REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION NO. 63 OF 2011

JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY SAMWEL ODOYO MIKWA AND BEATRICE OLACK 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 MIGORI/RONGO LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF RESIDENT MAGISTRATE'S COURT AT RONGO

BETWEEN

REPUBLIC……..……..……APPLICANT

VERSUS

MIGORI/RONGO LAND DISPUTES TRIBUNAL…….……..….1ST RESPONDENT

THE RESIDENT MAGISTRATE'S COURT AT RONGO…….……..2ND RESPODNENT

THE HONOURABLE ATTORNEY GENERAL……3RD RESPONDENT

AND

JANET ATIENO ODONDI…….…….……..1ST INTERESTED PARTY

CALSTOM OKOTH ODONDI……..2ND INTERESTED PARTY

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COLLINS YOUNG ODONDI…….3RD INTERESTED PARTY

JANE ABONGO ODONDI……4TH INTERESTED PARTY

EXPARTE

SAMWEL ODOYO MIKWA

BEATRICE OLACK

JUDGMENT

1. **Introduction**:

The exparte applicants, **Samwel Odoyo Mikwa** and **Beatrice Olack** (hereinafter referred to only as **"the applicants"**) obtained leave of this court on 17th June, 2011 to bring the present application for judicial review. The application which was filed on 22nd June, 2011 was brought on the grounds set out in the body thereof and in the supporting affidavit of the 1st applicant sworn on 22nd June, 2011. The applicants had earlier filed a statutory Statement dated 16th June, 2011 and a Verifying Affidavit sworn by the 1st applicant on the same date. These were filed pursuant to the provisions of Order 53 Rule 1 of the Civil Procedure Rules together with the

application for leave. The applicants sought the following reliefs;

i. **an order of certiorari to quash the proceedings and decision of the 1st respondent dated 31st May, 2011 by which the 1st respondent purported to revoke the applicants' title to the parcel of land known as LR No. North Sakwa/Kamasia/251 (hereinafter referred to only as "the suit property") and directed that new titles do issue in favour of the interested parties;**
ii. **an order of prohibition to prohibit the 2nd respondent and/or any other court of co-ordinate jurisdiction from adopting and/or enforcing the said decision of the 1st respondent dated 31st May, 2011 as its own judgment and/or decree.**

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

In summary, the applicants' application was brought on the following main grounds;

i. **that the 1st respondent had no jurisdiction to make the decision dated 31st May, 2011;**

ii. **that the said decision was illegal, null and void ; and**
iii. **that the 2nd respondent had no jurisdiction to adopt the said decision by the 1st respondent as its own judgment and/or decree.**

The facts that gave rise to the application herein can be summarized from the affidavits and the statement filed in court by the applicants as follows; at all material times, all that parcel of land known

as **LR. No. North Sakwa/ Kakmasia/ 251 ("the suit property")** measuring approximately, 6.8 hectares was registered in the name of one, **George Odondi Ogembo**, deceased(hereinafter referred to only as "the **deceased**". The deceased had two wives, the 4th interested party and one, **Agneta Odondi**, deceased (hereinafter referred to only as "**Agneta**"). Agneta was the deceased's first wife while the 4th interested party was the 2nd wife. The 1st and 3rd interested parties were the children of the deceased by Agneta while the 2nd interested party was a son of the

deceased by the 4th interested party. The 4th interested party applied for grant of letters of administration of the estate of the deceased without the knowledge of some of the members of the deceased's larger family and indicated in her application that she was the sole heir of the estate of the deceased that was comprised of among others the suit property. The 4th interested party obtained a Grant of Letters of Administration of the estate of the deceased on 7th January, 1999. The same was confirmed on 5th October, 1999. After confirmation of the said grant of letters of administration, the 4th interested party transferred the suit property into her name through transmission on 5th July, 2010. On 1st November, 2010, the 4th interested party entered into an agreement for sale of the suit property with the applicants at a consideration of Ksh. 850,000.00. Pursuant to this agreement, the suit property was transferred to the applicants who are husband and wife and they were duly registered jointly as the proprietors

thereof.

3. On 21st January, 2011, the 1st interested party lodged a complaint with the 1st respondent against the 1st applicant and the 4th interested party that the 4th interested party had sold family land (the suit property) to the applicants without the consent of other family members. The 1st interested party sought an order from the 1st respondent to have the suit property which was now in the names of the applicants divided between the houses of the deceased's two wives namely, the 4th interested party and Agneta. The 1st respondent heard the 1st interested party's complaint between 8th February, 2011 and 16th March, 2011 during which period all parties concerned were heard. In a decision that was made on 31st May, 2011, the 1st respondent held that the 4th interested party had acquired the suit property illegally. The 1st respondent proceeded to cancel the applicants' title over the suit property and ordered

that the suit property be divided equally between the interested parties. The 1st respondent's decision aforesaid was lodged with the 2nd respondent on the same day on which it was delivered for adoption as a judgment of the court pursuant to the provisions of section 7 of the Land Disputes Tribunals Act, 1990. The applicants were aggrieved by the said decision and its filing with the 2nd respondent for adoption as a judgment of the court on the grounds that I have already set out herein above and decided to institute these proceedings to challenge the same. The present application is not opposed by the respondents and the 2nd, 3rd and 4th interested parties. They neither filed replying affidavits nor grounds of opposition. The application is however opposed by the 1st respondent. The 1st respondent filed grounds of opposition and a replying affidavit. In her replying affidavit sworn on

13th April, 2012, the 1st interested party supported the 1st respondent's decision and its

filing with the 2nd respondent for adoption as a judgment of the court. The 1st interested party contended that the applicants have not put forward good grounds to warrant the quashing of the 1st respondent's decision complained of herein. The 1st interested party contended that the 1st respondent's decision had already been executed and as such quashing of the same will occasion injustice to her. The 1st interested party contended further that the applicants' application is incompetent bad in law and fatally defective in that, the same was not brought in the name of the Republic and that the same was brought contrary to the provisions of Order 53 rule 2 of the Civil Procedure Rules.

4. On 6th February, 2013, the court directed that the application herein be argued by way of written submissions. The applicant's advocates filed their submissions on 17th April, 2013. The 1st interested party did not file any submission. In

their written submissions, the applicants reiterated the contents of the affidavits filed in support of the application and submitted that the 1st respondent derived its jurisdiction from the Land Disputes Tribunals Act, No.18 of 1990 (now repealed). The applicants' submitted that the 1st respondent had no jurisdiction under the said act to determine whether or not the 4th interested party was lawfully appointed as an administrator of the estate of the deceased. They submitted that this is a province which is reserved exclusively for the succession court under the Succession Act, Cap. 160, Laws of Kenya. The applicants submitted further that the 1st respondent had no jurisdiction to determine the issue of ownership of the suit property and to cancel the applicants' title. In support of this submission the applicants relied on the cases of, **Sarah Wambui Mugo-vs-Land Disputes Tribunal Maragua & 2 others (2007) eKLR** and **Kisii HC. Misc. Civil Application No. 4 of 2007, R-vs-**

The Chairman Awendo Division Land Disputes Tribunal & 4 others (unreported). The applicants submitted further that a decision arrived at without jurisdiction is null and void and cannot stand. In support of this submission, the applicants relied on the cases of **Samwel Chacha Rioba –vs- George Joseph Kiginga & 2 others (2010) eKLR** and the statement of Lord Denning in the case of, **Macfoy-vs- United Africa Company Ltd. (1961) 3 ALL ER 1169 at 1172**. The applicants submitted further that the 1st respondent's decision complained of was in breach of the law and the applicant's constitutional rights. In conclusion, the applicants submitted that the 1st respondent's decision complained of being null and void, the same cannot stand and is liable to be quashed by this court in exercise of its supervisory powers. On the same breath, the applicants submitted that the court has power to prohibit the 2nd respondent from adopting as its judgment a decision which is

null and void.

5. I have considered the applicants' application, the statutory statement and the affidavits filed in support thereof. I have also perused the applicants' advocates' submissions and the case law cited in support thereof. Equally, I have considered the replying affidavit and the statement of grounds of opposition filed by the 1st interested party in opposition to the application. The issues that present themselves for determination in this application are as follows;

i. **Whether the application is competent;**
ii. **Whether the 1st respondent had jurisdiction to determine the issues that were raised before it by the 1st interested party and to make the decision complained of;**
iii. **Whether the said decision was valid;**

(iii) Whether the 2nd respondent had jurisdiction to adopt the said award as a judgment of the court and,

iv. **Whether the applicants are entitled to the reliefs**

sought against the respondents.

