity and such its decision was likewise without jurisdiction, null and void. In his submissions in reply, the 2nd respondent submitted that the 1st respondent had jurisdiction to determine the dispute that was presented before it by the 2nd respondent and as such the 1st respondent's decision on the said dispute was valid, effective and

binding. The 1st respondent submitted further that the 3rd respondent acted within the law in adopting the said decision as a judgment of the court. The 2nd respondent submitted that the applicant having failed to appeal against the said decision by the 1st respondent as provided for in law or to have the same quashed within the prescribed time, the present application is misconceived. I have considered the applicant's application, the statutory statement and the verifying affidavit filed in support thereof. I have also considered the replying affidavit filed by the 2nd respondent in opposition to the application and the written submissions filed by the parties' respective advocates. The issues that present themselves for determination in this application in my view are;

(i) Whether the 1st respondent had jurisdiction to determine the dispute that arose between the applicant and the 2nd respondent over the suit property?

(ii) Whether the 3rd respondent had jurisdiction to adopt the decision of the 1st respondent as a judgment of the court ?

(iii) Whether the applicant's application is competent? and, lastly;

(iv) whether the applicant is entitled to the orders sought?

It is not contested that Plot No. 780 was registered in the name of the deceased under the Registered Land Act, Cap.300, Laws of Kenya(now repealed). It is also not in dispute that both the applicant and the 2nd respondent claimed to have acquired proprietorship interest in the suit property from the children of the deceased. The depute between the applicant and the 2nd respondent that was taken before the 1st respondent for determination was therefore concerned with the ownership or title to the suit property. In its decision on the dispute, the 1st respondent made a finding that the suit property belongs to the 2nd respondent and called for the demarcation of the same and the issuance of a title deed in respect thereof to the 2nd respondent. While making this decision, the 1st respondent was well aware that the suit property was registered in the name of a deceased person. I am in agreement with the submission by the applicant that the 1st respondent had no jurisdiction to entertain the 2nd respondent's claim against the applicant. The 1st 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 1st respondent were spelt out in the said Act. The 1st respondent could not exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act sets out the disputes over which the 2nd 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."**

From the foregoing, it is clear that the 1st respondent did not have jurisdiction to determine disputes over ownership and/or title to land leave alone land registered in the name of a deceased person in respect of whose estate a legal representative had not been appointed. The 1st respondent did not therefore have the power to declare the 2nd respondent as the owner of the suit property and to order that the suit property be demarcated and transferred to him. In the case of **Desai-vs-Warsama (1967) E.A.351**, it was held that, 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. In the case of **Republic vs. Chairman Suneka Land Disputes Tribunal & 3 others, Exparte Dominic Maangu Nyabwengi & another [2013]eKLR** that was cited by the applicant in his submissions, this court stated 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**." The 1st respondent having presided over a dispute in respect of which it had no jurisdiction, its decision on that dispute is nothing but a nullity. If the 1st respondent's decision was a nullity as I have held above, the same could not be adopted by the 3rd respondent as a judgment of the

court. In the case of **Macfoy-vs-United Africa Co. Ltd.(1961) 3 All E.R 1169,** that I cited in the case of **Republic vs. Chairman Suneka Land Disputes Tribunal & 3 others Exparte Dominic Maangu Nyabwengi & another (supra)**, 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"**.

Since the decision of the 1st respondent was a nullity, it amounted to nothing in the words of Lord Denning. The 3rd respondent could not adopt nothing as a judgment of the court. The 3rd respondent had no jurisdiction under section 7 of the Act aforesaid to adopt annul and void decision of the 1st respondent as a judgment of the court. I did not at all understand the 2nd respondent's argument that this application was not brought within the prescribed time. It is not in dispute that the 1st respondent decision being challenged herein was made on 20th June, 2009 and that it was adopted as a judgment of the court on 17th September, 2009. It is also not in dispute that the application for leave to institute these proceedings was made on 11th December, 2009 and leave was granted on the same day. The application herein was subsequently filed on 4th January, 2010. From the foregoing, it is clear that the application for leave to bring the application herein was brought within six (6) months from the date when the decisions of the 1st and 3rd respondents sought to be quashed herein were made. The application herein was also brought within the time prescribed under Order 53 rule 3(1) of the Civil Procedure Rules. I do not agree within the submission by the 2nd respondent that once the 1st respondent's decision was adopted by the 3rd respondent as a judgment of the court then it could not be reviewed by this court. The said decision is liable to be quashed together with the order that adopted it as a judgment of the court. The 2nd respondent's argument would have had merit if the applicant had sought only the quashing of the 1st respondent's decision and left out the decision of the 3rd respondent that adopted it as a judgment of the court. That is not the case herein. The 2nd respondent's argument that the application herein was filed out of time is therefore overruled. I also find no merit in the respondent's argument that the existence of a right of appeal precluded the applicant from bringing these proceedings. The law is settled that availability of a right of appeal is not a bar to an application for judicial review. For the foregoing reasons, it is my finding that the application herein is properly before the court.

5. In conclusion, I am satisfied that this is an appropriate case to grant the orders sought by the applicant. The applicant has demonstrated that the decisions by the 1st and 3rd respondents complained of herein were made without jurisdiction and as such are null and void. The applicants' Notice of Motion application dated 4th January, 2010 is well merited. The same is allowed as prayed. Each party shall bear its own costs.

Delivered, dated and signed at Kisii this 31st day of October 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Bigogo for the Applicant

N/A for the 1st Respondent

Mr. Bosire h/b for G. Masese for the 2nd Respondent

N/A for the 3rd Respondent

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE