



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

JUDICIAL REVIEW NO.23 OF 2011

IN THE MATTER OF AN APPLICATION BY:

WILLIAM ROMAN MC TOUGH.....PLAINTIFF

VERSUS

IN THE MATTER OF THE KISUMU EAST DISTRICT LANDS DISPUTES TRIBUNAL

JENIPHER OGADA MBONE.....INTERESTED PARTY

J U D G M E N T

This judgment follows the filing of submissions by both the interested party – **JENNIFER MBONE OGADA** and Exparte applicant – **WILLIAM MC TOUGH** – on the application for judicial review filed here on 22/6/2011 and dated 20/6/2011. The application itself was filed after leave to file it was granted on 3/6/2011. The application is anchored on order 53 Rule 3 of Civil Procedure Rules and all other enabling provisions of law.

The court is being asked to issue an order of **CERTIORARI** to remove to itself and quash the decision of **KISUMU EAST DISTRICT LANDS DISPUTES TRIBUNAL** in Tribunal case No.32/2005. Costs of the application are also sought.

The subject property is **KISUMU/NYAHERA/1250** (hereafter the suit land). It appears clear that there was a dispute between the interested party and the exparte applicant before **KISUMU EAST LAND DISPUTES TRIBUNAL** concerning the suit land. The tribunal – respondent – awarded the suit land to the interested party. This was done in spite of the fact that the suit land was already registered in the name of **EXPARTE** applicant. This necessitated a challenge by the **EXPARTE** applicant via this suit on jurisdictional grounds.

The interested party filed a replying affidavit on 18/7/2011. She stated that the suit land was originally owned by her late great grandfather, Goge son of Ondu, and then registered in the name of Rombo Ondu, son of her brother-in-law, Daudi Ondu. The interested party was then given the suit land by Daudi Ondu and she build a house, in which she is still living since 1966. The interested party stated that the Exparte applicant was registered fraudulently as the owner of the suit land. She also faulted the exparte applicant for asserting that the land tribunal didn't give him a hearing.

The exparte applicant's submissions are generally an oblique restatement of what is to be found in the application and the statement accompanying application for leave. **BUT** there is more: There is an attempted exposition of the applicable law and the court was availed the decided case of **R V NYAMAIYA LAND DISPUTES TRIBUNAL** and 3 others **EXPARTE BENARD ONDIEKI YOHANA: MISC APPL. NO.1/2009, KISII**, as a guide.

The interested party's submissions are not much different either. They generally reflect a recap of what the replying affidavit contains. The thrust of both the replying affidavit and submissions focus on the merits of the case of the interested party. But there was also the assertion that the tribunal had competent jurisdiction to award her the suit land. And the **EXPARTE** Applicant was given a hearing, it was asserted.

Section 3(1) of the **LAND DISPUTES TRIBUNAL'S ACT** confers jurisdiction to decide on:

- (i) Division of, or determination of boundaries to land, including land held in common.
- (ii) A claim to work or occupy land
- (iii) Trespass to land.

Anything beyond the above is in excess of, or outside, jurisdiction. It is ultra VIRES and therefore a nullity. It amounts to nothing. And as the Court of Appeal stated in **KARANJA VS ATTORNEY GENERAL: HCC NO.310/97, NYERI,**

“.....any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order”.

There is a growing body of case law quashing decisions of Land Disputes Tribunal's on the basis of lack of, or in excess of, jurisdiction. When the interested party says the tribunal had competent jurisdiction to award her the land; and when she says that that jurisdiction arises because the land was ancestral land amenable to customary law, she is being ingenious. But this is the kind of ingenuity that Karanja's case (supra) refers to because even if customary law were to apply, its application would only be limited to matters stated in Section 3(1) of the Act (Supra).

The decision to award the land to the interested party was in effect a decision to change ownership of the suit land. When the interested party argues that the tribunal only awarded the land but didn't revoke the title, this also becomes another attempt at ingenuity. The award would ultimately lead to change or revocation of title. Quite clearly therefore, the tribunal acted outside its powers and therefore had no jurisdiction.

It is important to note that the court is not delving into the merits of the case. The focus here is jurisdiction; nothing less and nothing more. The interested party was therefore off the mark to base a big part of her case on the merits of the case.

The court notes that in the application for leave, there was a prayer for prohibition. The subsequent application however, which is the subject of this judgment, abandoned the prayer.

Considering the highlights of the case heretofore, it is obvious the application herein has merits. In fact, the respondent conceded to the application. The opposition by the interested party has not displaced the merits of the application.

An order of certiorari is therefore granted as prayed for in the application with costs to **EXPARTE APPLICANT.**

A.K. KANIARU – JUDGE

31/7/2013

31/7/2013

A.K. Kaniaru – Judge

Roseline O. C/C

No party – Present

Interpretation – English/Kiswahili

Odeny for Exparte Applicant

M/s Alango for Respondents

Interested party absent and in person

COURT: Judgment read and delivered in open COURT.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

31/7/2013