



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND JUDICIAL REVIEW APPLICATION NO. 65 OF 2010

IN THE MATTER OF AN APPLCIATION BY PAULINE BOCHABERI OMWANGE

FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

SOUTH KISII DISTICT LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

DAVID OURU MOKORA.....2ND REPSONDENT

THE HON. CHIEF MAGISTRATE KISII LAW COURT.....3RD RESPONDENT

EX-PARTE: PAULINE BOCHABERI OMWANGE

JUDGMENT

1. The ex parte applicant is the widow of one, **Samuel Omwange**, deceased (hereinafter referred to only as “**the deceased**”). At all material times the deceased owned and is still registered as the proprietor of all that parcel of land known as **LR No. Wanjare/Bokeire/2089** (hereinafter referred to only as “**the suit property**”). The deceased died on 1st July 1999. Sometimes in the month of December, 2009, the 2nd respondent herein lodged a claim against the applicant with the 1st respondent in which the 2nd respondent accused the applicant’s family of closing a footpath that was passing beside the suit property and which had been in use by the 2nd respondent and members of his family for several years. The 2nd respondent sought the assistance of the 1st respondent to compel the applicant to open up the said footpath. The 1st respondent heard the 2nd respondent, the applicant and a number of witnesses mainly from the 2nd respondent’s side and in a decision made on 15th January 2010 ordered the said foot path to be opened. The said decision was lodged before the 3rd respondent through Kisii CM. Misc. Appl. No. 11 of 2010 for adoption as a judgment of the court and the same was duly adopted on 15th March 2010.

2. The applicant was aggrieved by the said decision of the 1st respondent and its adoption by the 3rd respondent as a judgment of the court and has sought through these proceedings the quashing of the

same. The applicant has challenged the decision of the 1st respondent and its adoption by the 2nd respondent on several grounds. The applicant has contended that the 1st respondent acted outside its jurisdiction when it delved into a dispute over an easement. The applicant has contended further that the 1st respondent was not properly seized of the 2nd respondent's claim because the 2nd respondent had not formally lodged a complaint with the 1st respondent as required by section 3(2) of the Land Disputes Tribunals Act No. 18 of 1990 (now repealed). The applicant has contended further that the 1st respondent's decision was arrived at in breach of the rules of natural justice in that the applicant was not accorded a reasonable opportunity to defend herself.

3. The applicant has contended further that since she had not taken out letters of administration in respect of the estate of the deceased, she had no capacity to be sued on behalf of the deceased. The applicant has contended further that the members of the 1st respondent who presided over the 2nd respondent's claim had no power to do so due to the fact that they had not been duly appointed by the area District Commissioner as required by law. The applicant has contended that the decision of the 1st respondent aforesaid is null and void and that the location on which the said footpath has been created is on the suit property and not the officially surveyed location for the said footpath. The applicant has contended that since the decision of the 1st respondent was a nullity the same could not be lawfully adopted by the 3rd respondent as a judgment of the court. It is on account of the foregoing that the applicant has urged the court to quash the said decisions of the 1st and 3rd respondents.

4. All the respondents were served with the Notice of Motion application dated 23rd July 2010 together with the affidavit and the statutory statement that were filed in support thereof. None of the respondents filed a replying affidavit in response to the application. The 2nd respondent appointed a firm of advocates to act for him. The said firm of advocates did not file any replying affidavit in opposition to the application on behalf of the 2nd respondent despite the fact that Mr. Sagwe advocate from that firm appeared in court on 29th May 2013 and was granted leave to file a replying affidavit in the event that the 2nd defendant wished to do so.

5. As a result of the failure by any of the respondents to respond to the application herein, the same is unopposed. I have considered the application together with the verifying affidavit and the statutory statement that were relied by the applicant in support thereof. I am satisfied that the application is well founded. The 1st respondent was a creature of statute namely the Land Disputes Tribunal's Act No. 18 of 1990 (now repealed) (hereinafter referred to only as "the Act"). Section 3(1) of the Act sets out the jurisdiction of the 1st respondent. The 1st respondent could not exercise any power that was not conferred upon it under that section. The 1st respondent was empowered to hear and determine all disputes of a civil nature involving 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. It is clear from the foregoing that the 1st respondent did not have jurisdiction to determine disputes concerning closure of roads or footpaths. The disputes of that nature were reserved for the normal civil courts.

6. Due to the foregoing, I am in agreement with the submission by the applicant that the 1st respondent acted in excess of its jurisdiction when it entertained the 2nd respondents claim and proceeded to make the determination complained of herein. A decision made without jurisdiction is a nullity and is of no legal consequence. I am therefore in agreement with the submission by the applicant's advocate that the 3rd respondent equally acted in excess of its jurisdiction when it purported to adopt a null and void decision as a judgment of the court. I have stated it previously and I will repeat it here that section 7 (2) of the Act pursuant to which the decision of the 1st respondent was adopted by the 3rd respondent presupposed the existence of a valid decision by the tribunal. The section did not at all impose an obligation upon a magistrate's court to adopt of a judgment of the court a decision that is null and void. Having held that the 1st and 3rd respondents exceeded their jurisdictions in the decisions challenged herein, it is not necessary to consider the other grounds on which the said decisions were challenged by the applicant.

7. In conclusion, it is my finding that the applicant has made out a case for the grant of the orders sought in the application dated 23rd July 2010. I have noted from the mutation form dated 9th October 1984 that gave rise to the suit property that was attached to the applicant's affidavit sworn on 23rd July 2010 that there is a footpath that was reserved during the sub-division of Plot No. Kisii/Wanjare/Bokeire/1822 that gave rise to the suit property and Plot No. Kisii/Wanjare/Bokeire/2088 which is presumably owned by the 2nd respondent or his deceased father. The said footpath runs along Plot No. 2088 and the suit property up to a point when it joins a main road. This is the footpath that was the subject of the dispute between the 2nd respondent and the applicant before the 1st respondent. In the circumstances, I do not think that it is correct for the applicant to contend that there was no footpath serving Plot No. 2088 running next to the suit property. From the said mutation, it is clear that the footpath existed even before the suit property was created.

8. In view of the observations that I have made above, I would allow the application dated 23rd July 2010 in terms of prayer 1 thereof. I would add however that the granting of the said order shall not in any way entitle the applicant to close or block the footpath that was reserved under the mutation dated 9th October 1984 that I have referred to above. 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:-

Mr. Ombachi for the applicant

N/A for the respondents

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE