



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 54B OF 2009(JR)**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE CHIEF MAGISTRATE’S COURT, KISUMU ..... 1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR, MIGORI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JOSEPH ONYANGO MARERA ..... INTERESTED PARTY**

**EX PARTE**

**JACK OTIENO OBUDHO**

**JUDGMENT**

1. The ex parte applicant, **Jack Otieno Obudho** (hereinafter referred to only as “**the applicant**”) is the son and legal representative of one, Syprianus Obudho Osuna, deceased (hereinafter referred to only as “**the deceased**”). At all material times the deceased was the registered proprietor of all that parcel of land known as **LR No. West Suna/Wiga/829** (hereinafter referred to as “**the suit property**”). Sometimes in the year 2004 or thereabouts, the interested party herein lodged a claim against the deceased with Suba West Division Land Disputes Tribunal (hereinafter referred to as “the tribunal”) in which claim, the interested party alleged that the deceased had acquired the suit property fraudulently. The interested party contended before the tribunal that the suit property was before it was fraudulently transferred to the deceased registered in the name of the interested party’s brother one, Ambugo Obudho, deceased and that upon the demise of his said brother, it is the interested party who was entitled to inherit the suit property and not the deceased. The interested party contended that after the death of the said Ambugo Obudho, the deceased forged documents and caused himself to be registered as the proprietor of the suit property. The interested party sought the assistance of the tribunal to have the deceased’s title cancelled and the suit property registered in his name.
2. The tribunal heard the interested party and the deceased and in a ruling that was made on 21<sup>st</sup> February 2005, the tribunal cancelled the deceased’s title over the suit property and directed that the suit property be registered in the name of the interested party. The deceased was dissatisfied with the decision of the tribunal and preferred an appeal against the same to the Nyanza Provincial Appeals Committee (hereinafter referred to only as the “Appeals Committee”). The deceased’s appeal was heard and dismissed by the Appeals Committee on 17<sup>th</sup> July 2008. The appeals committee upheld the decision of the tribunal and reiterated that the suit property be registered in

- the name of the interested party. The decision of the appeals committee was filed at the Chief Magistrate's Court at Kisumu, the 1<sup>st</sup> respondent herein for adoption as a judgment of the court and the same was adopted on 25<sup>th</sup> August 2008 and a decree issued accordingly for execution.
3. The deceased was aggrieved with the said decisions by the Appeals Committee and the 1<sup>st</sup> respondent and brought this application on 4<sup>th</sup> March 2009 seeking an order of certiorari to remove into this court for the purpose of being quashed the decision of the 1<sup>st</sup> respondent made on 25<sup>th</sup> August 2008 in Land Case No. 33 of 2008 and an order of prohibition to prohibit the 2<sup>nd</sup> respondent from executing or otherwise enforcing the decisions of the Appeals Committee rendered on 17<sup>th</sup> July 2008 in Land Appeal No. 188 of 2005 and that of the Chief Magistrate's Court at Kisumu (1<sup>st</sup> respondent) given on 25<sup>th</sup> August 2008 in Land Case No. 33 of 2008 or otherwise interfering with the deceased's registration as the owner of the suit property. The deceased died on 11<sup>th</sup> May 2009 and was substituted herein by the ex parte applicant on 4<sup>th</sup> February 2010.
  4. The application by the deceased was brought on the grounds that were set out in the verifying affidavit of the deceased sworn on 18<sup>th</sup> February 2009 and the statutory statement of the same date. In summary, the application was brought on the grounds that the decisions of the tribunal and the Appeals Committee made on 21<sup>st</sup> February 2005 and 17<sup>th</sup> July 2008 respectively were arrived at in excess of their jurisdiction and as such the 1<sup>st</sup> respondent had no jurisdiction or power to adopt the same and issue an order for the eviction of the deceased. The deceased contended further that he was not given a hearing before the appeals committee. The deceased contended further that the 2<sup>nd</sup> respondent is in the process of executing the said decisions which are null and void unless prohibited by this court from doing so.
  5. The application was opposed by the interested party through a replying affidavit sworn on 12<sup>th</sup> November 2012. In response to the application, the interested party contended that the deceased acquired the suit property fraudulently and as such the applicant is not entitled to the orders sought. On the issue that the deceased was not given a hearing by the Appeals Committee, the interested party contended that the deceased was served with a hearing notice by the Appeals Committee but chose not to appear at the hearing of his appeal. The respondents did not oppose the application. On 15<sup>th</sup> May 2013, I directed that the applicant's application be heard by way of written submissions. The applicant filed his submissions on 3<sup>rd</sup> March 2014 while the interested party did so on 24<sup>th</sup> April 2014. I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the affidavit sworn by the interested party in opposition to the application. Finally, I have considered the written submissions filed herein by the advocates for the parties and the cases cited in support thereof. From the material before me and the submissions by the advocates for the parties, the following in my view are the issues that arise for determination;
    - i. Whether the application is competent?
    - ii. Whether the decision of the tribunal that was confirmed and/or upheld by the Appeals Committee was arrived at in excess of jurisdiction?
    - iii. Whether the adoption by the 1<sup>st</sup> respondent of the decision of the Appeals Committee aforesaid was valid?
    - iv. Whether the applicant is entitled to the orders sought?

## 6. Issue No. I;

The interested party has contended that the present application is incompetent on account of the fact that an application for leave to institute the same was filed out of time contrary to the provisions of order 53 rule 2 of the Civil Procedure Rules. The interested party has contended that the decision of the tribunal was made on 21<sup>st</sup> February 2005 while the decision of the Appeals Committee was made on 17<sup>th</sup> July 2008. The interested party contended that the six (6) months limitation period within which the applicant was entitled to seek the quashing of the said decision of the Appeals Committee through an order of certiorari had long expired by the time the applicant brought the

application for leave on 9<sup>th</sup> February 2009. I am not in agreement with the interested party's contention that the applicant's application for leave was filed out of time. It is very clear in the application before me that the decision which has been challenged is the one that was made by the Chief Magistrate's Court on 25<sup>th</sup> August 2008. The decisions of the tribunal and the Appeals Committee were merged in the decision of the Chief Magistrate's Court (the 1<sup>st</sup> respondent) when it adopted as a judgment of the court the decision of the Appeals Committee that had upheld the decision of the tribunal.

7. See, **Wamwea –vs- Catholic Diocese of Muranga Registered Trustees [2003] KLR 389** and **Johana Nyakwoyo Buti –vs- Walter Rasugu Omariba & 2 Others, Kisumu Court of Appeal, civil Appeal No. 182 of 2006 (unreported)**. The decision of the 1<sup>st</sup> respondent having been made on 25<sup>th</sup> August 2008, the application for leave that was filed herein on 9<sup>th</sup> February 2009 was filed within the six (6) months time limit provided for under order 53 rule 2 of the Civil Procedure Rules, 2010. The interested party's objection to the application herein on account of time bar is therefore overruled. It is my finding that the application is not incompetent on that account.

**8. Issue No. II;**

The tribunal and the Appeals Committee were established under the Land Disputes Tribunals Act No. 18 of 1990 (now repealed) (hereinafter referred to only as "the Act"). Being a creature of statute, the tribunal's jurisdiction was spelt out in the said statute. Section 3 (1) of the Act conferred upon the tribunal, jurisdiction to determine disputes of a civil nature involving the division of or the determination of boundaries to land, a claim to occupy or work land and, trespass to land. The tribunal could not exercise any jurisdiction outside that which was conferred by the Act. There is no doubt that the Act did not confer upon the tribunal jurisdiction to determine disputes over inheritance or ownership of land. The dispute that was taken before the tribunal by the interested party concerned inheritance and ownership of land and as such was outside the tribunal's jurisdiction.

9. The decision of the tribunal that was made on 21<sup>st</sup> February 2005 was therefore made without jurisdiction. A decision which is arrived at without jurisdiction is in law a nullity. In upholding the decision of the tribunal that was null and void and ordering the registration of the interested party as the owner of the suit property, the Appeals Committee presided over a nullity. The Appeals Committee having reached a conclusion that there was no competent or proper appeal before it, it had no jurisdiction in my view to purport to uphold the decision of the tribunal that was a nullity. The decisions of the tribunal and the Appeals Committee were therefore in my view arrived at without jurisdiction.

10. The decision of the Appeals Committee was presented to the 1<sup>st</sup> respondent for adoption as a judgment of the court under section 7 of the Act. In my view, section 7 of the Act presupposed a valid decision of the tribunal. In this case, there was no valid decision from the tribunal or the Appeals Committee which could be validly adopted by the 1<sup>st</sup> respondent as a judgment of the court. The 1<sup>st</sup> respondent had no jurisdiction to adopt a nullity as a judgment of the court. It is my finding therefore that the 1<sup>st</sup> respondent's judgment was equally null and void.

**11. Issue No. IV;**

I am satisfied that the applicant is entitled to some of the orders sought herein. The applicant has established that the decision of the 1<sup>st</sup> respondent sought to be reviewed herein was arrived at without jurisdiction. This court in exercise of its supervisory jurisdiction has power to remove the said decision to this for the purposes of being quashed. The applicant is therefore entitled to the order of certiorari sought. I however have some reservations with regard to the prayer for an order of prohibition sought against the 2<sup>nd</sup> respondent. According to the evidence before me, the decisions of the Appeals Committee and the 1<sup>st</sup> respondent have been executed by the 2<sup>nd</sup> respondent. The deceased's title to the suit property was cancelled and the suit property registered in the name of the interested party on 22<sup>nd</sup> April 2009 by the 2<sup>nd</sup> respondent. See, the certificate of official search dated 11<sup>th</sup> August, 2010 annexed to the affidavit of the interested party sworn on

12<sup>th</sup> November 2012 as exhibit “JOM 4”. The prayer for prohibition which seeks to prohibit the execution of the said decisions has therefore been overtaken by events. The court cannot prohibit what has already taken place. An order of prohibition cannot issue in respect of a decision or an act that has already been done. An order of prohibition looks to the future and not the past. Prayer 2 in the application cannot therefore be granted.

**12. Conclusion;**

In conclusion, the applicant’s application dated 3<sup>rd</sup> March, 2009 succeeds in part. The same is allowed in terms of prayer 1 thereof. The applicant shall have the costs of the application.

**Delivered, signed and dated at KISII this 21<sup>st</sup> of November, 2014.**

**S. OKONG’O**

**JUDGE**

**In the presence of:-**

..... for the applicant

.....for the respondents

..... for the interested party

..... Court Clerk

**S. OKONG’O**

**JUDGE**