



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
MISC. CIVIL.APPL. NO. 26 OF 2011
JUDICIAL REVIEW

**IN THE MATTER OF AN APPLICATION BY OMBETA OMBETA FOR JUDICIAL REVIEW
IN THE NATURE OF CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF THE REGISTERED LAND ACT, CAP.300, LAWS OF KENYA(NOW
REPEALED)**

AND

IN THE MATTER OF LAND PARCEL NO. WANJARE/BOMORENDA/221

BETWEEN

REPUBLIC.....
.....**APPLICANT**

VERSUS

THE CHAIRMAN SUNEKA LAND DISPUTES TRIBUNAL.....
.....**1ST RESPONDENT**

THE LAND REGISTRAR, KISII.....
.....**2ND RESPONDENT**

THE CHIEF MAGISTRATE, KISII.....
.....**3RD RESPONDENT**

AND

OMAMBIA NYAMBISA.....
..... **INTERESTED PARTY**

EXPARTE

JUDGMENT

1. **Introduction:**

The applicant, **Ombeta Ombeta** (hereinafter referred to only as “**the applicant**”) obtained leave of this court on 20th January, 2012 to bring the application herein that was filed on 31st January, 2012. The applicant sought the following reliefs;

- i. **an order of certiorari to bring before this court and quash the order and/ or decision of the 1st respondent dated 25th January, 2011 in Case No. 7 of 2010 and the judgment and/or decree of the 3rd respondent dated 4th March, 2011 in Kisii CMC. Misc. Civil Application No. 23 of 2011;**
- ii. **an order of prohibition to prohibit the respondents from transacting, dealing in or interfering with Land Parcel No. Wanjare/ Bomorenda/ 221 (hereinafter referred to as “the suit property”) without following the due process of law;**
- iii. **an order of mandamus directed at the 2nd respondent compelling him to register a prohibition restraining any transaction in relation to the suit property and to compel him to cancel the implementation and/or execution of the decision of the 1st and 2nd respondents referred to herein above.**

2. The application was brought on the grounds set out in the Supporting affidavit of the applicant sworn on 8th March, 2011, the Statement dated 7th March, 2011 and a Verifying Affidavit of the applicant sworn of the same date. The said statement and affidavits were filed pursuant to the provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules together with the application for leave. In summary, the application was brought on the following grounds;

- i. **that the 1st respondent had no jurisdiction to make the decision dated 25th January, 2011;**
- ii. **that the said decision was illegal, null and void ; and**
- iii. **that the 3rd respondent had no jurisdiction to adopt the said decision by the 1st respondent as a judgment of the court.**
- iv. **that the suit property was at all material times registered in the name of a third party who was not a party to the proceedings before the 1st and 3rd respondents.**

The circumstances that gave rise to the application as can be gleaned from the facts contained in the said affidavits and the statement filed by the applicant are as follows; at all material times, the suit property was registered in the names of one, **SABINA MORA WANDA** (hereinafter referred to only as “**Wanda**”). The suit property was registered in the name of Wanda on 30th October, 2009. Sometimes in the year 2010, the interested party filed a claim against the applicant with the 1st respondent namely; **Land Claim Case No. 07 of 2010**. In the said claim, the interested party claimed that he had purchased the suit property from the applicant in the year 1975 at a consideration of Ksh. 5000.00. The interested party claimed that the applicant had prevented him from using the suit property even though he had paid him the purchase price in full. The interested party sought the assistance of the 1st respondent to obtain a title to the suit property. The applicant contended in his defence before the 1st respondent that the interested party did not purchase the suit property from him as he had claimed. The applicant maintained that the suit property was leased to the interested party and at no time was it ever sold to him. The 1st respondent heard the parties together with their witnesses and delivered its decision on the dispute on 25th January, 2011. In the said decision, the 1st respondent made a finding that the applicant had sold the suit property to the interested party and ruled that the suit property belongs to the interested party. The 1st respondent’s decision aforesaid was lodged with the 3rd respondent on or about 4th February, 2011 for adoption as a judgment of the court pursuant to the provisions of section 7 of the Land Disputes Tribunals

Act, 1990 (now repealed). The 3rd respondent adopted the said decision as a judgment of the court on 4th March, 2011 and issued a decree on 7th March, 2011 for execution. The applicant was aggrieved by the said decision and its adoption by the 3rd respondent on the grounds that I have already set out herein above and decided to institute these proceedings to challenge the same.

3. The application was not opposed by the respondents who were duly served with the same. They neither filed a replying affidavit nor grounds of opposition to the application. They did not also appear in court during the hearing of the application. The application was opposed however by the interested party. In his replying affidavit sworn on 20th April, 2011, the interested party supported the 1st respondent's decision. The interested party contended that the applicant was given sufficient time to appeal against the said decision of the 1st respondent but failed to do so. The interested party termed the application herein as bad in law and an abuse of the process of the court.
4. When the application came up for hearing before me on 19th February, 2013, I directed that the same be argued by way of written submissions. The applicant's advocates' filed their submissions on 26th February, 2013 while the interested party's advocates filed their submissions in reply on 25th April, 2013. The applicant submitted that the interested party's claim before the 1st respondent concerned ownership and/or title to the suit property and that the 1st respondent assumed jurisdiction over the claim and purported to determine it pursuant to the powers that were conferred upon it under the Land Disputes Tribunals Act, No.18 of 1990 ("**the Act**") (now repealed). The applicant submitted that the 1st respondent fell in error both of law and fact. On fact, the applicant submitted that the applicant was not the registered proprietor of the suit property and as such could not be sued for the recovery of the title of the same. On law, the applicant submitted that the 1st respondent lacked the jurisdiction under the Act to determine disputes over ownership and/or title to land. The 1st respondent did not therefore have the jurisdiction to award the suit property to the interested party as it purported to do. With regard to the decision of the 3rd respondent, the applicant submitted that since the decision of the 1st respondent was made without jurisdiction and as such null and void, the 3rd respondent could not adopt the same as a valid judgment of the court. On his part, the interested party submitted that the application herein was filed out of time after leave was granted and as such the same is not maintainable. The interested party submitted further that the applicant's application is bad in law for failure to join the registered proprietor of the suit property in these proceedings. The interested party urged the court to dismiss the application.
- v. I have considered the application, the statutory statement and the affidavits filed in support thereof. I have also perused the applicant's advocates' submissions and the case law cited in support thereof. Equally, I have considered the interested party's affidavit in reply to the application and the submissions filed by his advocates 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 dispute that the interested party had with the applicant and to make the decision complained of;

(iii) Whether the said decision was valid;

(iii) Whether the 3rd respondent had jurisdiction to adopt the said decision as a judgment of the court and,

- v. **Whether the applicant is entitled to the reliefs sought against the respondents.**

6. Issue No. I:

The interested party objected to the applicant's application on a number of technical grounds. The first of such grounds was that, the application was not filed within 21 days after leave was granted contrary to the provisions of the Civil Procedure Rules. I see no merit at all in this objection. The applicant obtained leave on 20th January, 2012 to file these proceedings. The application herein was filed on 31st January, 2012 which was within 21 days of the date when leave was granted. The objection to the application based on time bar is in the circumstances baseless. The other objection to the application was based on non-joinder of Wanda into these proceedings as a party. Again, I cannot see any merit on this objection. Wanda was not a party to the proceedings before the 1st respondent. The decision of the 1st respondent which is the subject of these proceedings was made against the applicant and not against Wanda. The applicant was not under an obligation at all to join Wanda in these proceedings while challenging the decision that was made against him. In any event, the orders sought herein would not prejudice Wanda in any way. Wanda was therefore not a necessary party to these proceedings. This objection is also overruled. This paves the way for consideration of the application on issues of substance.

7. Issue No. II

The 1st respondent was established under The Land Disputes Tribunals Act, No.18 of 1990 (now repealed) ("the Act"). The powers of the 1st respondent were spelt out in the Act. The 1st respondent could not therefore exercise or assume powers outside those conferred by the Act. As was submitted by the applicant, 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 arising from agreements for sale of land. In the circumstances, the 1st respondent did not have the power to cancel a title to land or to order the transfer of land from one person to another. Due to the foregoing, I am in agreement with the submission by the applicant that, the 1st respondent acted outside its statutory powers when it entertained the interested party's claim over the suit property. The dispute between the applicant and the interested party concerned ownership of the suit property which was registered under the Registered Land Act, Cap. 300 Laws of Kenya (now repealed). 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. 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 two High Court cases that were cited by the applicant. Due to the foregoing, I am persuaded that the 1st respondent acted ultra vires its powers in making the decision dated 25th January, 2011 in favour of the interested party.

8. 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 25th January, 2011 were nullities.

9. Issue No. IV:

In the case of **Macfoy-vs-United Africa Co. Ltd.(1961) 3 All E.R 1169**, which I have cited in a number of cases of this nature, Lord Denning stated as follows concerning an act which is a nullity;

“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 3rd respondent for adoption. The purported adoption by the 3rd respondent of the 1st respondent’s decision as a judgment of the court amounted in the words of Lord Denning to, **“putting something on nothing”**. The judgment that was entered in favour of the interested party by the 3rd respondent on 4th March, 2011 following the adoption of the said decision of the 1st respondent was a nullity. I am of the view that, Section 7 of the Land Disputes Tribunals Act pursuant to which the decision of the 1st respondent was adopted by the 3rd respondent envisaged a lawful decision by the 1st respondent. In my view, that the 3rd respondent had inherent jurisdiction in exercise of its judicial function under that section to inquire as to the lawfulness or validity of the 1st respondent’s decision. The inquiry was not to be directed at the merit of the decision that was reserved for the Appeals Committee under the said Act but on whether the decision was made in accordance with the law. The 3rd respondent had no jurisdiction under section 7 of the Land Disputes Tribunal Act 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 3rd respondent could enter judgment and issue a decree. The decision of the 3rd respondent dated 4th March, 2011 and the decree that was issued pursuant thereto were therefore null and void for want of jurisdiction.

10.Issue No.V:

This issue concerns the question whether this is an appropriate case to grant the orders of certiorari, prohibition and mandamus sought by the applicant. Certiorari, Prohibition and Mandamus are public law remedies. These remedies are available to persons whose legally recognized interests have been infringed by public bodies, inferior courts or tribunals or officers exercising statutory powers. In, Halsbury’s Laws of England, 4th Edition, paragraph 46, the author 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”.

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 found herein above, the 1st respondent had no jurisdiction to entertain the interested party’s claim. The 1st respondent’s decision on the said claim was therefore made without jurisdiction and as such was a nullity. Likewise, the 3rd respondent had no jurisdiction to adopt a decision that was a nullity as a judgment of the court. Its ruling and decree issued in that regard

were equally nullities. 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, prohibition and mandamus sought by the applicant.

11. Since the orders sought are discretionary, I have reviewed the facts of this case to see if any special circumstance exists that may militate against the granting of any of the orders sought. I have not come across any save only to state that since the applicant is not the registered proprietor of the suit property, I would not compel the 2nd respondent to register a prohibition against the title to the suit property to restrain any transaction involving the same. I would grant the mandamus as prayed but will limit it to compelling the 2nd respondent to cancel any acts done if any towards the implementation and/or execution of the decision of the 1st respondent dated 25th January, 2011 and the decree of the 3rd respondent given on 4th March, 2011. Due to the foregoing, I allow the Notice of Motion application dated 23rd January, 2012 in terms of prayers 1 and 2 thereof. Prayer 3 is also granted but subject to the limitation stated above. In view of the history of the dispute herein, each party shall bear its own cost of the application.

Dated, signed and delivered at Kisii this 30th day of August, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Miss. Sagwa for the Applicant

No appearance for the Respondents

Mr. Ochwangi holding brief for Mbeche for the Interested Party

Bibu Court Clerk

S. OKONG'O,

JUDGE.