6. **Issue No.I:**

The 1st interested party had submitted that the application herein is incompetent and bad in law on two grounds namely; that the application was not brought in the name of the Republic and, secondly that it offends the provisions of Order 53 rule 2 of the Civil Procedure Rules. I don't see any merit at all on the first ground. The application herein was brought in the name of the Republic as the applicant as is the usual practice in judicial review applications. This objection to the application is baseless. On the second ground of objection, the 1st interested party did not make any submission. I am unable therefore to understand how the present application offended the provisions of Order 53 rule 2 of the Civil Procedure Rules. This provision of the Civil Procedure Rules sets out a time limit with which applications for an order of certiorari should be made which is 6 months from the date of the

decision being challenged. The decision by the 1st respondent which is the subject of this application was made on 31st May, 2011 while the proceedings herein were instituted on 17th June, 2011. In the circumstances, the application for an order of certiorari was filed within the time limit set out in Order 53 rule 2 of the Civil Procedure Rules. It follows therefore that the 1st interested party's objection based on breach of the said provisions of the Civil Procedure Rules equally has no basis.

6. Issue No. II:

The 1st respondent was established under The Land Disputes Tribunals Act, No.18 of 1990 (now repealed) (hereinafter referred to as "the Act"). The powers of the 1st respondent were spelt out in the

said Act. The 1st respondent could not therefore exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act sets out the disputes over which the 1st respondent had

jurisdiction as follows; **"……..all cases of civil nature involving a dispute as to;**

a. **the division of, or the determination of boundaries to, land, including land held in common;**
b. **a claim to occupy or work land; or**
c. **trespass to land."**

It is clear from the foregoing that the 1st respondent did not have jurisdiction to determine disputes over ownership of or title to land. The 1st respondent also lacked jurisdiction to determine disputes over the distribution of estates of deceased persons. The 1st respondent did not therefore have the power to order the cancellation of the applicants' title over the suit property and the transfer of the same to the interested parties. Due to the foregoing, I am persuaded by the applicants' submission that, the 1st respondent acted outside its statutory powers when it entertained the 1st interested party's complaint and proceeded to make the decision complained of herein. The dispute between the

1st interested party and the 4th interested party concerned the issue of distribution of the estate of the deceased while the dispute as it related to the applicants concerned the ownership of the suit property. Section 47 of the Succession Act, Cap.160, Laws of Kenya, divested the 1st respondent of jurisdiction to deal with disputes relating to the distribution of estates of deceased persons. The suit property was registered under the Registered Land Act, Cap. 300 Laws of Kenya (now repealed) and as at the time when the 1st interested party lodged her claim with the 1st respondent, the jurisdiction to determine disputes concerning title to or possession of land registered under the Registered Land Act, (supra) was conferred exclusively upon the High Court and the Magistrates Court's in limited cases by section 159 of the said Act. The 1st respondent had no jurisdiction to determine issues to do with the ownership or title to land registered under the said Act. See, the Court of Appeal Cases of **Jotham Amunavi-vs-The**

Chairman Sabatia Division Land Disputes Tribunal & another, Court of Appeal at Kisumu, Civil Appeal No. 256 of 2002 (unreported) and **Dominica Wamuyu Kihu-vs-Johana Ndura Wakaritu, Court of Appeal at Nyeri, Civil Appeal No. 269 of 2007(unreported)**. See also the High Court cases cited by the applicants referred to herein above. Due to the foregoing, I am in full agreement with the submission by the advocates for the applicants that the 1st respondent acted ultra vires its powers in making the decision dated 31st May, 2011 in favour of the interested parties herein.

7. **Issue No.III:**

It has been said that jurisdiction is everything and without it a court or tribunal must lay down its tools. Jurisdiction cannot be assumed neither can it be conferred by agreement. In the case of **Desai-vs-Warsama (1967) E.A.351**, it was held that, no court can confer jurisdiction upon itself and where a

court assumes jurisdiction and proceeds to hear and determine a matter not

within its jurisdiction, the proceedings and the determination are a nullity. In the said case, Hamlyn J. referred to, **Volume 9, Halsbury's Laws of England, Page 351** for the proposition that; **"where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing".** Having come to the conclusion that the 1st respondent had no jurisdiction to entertain the claim that was brought before it by the interested party, it is my finding that the proceedings before the 1st respondent and its decision made on 31st May, 2011 were nullities.

8. **Issue No.IV:**

In the case of **Macfoy-vs-United Africa Co. Ltd.(1961) 3 All E.R 1169,** that was cited by the applicants in their submissions, Lord Denning stated as follows concerning an act which is a nullity at page 1172;

> **"if an act is void, then it is in law a nullity. It is not**

> **only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"**.

I am of the view that since the decision of the 1st respondent was a nullity, there was nothing in law that could be filed before the 2nd respondent for adoption. Adoption by the 2nd respondent of the 1st respondent's said decision as a judgment of the court would amount in the words of Lord Denning to, **"putting something on nothing"**. Such judgment would equally be a nullity. I am of the view that, Section 7 of the Land Disputes Tribunal Act pursuant to which the decision of the 1st respondent was lodged with the 2nd respondent for adoption envisaged a lawful decision by the 1st respondent. The 2nd respondent had no jurisdiction under section

7 of the Land Disputes Tribunal Act aforesaid to adopt annul and void decision by the 1st respondent. It is my finding that since the decision of the 1st respondent was a nullity for want of jurisdiction, there was nothing on the basis of which the 2nd respondent could enter judgment and issue a decree. The 2nd respondent has no jurisdiction to adopt the said decision as a judgment of the court.

9. **Issue No.V:**

This issue concerns the question whether this is an appropriate case to grant the orders of certiorari and prohibition sought by the applicants. Certiorari and Prohibition are some of the public law remedies

available to persons whose legally recognized interests have been infringed by public bodies or officers exercising statutory powers. In, Halsbury's Laws of England, 4th Edition, paragraph 46, the author has stated as follows;

> **"the courts have inherent jurisdiction to review the exercise by public bodies or officers of**

> **statutory powers impinging on legally recognized interests. Powers must not be exceeded or abused".**

10. The applicants have sought an order of certiorari to quash the decisions of the 1st respondent complained of herein above and an order of prohibition to prohibit the 2nd respondent from adopting the said decision as a judgment of the court. **H.W.R Wade & C.F.Forsyth in their book, Administrative Law, 10th Edition** have said this on the remedies of Certiorari and Prohibition at page 509,

> **"the quashing order and prohibiting order are complementary remedies, based upon common principles…….A quashing order issues to quash a decision which is ultra vires. A prohibiting order issues to forbid some act or decision which will be ultra vires. A quashing order looks to the past, a prohibiting order to the future."**

11. In the case of **Council for Civil Service Unions –vs- Minister for Civil Service [1985] A.C. 374 at 401D,** lord Diplock had this to say on the purview of judicial review;

> **"Judicial Review has I think developed to a state today when……one can conveniently classify under three heads the grounds upon which administrative action are subject to control by judicial review. The first ground I would call "illegality". The second "irrationality" and the third "procedural impropriety"…….By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it…."**

12. The Court of Appeal in the case of, **Kenya National Examination council –vs- Republic, Exparte Geoffrey Gathenji Njoroge & 9 others [1997] e KLR** also laid out the scope and efficacy of the remedies of certiorari, mandamus and prohibition. In that case the court described the remedies of

prohibition and certiorari as follows;

> **"…….prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land……Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons…."**

13. This court has power under section 13(7) (b) of the Environment and Land court Act, 2011 to grant the prerogative orders sought. As I have already concluded herein above, the 1st respondent had no jurisdiction to entertain the interested parties' claim. Its decision on the said complaint was therefore made without jurisdiction and as such was a nullity. Likewise, the 2nd respondent had no jurisdiction to adopt a decision that

was a nullity as a judgment of the court. From the authorities and cases that I have cited above, I am satisfied that this is an appropriate case to grant the orders of certiorari and prohibition sought by the applicants. Since the orders sought are discretionary, I have reviewed the facts of this case for any special circumstance that may militate against the granting of the orders sought. I have not come across any. The 1st interested party had alleged in her statement of grounds of opposition dated 13th April, 2012 that the applicants had acquired ownership of the suit property fraudulently. This is something that if proved would have weighed heavily in the mind of the court while considering whether or not to grant the orders sought herein. However, no material was placed by the 1st interested party before the court in proof of this allegation. No weight can therefore be put upon it by the court. Due to the foregoing, I find the applicants' Notice of Motion application

dated 22nd June, 2011 well merited. I allow the same and grant orders in terms of prayers 1 and 2 thereof. The applicants shall have the costs of the application to be paid by the 1st interested party only.

Dated, signed and delivered at Kisii this 19th day of July, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Gembe holding brief for Otieno for the Applicants

No appearance for the Respondents

No appearance for the Interested Parties

Mobisa Court Clerk

S. OKONG'O,

JUDGE.

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