No. 329

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 2 OF 2012 (JR)

IN THE MATTER OF AN APPLICATION BY JARED OTIENO AOKO FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF THE DECREE OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT RONGO

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 (NOW REPEALED)

BETWEEN

RONGO LAND DISPUTES TRIBUNAL ……..…..….. 1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE'S COURT AT RONGO ….....……. 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL …… 3RD RESPONDENT

AND

ELISHA OKOTH OTIENO …….....…..…… INTERESTED PARTY

EX PARTE :JARED OTIENO AOKO

JUDGMENT

1. The ex parte applicant, **Jared Otieno Aoko** (hereinafter referred to as "**the applicant**") sought leave of this court on 1st March 2012 to institute an application for judicial review in the nature of certiorari to remove to this court for the purposes of being quashed the decisions of the 1st and 2nd respondents made on 20th September 2011 and 24th October 2011 respectively and the decision of the land registrar Migori to implement the said decisions. The applicant's application for leave was heard and granted by R. Lagat Koriri J. on 9th March 2012. Following the granting of leave as aforesaid, the applicant brought the present application for judicial review by way of Notice of Motion dated 14th March 2012 in which he sought the following orders;-

i. **That the court be pleased to issue an order of certiorari to remove the decision of the Rongo Land Disputes Tribunal (1st respondent) dated 20th September 2011, the decision of the Senior Resident Magistrate's Court at Rongo (2nd respondent) made in Misc. Civil Application No. 25 of 2011 on 24th October 2011 and the subsequent decision of the land registrar, Migori to implement the said decisions of the 1st and 2nd respondents for the purposes of being quashed.**

2. The applicant's application was supported by the supporting affidavit and verifying affidavit of the applicant sworn on 14th March 2012 and 29th February 2012 respectively and the statutory statement dated 29th February 2012. The applicant's application was brought on the grounds that; the applicant was at all material times the registered proprietor of all that parcel of land known as **LR No. Kamagambo/Kongudi/1111** (hereinafter referred to as "**the suit property**"). Sometimes in September, 2011, the interested party herein lodged a claim against the applicant with the 1st respondent.
3. In his claim before the 1st respondent, the interested party claimed that the suit property belongs to him and other members of his family and sought the assistance of the 1st respondent to get back the same from the applicant. The 1st respondent heard the interested party's claim and in an award that was delivered on 20th September 2011 allowed the same and awarded the interested party and his two (2) brothers the suit property. The applicant was ordered to transfer the suit property to the interested party and his said two brothers failure to which the executive officer of the court would execute the transfer on his behalf. The 1st respondent's award was lodged with the 2nd respondent in October, 2011 and was adopted as a judgment of the court on 24th October 2011 and a decree was issued on the same date for execution. Following this decree, the title of the applicant over the suit property was cancelled and the suit property transferred and registered in the name of the interested party on 28th October 2011.
4. The applicant has contended that when the 1st respondent presided over the interested party's claim, the Land Disputes Tribunal's Act No. 18 of 1990 ("the Act") under which the 1st respondent was constituted had been repealed and as such the 1st respondent had no jurisdiction to entertain the claim and to make the decision complained of. The applicant has contended further that since the suit property was registered under the Registered Land Act, Cap 300 Laws of Kenya (now repealed), the dispute over the title and/or ownership thereof could be determined only by the High Court. The applicant has contended therefore that even if the Act had not been repealed, the 1st respondent could not have had jurisdiction to determine the interested party's claim. The applicant has contended further that, the 1st respondent delved into issues concerning succession under the Law of Succession Act, Cap 160 Laws of Kenya which it had no jurisdiction to deal with.
5. The applicant's application was opposed by the interested party. The Attorney General entered appearance for the respondents but did not file any affidavit in reply to the application. The interested party filed a notice of preliminary objection dated 30th March 2012 and a replying affidavit sworn on 5th April 2012 in opposition to the application. In his notice of preliminary objection, the interested party contended among others that, the applicant's application herein is incompetent in that the same is not brought in the name of Republic. The interested party contended further that the application has been brought contrary to order 53 rule 2 of the Civil Procedure Rules. In his replying affidavit, the interested party contended that the decisions of the 1st and 2nd respondents have been fully executed and as such the quashing thereof would occasion him injustice. The applicant reiterated the fact that application has not been brought in the name of the republic and that the same is contrary to order 53 rule 2 of the civil procedure rules and as such the same is incompetent, bad in law and fatally defective.
6. When the application came up for hearing on 26th February 2014, the advocates for the parties agreed to argue the same by way of written submissions. The applicant filed his written submissions on 19th March 2014 while the interested party did so on 13th June 2014. I have considered the applicant's application together with the affidavit and statutory statement filed in

support thereof. I have also considered the replying affidavit and notice of preliminary objection filed by the interested party in opposition to the application. Finally, I have considered the written submissions filed by the advocates for both parties and the authorities cited. In my view the issues arising for determination in this application are as follows:-

i. Whether the application is competent?
ii. Whether the 1st respondent had jurisdiction to determine the dispute that existed between the interested party and the applicant?
iii. Whether the 2nd respondent had jurisdiction to adopt the decision of the 1st respondent as a judgment of the court?
iv. Whether the applicant is entitled to the orders sought?

7. **Issue No. I;**

The interested party has challenged the competency of the application herein on several grounds. The first ground is that, the application has not been brought in the name of the republic as required by law. It is not in dispute that the applicant's application has not been brought in the name of the republic. In the application, the ex parte applicant is indicated as the applicant. This is contrary to the well established practice which has received recognition in several judicial pronouncements. Refer to the cases of, **Farmers Bus Service & Others –vs- Transport Licensing Appeal Tribunal [1959] E. A 779** and **Mohammed Ahmed –vs-R [1957] E. A 523**. While I am in agreement with the interested party that the application herein is defective in form, I am not satisfied that the said defect is such that it can render the application totally defective and unmaintainable. The interested party has not indicated that he has been prejudiced in any way by the form in which the application has been brought or that he will suffer injustice if the application is considered on merit in that form. This court is enjoined by Article 159 (2) (d) of the Constitution of Kenya 2010 to dispense justice without undue regard to procedural technicalities.

8. I would therefore ignore the objection herein which is based on the form of the application for the sake of substantive justice. The applicant's advocates have cited the decisions of Odunga J. in the case of **Republic –vs- National Social Security Fund Board of Trustees and Another ex parte Town Council of Kikuyu [2014] eKLR** which supports the position that I have taken herein. The other ground on which the competency of the application herein was attacked was that since the decision of the 1st respondent sought to be quashed herein has been adopted as a judgment of the court, the same no longer exists and is not liable to be quashed. I am in agreement with the submission by the interested party that once the decision of the 1st respondent was adopted by the 2nd respondent as a judgment of the court, it ceased to exist as a decision of the 1st respondent and became a judgment of the court. I am however not in agreement with the contention by the interested party that once the decision of the 1st respondent was adopted by the 2nd respondent, it was taken beyond the supervisory jurisdiction of this court and as such cannot be reviewed.
9. The applicant herein has sought not only the review and quashing of the decision of the 1st respondent but also the decision of the 2nd respondent through which it was adopted as a judgment of the court. This court has supervisory jurisdiction over the 2nd respondent. The 2nd respondent's decisions are therefore amenable to review by this court. In the circumstances, I see no reason why this court cannot quash the decision of the 1st respondent together with the decision of the 2nd respondent that adopted it as a judgment of the court. The situation would have been different if the applicant had only sought the quashing of the decision of the 1st respondent and left out the decision of the 2nd respondent that made it a judgment of the court. That is not the situation herein. I see no merit therefore in this aspect of the interested party's objection. The last objection by the interested party was based on none compliance with order 53 rule 2 of the Civil Procedure Rules. The interested party did not elaborate on this objection in his submissions. It is not clear to me therefore in what respect the application herein failed to comply with order 53 rule 2. I am satisfied that the application for leave to institute the present application was brought within the prescribed time. I see no basis therefore for the objection founded on order 53 rule 2 of

the Civil Procedure Rules. For the foregoing reasons, it is my finding that the applicant's application herein is competent and properly before the court.

