REPUBLIC OF KENYA

High Court at Kisii

Miscellaneous Civil Application 109 of 2011

IN THE MATTER OF AN APPLICATION BY JOHNSON AYIENDA TO APPLY FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

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

AND

IN THE MATTER OF MARANI LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF CHIEF MAGISTRATE'S COURT AT KISII

BETWEEN

REPUBLIC……..……..……APPLICANT

V

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

THE CHIEF MAGISTRATE'S COURT AT KISII…….....…..……..2ND RESPODNENT

AND

JACQUES ORANGI AYIENDA

DONALD BOSIRE AYIENDA…….....…….INTERESTED PARTIES

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EXPARTE

JOHNSON AYIENDA

JUDGMENT

1. Introduction:

The exparte applicant, **Johnson Ayienda** (hereinafter referred to only as **"the applicant"**) sought and obtained leave of this court on 5th December, 2011 to institute judicial review application for an order of certiorari. The application was filed on 20th December, 2011. The same was brought on the grounds set out in the Supporting affidavit of the applicant sworn on 20th December, 2011, and the Statement of facts dated 29th November, 2011 which was filed pursuant to the provisions of Order 53 Rules 1 and 2 of the Civil Procedure Rules, 2010 in support of the application for leave. The application seeks the following reliefs;

i. An order of prohibition prohibiting the 2nd respondent or any other court from further hearing Chief Magistrate Court's Misc. Civil Application No. 115 of 2011, Jacques

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Ayienda or any other application seeking to adopt as judgment of the court the 1st respondent's decision dated 29th September, 2011;

ii. **An order of certiorari to remove into this court and quash the proceedings and decision of the 1st**

respondent dated 29th November, 2011;

iii. **The cost of the application**.

2. The grounds on which the application has been brought;

The applicant's application has been brought on the following main grounds;

i. that the 1st respondent had no jurisdiction to make the decision dated 29th September, 2011 ;

ii. **that the said a decision was ultra vires, unconstitutional, null and void and;**

iii. that the said decision was made in breach of the rules of natural justice.

The facts of this case in summary as far as I can gather from the affidavits on record are as follows. The applicant was at all material times the registered proprietor of all those parcels of

land known as **LR. No. West Kitutu/ Mwakibagendi/ 1395, West Kitutu/ Mwakibagendi/ 876 and West Kitutu/ Mwakibagendi/ 1611** (hereinafter referred to as **"the suit properties"** where the context so admits). The parcel of land, LR.No.West Kitutu/ Mwakibagendi/ 1395 was subdivided in the year 2010 into **LR. Nos. West Kitutu/ Mwakibagendi/2858,2859 and 2860.** The interested parties are the sons of the applicant. Sometimes in the year 2007 or thereabouts, the interested parties got concerned that the applicant was disposing of most of his land without consulting them. The parties tried to resolve the dispute with the assistance of the village elders and the provincial administration but were unsuccessful. In the year 2011, the interested parties lodged a claim against the applicant before the 1st respondent. In their claim, they accused the applicant of selling family land without consulting them and sought an order that the applicant be directed to divide the suit properties between his two (2)

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households represented by his two (2) wives. Each household would in turn divide their share among themselves. The applicantobjected to the interested parties' claim on various grounds. The 1st respondent heard the parties and their witnesses and by a decision made on 21st June, 2011, ordered that the land parcel Nos. West Kitutu/Mwakibagendi/1395 and 876 be divided equally between the applicant's two wives and that Plot No. West Kitutu/Mwakibagendi/ 1611, be retained by the applicant. The 1st respondent ordered further that once their decision is adopted by the Court, the interested parties should commission a surveyor to carry out the sub-division of the said properties and in the event that the applicant declines to execute the documents necessary to accomplish the said sub-division, the executive officer of the court should do so on behalf of the applicant. The 1st respondent's decision aforesaid was lodged with the 2nd respondent for adoption as a judgment of the court on 31st

October, 2011. The 2nd respondent adopted the said decision on 25th November, 2011 and a decree was issued accordingly on 13thDecember, 2011. The applicant was aggrieved by the said decision and its adoption by the 2nd respondent for reasons that I have already set out herein above and decided to institute these proceedings.

3. The application is opposed by the 1st respondent and the interested parties. The interested parties filed a replying affidavit sworn on 30th March, 2012 by the 1st interested party on his behalf and on behalf of the 2nd interested party. The 1st respondent filed a replying affidavit sworn by its then, Chairman, one, Daniel Kimori Nyakundi on 30th April, 2012. The 1st respondent and the interested parties supported the 1st respondent's decision and its adoption by the 2nd respondent. The 1st respondent opposed the application on the grounds that, the decision of the 1st respondent was proper the same

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having been made after giving both parties an opportunity to be heard. The 1st respondent also contended that the application has been overtaken by events the decision complained of having been adopted as a judgment of the court by the 2nd responded prior to the institution of these proceedings. On their part, the interested parties opposed the application on several grounds. The main ground put forward by the interested parties was that, the application is incompetent, misconceived and amounts to an abuse of the process of the court the same having been brought after the adoption of the decision complained of by the 2nd respondent as a judgment of the court. The interested parties contended that this court does not have jurisdiction to quash a decree of a court of competent jurisdiction. On 25th May, 2012, the parties agreed

by consent to argue the application by way of written submissions. The applicant filed his submissions on 8th June, 2012, the interested parties on 9th July, 2012 and the 1st respondent on 8th March,

2013. In his submission, the applicant contended that the 1st respondent had no jurisdiction to determine a dispute over a title to land duly registered under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed). The applicant contended that the jurisdiction of the 1st respondent was limited under section 3 of the Land Disputes Tribunal Act, No. 18 of 1990 (now repealed) to the determination of disputes of 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, or trespass to land. The applicant contended that the 1st respondent did not have jurisdiction annul or alter the ownership of registered land as such jurisdiction is conferred exclusively upon the court by the provisions of section 143 of the Registered Land Act, Cap. 300 (now repealed). The applicant submitted further that the decision of the 1st respondent cannot stand also because one of the parcels of land

namely Plot No. West Kitutu/Mwakibagendi/1395 had been sub-divided into three (3) portions and separate titles issued to third parties before the dispute was taken before the 1st respondent and that those parties were not enjoined in the claim that was lodged before the 1st respondent. The said parcel of land on which the 1st respondent' decision purported to attach did not therefore exist as of the date of the decision which as concerns that parcel of land was made in vain. The applicant submitted further that as the registered proprietor of the suit properties the applicant had the absolute power to use and abuse. The applicant could not therefore be compelled to transfer the suit properties to his wives while still alive. Finally, the applicant submitted that the decision of the 1st respondent complained of herein was made on 29th September, 2011 by which time the 1st defendant had ceased to exist after the enactment of The Environment and Land Court Act, No.19 of

2011. The decision was therefore made by a non- existent body and as such was null and void ab initio. The submissions of the 1st respondent and the interested parties although filed separately raised similar issues. I will therefore analyze them together. The 1st respondent and the interested parties submitted that the applicant's application was filed pursuant to leave that was granted by this court on 5th December, 2011. The leave that was sought and granted by the court allowed the applicant to apply for orders of certiorari to remove to the court and quash the decision of the 1st respondent made on 29th September, 2011 that was adopted by the 2nd respondent. The applicant did not seek and never obtained leave of the court to apply for an order of prohibition. The 1st respondent and the interested parties contended

therefore that the present applicant is incompetent to the extent that it purports to be seeking an order of prohibition for which no leave was

obtained. The 1st respondent and the interested parties submitted further that decision of the 1st respondent was madeon 21st June, 2011 and not on 29th September, 2011 as claimed by the applicant. It was therefore their contention that the applicant is seeking the assistance of the court to quash a non-existent decision which will result in the court issuing an order in vain. To this extent again, the 1st respondent and the interested parties submitted that the application before the court is incompetent and amounts to an abuse of the process of the court. Finally, the 1st respondent and the interested parties submitted that the decision of the 1st respondent having been adopted by the 2nd respondent became a judgment of the court. It therefore ceased to be a decision of the 1st respondent but that of the 2nd respondent. There was therefore no decision of the 1st respondent capable of being quashed by an order of certiorari.

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4. I have considered the applicant's application, the statement and affidavit filed in support thereof together with the applicant's advocates submissions. I have also considered the affidavits in reply filed by the 1st respondent and interested parties in opposition to the application and their advocates' submissions. The issues that present themselves for determination in this application are two fold, namely;

i. **Whether the application is incompetent;**

ii. **Whether the applicant is entitled to the reliefs sought.**

5. Issue No.1:

The applicant's application for leave to institute judicial review proceedings was filed on 29th November, 2011. According to the said application, leave was sought to bring an application for judicial review in the nature of certiorari to bring before the court and quash the decision of the 1st respondent made on **29th September, 2011** that had been adopted as a judgment of the

court by the 2nd respondent**.** Theapplicant also sought an order that the leave sought if granted should operate as a stay. The court granted leave as prayed and the order extracted by the applicant and signed by the Deputy Registrar on 9th December, 2011 is very clear as to the orders that were made by the court. I have noted however that, although the applicant sought and obtained leave of the court to bring an application for judicial review in the nature of certiorari only, the Notice of Motion application in prayer (1) is seeking an order of prohibition. There is no doubt looking at the application for leave and the order granted by the court that, no leave was granted to the applicant to bring judicial review proceedings in the nature of an order of prohibition. It follows therefore that the order of prohibition sought in prayer (1) in the applicants Notice of Motion application dated 20th December, 2011 has been sought without the requisite leave contrary to the provisions of Order

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53, rule 1(1) of the Civil Procedure Rules, 2010. To that extent, the application is incompetent. The said prayer which is sought without leave cannot be granted. The application is also incompetent in relation to prayer (2) thereof which seeks an order of certiorari for two (2) reasons. First, a copy of the decision of the 1st respondent attached to the applicant's affidavit in support of the application herein has no date although in the said affidavit and in the application, the applicant claims that the said decision was made on 29th September, 2011. Apart from the statement in the applicant's affidavit there is no other evidence that was placed before court to support the applicant's contention that the decision of the 1st respondent was made on 29th September, 2011. On the other hand, the 1st respondent and the interested parties maintained that the 1st respondent's decision was made on 21st June, 2011 and not 29th September, 2011 as claimed by the applicant. In the

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interested parties' replying affidavit, they have annexed a copy of the same decision of the 1st respondent similar to the one annexed to the applicant's affidavit save that this one is dated 21st June, 2011. I was unable to decide on the material before the court whether the 1st respondent's decision challenged herein was made on 29th September, 2011 or 21st June, 2011. To resolve this conflict, I went out searching for an original copy of that decision. The search took me to the court file for the **Chief Magistrate's Court at Kisii, Misc. (LDT) No. 115 of 2011,** which is the application that was made before the 2nd respondent for the adoption of the 1st respondent's decision and through which the original copy of the 1st defendant's proceedings and decision were lodged with the 2nd respondent. The said proceedings show that the hearing of the interested parties' claim before the 1st respondent was finalized on 26th April, 2011 and that the 1st respondent delivered its ruling on the matter on 21st June, 2011

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which is the date given in the original copy of the decision of 1st respondent that was lodged in that file for adoption. This decision of the 1st defendant dated 21st June, 2011 that was lodged with the 2nd respondent for adoption pursuant to the provisions of section 7 of the Land Disputes Tribunal Act, No.18 of 1990, must be taken as the correct decision of the 1st respondent in the absence of any other decision to the contrary . It is therefore my finding that the decision of the 1st respondent complained of herein was made on 21st June, 2011 and not on 29th September, 2011as alleged by the applicant in the Notice of Motion application and the chamber summons application for leave respectively. This means that, the applicant has sought an order to quash a non-existent decision. As submitted by the interested parties' advocates, a court of law cannot act in vain. An order of certiorari sought to quash the 1st respondent's decision made on 29th September, 2011 which is non-existent

cannot therefore issue. Secondly, the applicant has in his Notice of Motion application sought the quashing of the decision of the 1st respondent only. By the time this application was filed, the 1st respondent's decision had been adopted by the 2nd respondent as a judgment of the 2nd respondent and a decree issued by the 2nd respondent for execution. Once the decision of the 1st respondent was adopted by the 2nd respondent, it became a judgment of the 2nd respondent and the same could not thereafter stand independently. In this proposition, I find support in the decision of Khamoni J. (as he then was) in the case of, **R.vs. Chairman Land Disputes Tribunal, Kirinyaga District & Another, Exparte Kariuki, [2005] 2 KLR 10,** in which it was held as follows,

" when a decision of the Land Disputes Tribunal has been adopted by a Magistrate's court in accordance with the provisions of the Land Disputes Tribunals Act, the adoption makes the decision of the Tribunal

or the Appeals Committee to be a decision of the Magistrate's court. Consequently, the decision of the Tribunal or Appeals Committee in law ceases to exist as an independent decision challengeable separately in an appeal or judicial review."

The applicant could not therefore seek to quash the decision of the 1st respondent after its adoption as a judgment of the 2nd respondent without challenging the said judgment and the decree that flowed

therefrom. Even if this court was to quash the decision of the 1st respondent, the judgment and decree of the 2nd respondent will remain and there would be nothing stopping the interested parties and the 2nd respondent from executing the same now that the order of prohibition that was sought by the applicant was without leave and as such cannot issue. An order of certiorari directed against the decision of the 1st respondent which has become a judgment of the 2nd respondent would in my view be in vain unless a similar order is

directed against the judgment and decree of the 2nd respondent. I am therefore not inclined to grant such an order. I don't however agree with the 1st respondent and the interested parties' submission that this court has no jurisdiction to quash by an order of certiorari the judgment and decree of the 2nd respondent. In exercise of this court's supervisory power over inferior courts and tribunals, the court has jurisdiction to quash by an order of certiorari any judgment or decree issued by a subordinate court without jurisdiction. If the decision of the 1st respondent that was adopted by the 2nd respondent as a judgment was made without jurisdiction, the 2nd respondent's adoption thereof would likewise have been made without jurisdiction. If this court had been moved to quash the said judgment and the decree that was issued pursuant thereto, the court would not hesitate to do so.

6. Issue No.2:

From what I have set out herein above, I am not satisfied that the applicant has made out a case for the orders of certiorari and prohibition sought herein against the respondents and the interested parties. The application fails, partly, for having been brought without leave of the court contrary to the provisions of Order 53 Rule 1(1) of the Civil Procedure Rules with respect to the prayer for prohibition, partly, for having been directed against a non-existent decision and lastly, for seeking to quash a decision that had already been adopted as a judgment of the court. Before concluding this judgment, I would like to make two (2) observations. First, if the application before me was directed at the decision of the 1st respondent that was made on 21st June, 2011 and, the applicant had obtained leave to seek an order of prohibition and had sought an order of certiorari

against the decisions of both the 1st and 2nd respondents, I would have on the facts that I have set out herein above allowed the application. I am in full agreement with the submission by the applicant that the 1st respondent had no jurisdiction to determine a dispute over title to land and the 2nd respondent similarly could not adopt as a judgment of the court, a decision that was arrived at without jurisdiction. Secondly, I have considered without being prompted to do so by the applicant whether the application can be saved by the provisions of Article 159(2) (d) of the constitution of Kenya. I have concluded that this is not possible as the issues militating against the granting of the orders sought by the applicant are not mere technical issues of procedure but substantive issues of law. As things stand therefore, the application must fail. The Notice of Motion application dated 20th December, 2011 is hereby dismissed. Due to the relationship between the

applicant and the interested parties and the fact that the 1st respondent contributed to the bringing of these proceedings by presiding over a dispute with respect to which it had no jurisdiction, I order that each party shall bear its own costs.

Dated, signed and delivered at Kisii this 31st day of May, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. G. Masese for the Applicant

No appearance for the 1st Respondent

Mr. B. Masese holding brief for Nyamurongi for the Interested Parties

Mobisa Court Clerk

S. OKONG'O,

JUDGE.