



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 100 OF 2011 (JR)

**IN THE MATTER OF APPLICATION BY AGNES NYABOKE MOGAKA TO APPLY FOR
JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)**

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990

AND

IN THE MATTER OF LR. NO. NORTH MUGIRANGO/MAGWAGWA 1/1008

AND

IN THE MATTER OF SENIOR PRINCIPAL MAGISTRATE – NYAMIRA LAW COURTS

BETWEEN

AGNES NYABOKE MOGAKA EX PARTE
APPLICANT

VERSUS

NYAMUSI LAND DISPUTES TRIBUNAL BOARD 1ST RESPONDENT

THE SENIOR PRINCIPAL MAGISTRATE’S COURT AT NYAMIRA 2ND RESPONDENT

AND

FRANCIS ONYANCHA MOGAKA INTERESTED
PARTY

JUDGMENT

1. At all material times, the applicant was the registered proprietor of all that parcel of land known as LR No. North Mugirango/Magwagwa I/1008(hereinafter referred to as “the suit property”). Sometimes in September, 2011 or thereabouts the interested party lodged a claim against the applicant with the 1st respondent concerning the suit property. The interested party claimed that he was entitled to a portion of the suit property. The interested party contended that the suit property had been divided and portions thereof given to him and the applicant by his deceased father who was the previous owner thereof and that the applicant had destroyed the boundary that had marked the interested party’s portion and the

applicant's portion of the suit property, encroached on the interested party's side of the said property and acquired a title deed in her name for the entire parcel of land, the interested party's portion thereof included. The interested party urged the 1st respondent to compel the applicant to vacate the interested party's portion of the suit property and to cause the same to be transferred to the interested party. The 1st respondent heard the interested party and his witnesses in relation to the said claim. The applicant is said to have refused to participate in the proceedings. In its decision made on 21st September, 2011, the 1st respondent ordered that the suit property be subdivided into two portions and a portion thereof transferred to the interested party. The 1st respondent's decision was lodged before the 2nd respondent which adopted the same as a judgment of the court on 27th October, 2011.

2. The applicant was dissatisfied with the decision of the 1st respondent and its adoption by the 2nd respondent as a judgment of the court as aforesaid. The applicant moved to this court on 8th November, 2011 and obtained leave of the court to apply for an order of certiorari to remove to this court and quash the order that was made by the 1st respondent and subsequently adopted as a judgment of the court by the 2nd respondent. Pursuant to the said leave, the applicant brought the application herein for judicial review on 9th December, 2011. In the application that was brought under order 53 rules 3 and 4, the applicant sought the following orders, namely, that;

a) The honourable court be pleased to issue an order of prohibition prohibiting the 2nd respondent or any other court from further hearing Nyamira Senior Resident Magistrate's Misc. Civil Application No. 33 of 2011, Francis Onyancha Mogaka vs. Agnes Nyaboke Mogaka or any other application seeking to adopt as a judgment of the court the 1st respondent's decision dated 29th December 2011.

b) The honourable court be pleased to issue an order of certiorari to remove into the High Court and quash the proceedings and the decision of the 1st respondent dated 29th September 2011.

c) That costs of this application and of the chamber summons application dated November 2011 be borne by the interested parties.

3. The application was supported by the affidavit of the applicant sworn on 8th December, 2011 and the statutory statement that was filed in court with the application for leave. The application was premised on grounds among others that the applicant was the registered owner of the suit property and that her title to the property had been upheld by the High Court. The applicant contended that the 1st respondent had no jurisdiction to award the interested party a half portion of the suit property. The applicant contended that in the circumstances, the court should issue an order of prohibition to prohibit the 2nd respondent from implementing the said ultra-vires decision by the 1st respondent. The applicant contended further that if the court does not issue the order of certiorari sought herein, the applicant stands to lose half portion of the suit property to the interested party.

4. The application was opposed by the interested party. The interested party filed a replying affidavit sworn on 9th July 2013 in which he admitted that he lodged a complaint or a claim with the 1st respondent and that the 1st respondent after hearing his claim made a determination in his favour. The interested party averred that the 1st respondent's said decision was lodged with the 2nd respondent who adopted the same as a judgment of the court on 27th October, 2011. The interested party averred that the 1st respondent's decision having been adopted by the court as a judgment, the same is not capable of being quashed as sought by the applicant. The interested party has averred further that the 2nd respondent having adopted the decision of the 1st respondent on 27th October, 2011 as aforesaid, the order of prohibition sought by the applicant herein which is directed at the same activity cannot issue as the court cannot prohibit what has already taken place.

5. When the matter came before me on 10th March 2014, I directed that the application be argued by way of written submissions. The advocates for both parties filed their submissions as directed by the court and the same are on record. I have considered the applicant's application and the replying affidavit filed by the interested party in opposition thereto. I have also considered the respective submissions filed by the advocates for the parties and the case law cited in support thereof. The issues that arise for determination are namely, whether the applicant's application is maintainable and, whether the applicant is entitled to the orders sought. The interested party has objected to the applicant's application on two grounds which do not go to the merit of the application but rather to its competency.

6. The first issue which has been raised by the interested party is that the decision by the 1st respondent that the applicant has sought to quash through prayer 2 of the application was adopted by the 2nd respondent as a judgment of the court on 27th October, 2011 before the institution of these proceedings and as such the same ceased to be a decision of the 1st respondent and assumed the status of a judgment of the court and as such the same cannot be quashed. It is not in dispute that by the time the applicant sought leave to institute this application for judicial review, the 1st respondent's decision had already been lodged with the 2nd respondent and adopted as a judgment of the court. I am in agreement with the contention by the interested party that on adoption of the 1st respondent's decision by the 2nd respondent as a judgment of the court, the said decision was merged with the decision of the 2nd respondent that adopted it and it became a judgment of the court. The 1st respondent's decision ceased therefore to exist independently of the 2nd respondent's decision and as such the same was not capable of being quashed.

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 applicant should have sought not only the quashing of the 1st respondent's decision but also the decision of the 2nd respondent. If this court was to purport to quash the decision of the 1st respondent, what would be the fate of the decision of the 2nd respondent that had adopted it? This would create judicial absurdity a situation that the court must avoid at all cost. I am therefore in agreement with the contention by the interested party that after the adoption of the decision of the 1st respondent as a judgment of the court, the same ceased to exist independently and as such cannot be quashed. Failure by the applicant to seek the quashing of the decree or order of the 2nd respondent that adopted the said decision as a judgment of the court is fatal to the applicant's application for an order of certiorari.

8. I am also in agreement with the interested party that the applicant's prayer for an order of prohibition is misconceived. This is for two reasons. First, the applicant neither sought nor obtained leave of the court to apply for an order of prohibition. In the circumstances, it would be contrary to the provisions of Order 53 1(1) of the Civil Procedure Rules, 2010 to grant such order. Secondly, an order of prohibition looks at the future and not the past. This means that prohibition cannot undo things which have been done. As I have stated above, when the applicant instituted these proceedings, the decision of the 1st respondent had already been adopted by the 2nd respondent as a judgment of the court. In the circumstances, the applicant cannot purport to seek an order to prohibit the adoption of the said decision of the 1st respondent by the 2nd respondent. For the foregoing reasons, it is my finding that the applicant's application herein is not maintainable.

9. In conclusion, I find no merit in the Notice of Motion application dated 8th December, 2011. The same is dismissed accordingly. In view of the relationship between the parties, each party shall bear its own costs.

Delivered, signed and dated at KISII this 14th of November, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i h/b for G. J. Masese for the applicant

N/A for the respondents

N/A for the ex parte applicant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE