REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL.APPL. NO. 64 OF 2010

JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY JOEL OMANGA FOR LEAVE 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 ETAGO LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF LR.NO.SOUTH MUGIRANGO/NYATARO/513

BETWEEN

REPUBLIC……..……..……APPLICANT

VERSUS

CHAIRMAN ETAGO LAND DISPUTES TRIBUNAL…….....……1ST RESPONDENT

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

AND

HENRY NYANCHOKA…….…….....……..…….INTERESTED PARTY

EXPARTE

JOEL OMANGA

RULING

1. **Introduction**:

What is before me is an exparte application by **Joel Omanga** (hereinafter referred to only as **"the applicant"**) dated 12th June, 2010 in which he is seeking leave of the court to institute judicial review application for orders of certiorari and prohibition against the respondents. It is not clear from the record why this exparte application that was brought under certificate of urgency has taken over two (2) years to be heard. I have noted the following from the court file; on 12th July, 2010, the applicant lodged in court a notice of intention to institute an application for leave to apply for orders of certiorari. Also lodged in court on the same day were statutory statement dated 12th July, 2010 and Verifying Affidavit sworn by the applicant on 12th July, 2010. The applicant did not

institute the application for leave the following day after the said notice as was the normal practice at the time when leave to the Deputy Registrar was mandatory unless excused by the court prior to making the application for leave. It was not until 30th July, 2010, about fourteen (14) days after the said notice that the applicant filed the application for leave herein. Although the application was brought under certificate of urgency, the applicant did not cause it to be placed before the judge for immediate disposal. The applicant left the application pending for over 1 ½ years without listing it for hearing. The application was ultimately listed for hearing on 11th June, 2012. This date was taken on 14th May, 2012. For some reason which is not indicated in the court file, the application was not heard on 11th June, 2012. It took the applicant again 5 months to relist the application for hearing. The application was ultimately listed for hearing on 12th March, 2013 when it was

heard. This date was taken on 20th December, 2012. I have given this history to show that the applicant has not been keen and diligent in pursuing this application. This slackness in prosecuting the application will be revisited later in this ruling.

2. The application herein was brought on the grounds set out in the supporting affidavit and verifying affidavit of the applicant both sworn on 12th July, 2010 and the Statement of facts dated 12th July, 2010. The application sought the following reliefs;

i. **That leave be granted to apply for orders of certiorari to bring to the honorable court and to have abashed (sic) all the proceedings findings, and decision of 22nd day of January, 2010 in Gucha District Etago Division Land Disputes Tribunal Miscellaneous Case No. 8 of 2009 (HENARY (sic) NYAKOE NYANCHOKA-VS-JOEL OMANGA & PRESTOR OKEMWA) (REF:GUCHA-ETAGO-LTD/LPN/513);**
ii. **Leave be granted to apply for order (sic) of prohibition to prohibit the respondent (sic) or their servants and/or agents or any public officer from implementing the decision made on 22nd day of January, 2010 in (HENARY (sic) NYAKOE NYANCHOKA-VS-JOEL OMANGA & PRESTOR OKEMWA) (REF:GUCHA-ETAGO-LTD/LPN/513);**
iii. **The granting of such leave does operate as a stay of the proceedings, findings and decisions (sic) in Gucha District Etago Division Land Disputes Tribunal Miscellaneous Case No. 8 of 2009 (HENARY (sic) NYAKOE NYANCHOKA-VS-JOEL OMANGA & PRESTOR OKEMWA);**
iv. **The costs of the application be provided for**.

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

The applicant has brought the application on the following main grounds;

i. **that the 1st respondent had no jurisdiction to entertain the dispute that was brought before it by the interested party and to make the decision dated 22nd January, 2010 ;**
ii. **that the said decision was ultra vires, irregular, unlawful, null and void and;**
iii. **that the adoption of the said decision by the 2nd respondent was equally ultra vires the**

powers of the 2nd respondent.

The facts of this case in summary as set out in the affidavits on record and the exhibits annexed thereto are as follows. The applicant is the son of one**, Okemwa Kariago**, deceased. The

applicant's deceased father was at all material times the registered proprietor of all that parcel of land known as **LR. No. South Mugirango/ Nyataro/513** (hereinafter referred to as **"the suit property"** where the context so admits). The applicant's deceased father had a brother by the name **Nyanchoka Keriago,** also deceased. Sometimes in January, 2010, the interested party herein who is the son of **Nyanchoka Keriago,** deceased made a claim against the applicant and the applicant's brother one, **Prestor Okemwa** before the 1st respondent seeking an order compelling the applicant and his said brother to sub-divide the suit property and transfer a half portion thereof to the interested party. The interested party brought the said claim on the ground that the applicant's deceased father and the interested party's deceased father, Nyanchoka Keriago's were supposed to share of the suit property equally. The interested party claimed that the suit

property belonged to their grandfather, one, **Keriago** although the same was registered in the name of the applicant's father aforesaid. The interested party had therefore gone to the 1st respondent to claim his father's alleged share in the suit property. The 1st respondent heard the parties and their witnesses and by a decision made on 22nd January, 2010, ordered that the suit property be divided equally between the applicant and his said brother on one part and the interested party on the other part and in the event that the applicant and his said brother declines to execute the documents necessary to accomplish the said division, the executive officer of the court should do so on their behalf. The 1st respondent's decision aforesaid was lodged with the 2nd respondent for adoption as a judgment of the court on 11th February, 2010 and the same was adopted on 19th May, 2010. 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. According the applicant's affidavit in support of this application, the applicant's father in whose name the suit property is registered died on 18th August, 1987. The interested party's claim was therefore lodged against a property of a deceased person and concerned the division of the said property which was not within the jurisdiction of the 1st respondent. The applicant stated further that the decision of the 1st respondent amounted to intermeddling with the estate of a deceased person contrary to the provisions of the Succession Act, Cap. 160, Laws of Kenya. The applicant claimed also that the 1st respondent was not properly constituted when it presided over the interested party's claim as the members who constituted the 1st defendant at the material time had not been gazetted. The applicant contended therefore that the 1st

respondent's decision was nothing but a nullity. Finally, the applicant contended that the dispute before the 1st respondent touched on the issue of title to land which the 1st respondent had no jurisdiction to determine.

3. When the application came up before me for hearing on 12th March, 2013, Mr.Sagwe, advocate appeared for the applicant. In his submission, Mr.Sagwe contended that the 1st respondent had no jurisdiction to determine the claim that was presented before it by the interested party over the suit property. Counsel argued that the suit property was registered in the name of the applicant's father who was deceased as at the time the interested party's claim was lodged with the 1st respondent and that no letters of administration had been applied for or obtained with respect to his estate. Counsel argued that the dispute presented to the 1st respondent concerned the issue of division of the estate of the applicant's deceased father and the

1st respondent had no jurisdiction over such matters which are reserved for the succession court. Counsel argued that the decision of the 1st respondent amounted to intermeddling in the estate of a

deceased person. Counsel submitted that the 1st respondent had no jurisdiction to entertain the interested party's claim and urged the court to grant leave so that the applicant may institute appropriate application for the quashing of the said decision. Mr. Sagwe also urged the court to make an order that the application for judicial review that the applicant had lodged on 30th July, 2010 before leave was granted be deemed as duly filed.

4. I have considered the applicant's application together with the statement and affidavits filed in support thereof. I have also considered the applicant's advocates submissions. This being an application for leave to institute judicial review application, the only issues that present themselves for determination at this stage are the following;

I. **Whether the application has been brought in accordance with the applicable rules and procedure;**
II. **Whether the applicant has established a prima facie case against the respondents which should be pursued in a judicial review application.**
III. **Whether the leave sought should be granted.**
IV. **Whether the order for stay of proceedings should be granted;**

5. Issue No.I:

The applicant has sought leave to apply for an order of certiorari and prohibition and for such leave if granted to operate as a stay. The decision sought to be quashed was made on 22nd January, 2010 while the application herein was filed on 30th July, 2010. The application was therefore filed after a lapse of over 6 months from the date of the decision complained of. This court is barred by the provisions of Order 53 rule 2 of the Civil Procedure Rules as read with section 8 of the Law Reform Act, Cap. 32 Laws of Kenya from granting leave to apply for an order of certiorari after a lapse of 6

months from the date of the decision complained of. The leave sought herein as far as it relates to an order of certiorari is therefore time barred. I have also noted that the application has been brought in the name of the Republic instead of the name of the applicant. This is contrary to well established procedure for instituting applications for leave to apply for judicial review. I am of the view however that this procedural blunder is not fatal to the application. It can be cured by the provisions of Article 159 (2) (d) of the Constitution of Kenya being a mere procedural lapse which neither goes to the jurisdiction of the court nor prejudices any party.

6. Issue No.II:

I am satisfied from the material placed before the court that the applicant has in this application raised weighty issues of law and procedure against the proceedings and decisions of the 1st and 2nd respondents complained of herein. The applicant would therefore

in normal circumstances be entitled to have these issues heard and determined in a judicial review application. Under section 3 of the Land Disputes Tribunal Act, No. 18 of 1990 (now repealed) the jurisdiction of the 1st respondent was limited 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. I am doubtful whether the 1st respondent had jurisdiction over succession disputes or disputes concerning title or ownership of registered land. I am not satisfied however from the manner in which the application for leave is framed that the proposed judicial review application stands any chance of success. In the Court of Appeal case of **Njuguna-Vs-Minister for Agriculture (2000) 1 E.A 184,** it was held that,

> **"the test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case, that the reliefs might be granted on the hearing of the substantive application.''**

As I have already mentioned above, the application herein is time barred as far as the leave sought to apply for an order of certiorari is concerned. This leaves only the leave sought to apply for an order of prohibition for consideration. The applicant has in his chamber summons application sought leave to apply for an order of prohibition to prohibit the execution of the decision of the 1st respondent made on 22nd January, 2010. 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 for the purposes of execution. The decision of the 1st respondent became a judgment of the 2nd respondent upon adoption as aforesaid and ceased to exist independently. See the persuasive holding by Justice Khamoni (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 he said that,

> **"When a decision of the Land Disputes Tribunal has been adopted by a Magistrates Court in accordance with the provisions of The Land Disputes Act, the adoption makes the decision of the Tribunal or the decision of the Appeals Committee be a decision of the Magistrates 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 cannot therefore be successful in seeking to prohibit the execution of the decision of the 1st respondent after its adoption as a judgment of the 2nd respondent. What will be executed is the judgment and decree of the 2nd respondent and not the decision of the 1st respondent. It follows that even if the applicant is granted leave to apply for an order of prohibition to prohibit the execution of the decision of the 1st respondent, such leave would be in vain as it should have been directed against the judgment and decree of the 2nd respondent. I am aware that these are issues which should have been canvassed at the hearing of the judicial review application. I am of the view however that some

issues are too plain for argument and that the requirement for leave before instituting judicial review application is to block applications with no chances at all of succeeding from moving to the next stage. This serves twin purpose, namely, saving of courts time and, stopping vexation of parties and abuse of the process of the court. I am convinced that this is one such application which should not be allowed to take the next step. I am fortified in this proposition by the statement of Lord Diplock in the case of, **R Vs. IRC exparte Federation of Self Employed (1982) AC 642** where he said;

> **"The need for leave to start proceedings for remedies in Public Law is not new. It applied previously to applications for prerogative orders though not to civil courts for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove uncertainty in which public offices and authorities might be left as to whether they could safely proceed with administrative action while proceeding for judicial review is actually pending even though misconceived."**

7. Issue No.III.

From what I have set out herein above, it is my finding that the applicant's application for leave to apply for an order of certiorari to quash the decision of the 1st respondent made on 22nd January, 2010 is time barred. Prayer (a) in the chamber summons application dated 12th July, 2010 is therefore not for granting. As regards leave to apply for an order of Prohibition sought in prayer (b) of the application, I am of the view for the reasons that I have set out herein above that an application for an order of prohibition to prohibit the execution of the decision of the 1st respondent would not succeed as that decision had been adopted as a judgment of the 2nd respondent, and the applicant has not sought leave to quash the decision of the 2nd respondent or to prohibit the execution thereof. Due to the foregoing, I am not satisfied that the

applicant is entitled to the leave sought.

8. Issue No.IV.

Whether or not to make an order that leave to apply for an order of certiorari or prohibition should operate as a stay is a matter for the discretion of the court. Like any other discretion, it must be exercised judicially and in accordance with the established legal principles. An order of stay is not one of the prerogative orders and as such would only be granted where the court grants leave to an applicant to apply for either an order of certiorari or prohibition. In the present case, I have already reached a decision that the applicant is not entitled to the leave sought. This prayer for leave does not therefore fall for consideration save only to state that even if the applicant had obtained the leave sought herein, I would not have in the circumstances of this case ordered that such leave should operate as a stay. The stay is sought against the decision of the 1st respondent that was made on 22nd January, 2010, more than

3 years ago. This decision was adopted as a judgment of the court on 19th May, 2010. In paragraph 12 of the affidavit in support of the application herein the applicant stated that as at the time of bringing this application in the year 2010, the interested party had made an application to execute the 1st respondent's order. It is not clear at the moment at what stage the execution process has reached. I am of the view that it would not have been fair for this court to issue an order staying a decision that was made over 3 years ago. To do so would have amounted to giving an approval to the careless manner in which this application has been mounted and pursued by the applicant.

9. Conclusion;

From what I have set out herein above, I have reached the conclusion that the applicant's application dated 12th July, 2010 must fail in its entirety. The application fails, partly, for having been brought out of time contrary to the provisions of Order 53

Rule 2 of the Civil Procedure Rules with respect to the prayer for leave to apply for an order of certiorari and partly, for having sought leave to apply for an order of prohibition directed against the decision of the 1st respondent that had already been adopted by the 2nd respondent as a judgment of the court. Before concluding this judgment, I would like to state that if this application had been brought timeously and appropriate orders were sought against the decisions of the 1st and 2nd respondents, I would have granted the leave sought. As I have stated above, I am in full agreement with the submissions made by the applicant that the 1st respondent had no jurisdiction to determine a dispute over title to land or division of an estate of a deceased person and that, the 2nd respondent similarly could not adopt as a judgment of the court, a decision that was arrived at without jurisdiction. As things stand however, the application is not for granting. The Chamber Summons application dated 12th July, 2010 is hereby dismissed

with no order as to costs while the Notice of Motion application of the same date that was filed on 30th July, 2010 without leave of the court is struck out.

Dated, signed and delivered at Kisii this 7TH day of JUNE, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Abobo holding brief for Sagwe for the Applicant

Mobisa Court Clerk

S. OKONG'O,

JUDGE.