10. **Issue No. II;**

The 1st respondent was established under the Land Disputes Tribunal Act No. 18 of 1990 ("the Act")(now repealed). Section 3 (1) of the Act conferred jurisdiction on the 1st respondent to deal with all cases of a civil nature involving a dispute as to; the division of or the determination of boundaries to land, including land held in common, a claim to occupy or work land and trespass to land. The Act was repealed by the Environment and Land court Act, 2011 which commenced on 30th August 2011. In paragraph 3 of his affidavit sworn on 5th March 2012 in reply to the present application the interested party stated as follows;

> **"THAT it is factually correct that I lodged a claim against the ex parte applicant herein in respect to land parcel LR No. Kamagambo/ Kongudi/1111 before the Rongo Land Disputes Tribunal on the 6th September 2011 (emphasis mine) which culminated into a ruling delivered on the 20th September, 2011 awarding me 6ha of the aforementioned land parcel."**

The interested party has admitted in this statement that he lodged his claim with the 1st respondent on 6th September 2011. This was after the repeal of the Act on 31st August 2011. The 1st respondent did not have jurisdiction on 6th September 2011 to admit and entertain the interested party's claim. The proceedings of the 1st respondent which were purportedly conducted under the Act were conducted without jurisdiction, the act having been repealed and the 1st respondent dissolved thereby.

11. I am aware that under section 30(1) of the Act and the practice directions given thereunder by the Chief Justice, the 1st respondent could continue to handle cases that were pending before it as of the date of the repeal of the Act. I have no evidence before me that the interested party's claim was pending before the 1st respondent as at 31st August 2011. I am in agreement therefore with the submission by the applicant that the 1st respondent acted without jurisdiction when it entertained the interested party's claim and made the decision complained of. It is irrelevant that the applicant participated in the proceedings before the 1st respondent and did not raise any objection to its jurisdiction. In the case of **Allarakhia –vs- Agakhan [1969] E. A 613** that was cited by the applicant, it was held that **"parties may not by mutual consent confer jurisdiction upon a court which has no jurisdiction."** In the case of **Desai –vs- Warsama [1967] E. A 351** it was held that **"a court cannot confer jurisdiction upon itself**. It follows therefore that the 1st respondent could neither confer jurisdiction upon itself nor be clothed with such jurisdiction by the parties**.**
12. Even if it is assumed that the Act had not been repealed when the interested party lodged the claim with the 1st respondent or that the said claim was pending as at the date of repeal of the Act, I am of the opinion that the 1st respondent could still not entertain the claim. As I have stated above, the Act conferred upon the 1st respondent limited and specific jurisdiction. The 1st respondent could not entertain disputes in respect of which the Act did not confer jurisdiction upon it. The interested party's claim concerned title and/or ownership of the suit property. In its decision, the 1st respondent ordered that the suit property be transferred to the interested party and his siblings. The Act did not give jurisdiction to the 1st respondent to determine disputes over title to and/or ownership of land. The 1st respondent therefore acted outside the jurisdiction that was conferred upon it by the Act when it entertained and determined the interested party's claim.
13. **Issue No. III;**

In the case of **Desai –vs- Warsama** (Supra) it was stated that a judgment of a court without jurisdiction is a nullity and that where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. I am in agreement with the submission by the applicant's advocates that the

1st respondent's decision having been made without jurisdiction, it was a nullity and as such there was nothing which the 2nd respondent could adopt as a judgment of the court. The 2nd respondent's decree was therefore equally issued without jurisdiction and as such null and void.

14. **Issue No. IV;**

The applicant has established that the decisions of the 1st and 2nd respondents complained of herein were made without jurisdiction and as such null and void. The decisions of the 1st and 2nd respondents are therefore liable to be quashed by an order of certiorari. Since the decree by the 2nd respondent has already been implemented by the land registrar, the applicant has sought a further order that the decision of the said land registrar be quashed. I have no doubt that the decision by the land registrar, Migori District to implement a court decree that was a nullity is liable to review by this court. The court having held that the decree that was issued by the 2nd respondent is a nullity, its implementation cannot stand. The prayer seeking the quashing of the implementation of the said decree by the land registrar is therefore well founded.

15. **Conclusion;**

The applicant has satisfied this court that he is entitled to the prayers sought in the Notice of Motion application dated 14th March 2012. The said application is allowed as prayed. The decisions of the 1st and 2nd respondents dated 20th September 2011 and 24th October 2011 respectively are hereby brought to this court and quashed. The decision of the registrar, Migori District to implement the said decisions is also brought to this court and quashed. In view of the defect in the form of the applicant's application and the relationship between the applicant and the interested party, each party shall bear its own costs of the application.

Delivered, signed and **dated** at **KISII** this **31ST** of **October, 2014.**

S. OKONG'O

JUDGE

In the presence of:-

N/A for the applicant

N/A for the respondent

N/A for the ex parte applicant

Mr. Ombachi h/b for Mbuya for the interested party

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE