NO.107

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

JUDICIAL REVIEW APPLICATION NO. 67 OF 2011

IN THE MATTER OF AN APPLICATION BY SAMWEL MOMANYI SERETI FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT,NO.18 OF 1990 (REPEALED)

AND

IN THE MATTER OF MANGA LAND DISPUTES TRIBUNAL

BETWEEN

REPUBLIC……....…….....……..……..……APPLICANT

VERSUS

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

GIDEON MOSOTI MOMANYI….……..……..……..……..2ND RESPODNENT

EVANS MOMANYI SERETI……..……..……3RD RESPONDENT

EXPARTE

SAMWEL MOMANYI SERETI

E&L.JR.NO.67 OF 2011

NO.107

JUDGMENT

1. **Introduction**:

The ex parte applicant, **Samwel Momanyi Sereti** (hereinafter referred to only as **"the applicant"**) obtained leave of this court on 1st July, 2011 to bring the application herein which was filed on 18th July, 2011. The application was brought on the grounds set out in the supporting affidavit of the

applicant sworn on 28th June, 2011, statutory Statement dated 28th June, 2011 and a three paragraph Verifying Affidavit that was also sworn by the applicant on the same date. The said affidavits and statement were filed pursuant to the provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules together with the application for leave. The applicant sought the following reliefs;

i. **An order of certiorari to remove into this court and quash the decision of the 1st respondent dated 9th May, 2011 in Land Case No. 6 of 2010;**

ii. **The costs of the application.**

2. The grounds on which the application was brought;

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

i. **that the 1st respondent had no jurisdiction to entertain the dispute that existed between the 2nd and 3rd respondents on the one hand and the applicant on the other hand as it concerned title and/or ownership of parcels of land that were registered in the name of the applicant;**
ii. **that the decision of the 1st respondent dated 9th May, 2011 was illegal, null and void ; and**
iii. **that the decision of the 1st respondent was made in breach of the rules of natural justice.**

3. The facts as to the circumstances that gave rise to the application herein can be summarized from the affidavits and the statement filed herein by the applicant as follows; the applicant was at all material times the proprietor of a parcel of land the particulars of which were not disclosed in the proceedings before the 1st respondent and before this court.

The applicant claimed that he had four (4) wives all with whom he had children. These wives were married in the following order, Joyce Nyaboke Nyakundi, Annah Moraa Momanyi, Jane Bonareri Momanyi and Rebecca Moraa. The applicant claimed that three (3) of his wives who were still married to him together with his children including those from his fourth wife who had left him and got married elsewhere were entitled to have a share of his parcel of land aforesaid. The applicant sold a portion of his land measuring about 8 acres to various persons for the purposes, according to him, of raising money to educate his children. The applicant thereafter divided his remaining land between his four households represented by his four wives that I have mentioned herein above.

4. The 2nd and 3rd respondents are the sons of the applicant by Jane Bonareri Momanyi. The 2nd and 3rd respondents were aggrieved by the applicant's act of selling his land as aforesaid

and the division of the remaining land amongst his said four wives and their children. According to the 2nd and 3rd respondents, the land that was registered in the name of the applicant was ancestral land and as such the applicant had no right to dispose of the same as he wished. The 2nd and 3rd respondents contended further that the applicant had only two wives namely, Annah Moraa and Jane Bonareri and not four wives as he had alleged. The 2nd and 3rd respondents contended therefore that

the applicant should have divided his remaining land only to the said two wives and their children and not otherwise. The dispute between the applicant and the 2nd and 3rd respondents was taken before the clan elders for arbitration but the same was not resolved.

5. The 2nd and 3rd respondents thereafter lodged a claim against the applicant with the 1st respondent some times in the year 2011. The 2nd and 3rd respondents accused the applicant before

the 1st respondent of selling land without consulting them and of falsifying the number of wives that he had and proceeding to divide his remaining land to among others, his non wives. The 2nd and 3rd respondents sought an order from the 1st respondent to stop the applicant from selling any more land and to have the applicant's land divided only amongst his two wives and their children. The 1st respondent assumed jurisdiction over the dispute and heard all the parties together with their witnesses before making a decision on 9th May, 2011. In the said decision, the 1st defendant stopped the applicant from selling any more land and confirmed that the persons that the applicant's family members and the clan elders had identified as having purchased land from the applicant were the only genuine purchasers. The 1st respondent held further that the applicant had only two wives, namely, Jane Bonareri Momanyi and Annah Moraa Momanyi and as such the

applicant's land should be divided only to the two households. The applicant was aggrieved by the said decision on the grounds that I have already set out herein above and decided to institute these proceedings to challenge the same.

6. This application was not opposed by the 1st respondent who filed neither a replying affidavit nor grounds of opposition in response thereto. The application was however opposed by the 2nd and 3rd respondents. The 2nd and 3rd respondents filed a replying affidavit sworn by the 3rd respondent in opposition to the application. In his replying affidavit, the 3rd respondent supported the 1st respondent's decision. The 2nd and 3rd respondents contended that, their claim against the applicant concerned sub-division of and work on land. It was their case therefore that the 1st respondent had jurisdiction to determine the claim. The 2nd and 3rd respondents contended further that the 1st respondent's decision complained of had already been

adopted as a judgment of the court by the Magistrate's Court at Nyamira and since the Magistrate's court had not been enjoined in these proceedings for the purposes of challenging the said adoption, the order sought herein cannot issue. The 2nd and 3rd respondents contended in conclusion that the application herein does not meet the threshold for granting judicial review applications and as such the same should be dismissed.

7. The application came up for hearing before me on 29th April, 2013 when Mr. Ombachi, advocate appeared for the applicant and Mr. Nyambati, advocate appeared for the 2nd and 3rd respondents. In his submission, the applicant's advocate reiterated and adopted the contents of the affidavits and statement that were filed by the applicant 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 applicant's advocate submitted that

the 1st respondent had no jurisdiction under the said act to determine issues relating to; the genuine wives and children of the applicant, the right of the applicant to deal with his land and the bona fide persons to whom the applicant had sold land. Counsel submitted that these issues that formed the crux of the dispute that the 2nd and 3rd respondents had taken before the 1st respondent for determination were outside the jurisdiction of the 1st respondent. Counsel submitted further that the 1st respondent made a determination that affected third parties without having given them a hearing contrary to the rules of natural justice. The applicant's advocate submitted further that the jurisdiction of the 1st respondent was not properly invoked in that the 2nd and 3rd respondents did not file a formal claim with the 1st respondent as required under rule 3 (1) of The Land Disputes Tribunals (Forms and Procedure) Rules, 1993 (now repealed). The 2nd and 3rd respondent's claim was

therefore baseless and the 1st respondent should not have taken cognizance of the same. Counsel denied the claim by the 2nd and 3rd respondents in their replying affidavit that their claim before the 1st respondent concerned sub-division and work on land.

8. In his reply to the submission by the applicant's advocate, Mr. Nyambati, advocate for the 2nd and 3rd respondents submitted that the application herein has no merit whatsoever. Counsel submitted that the 1st respondent's decision challenged herein was adopted as a judgment of the court on 4th April, 2012 after the lapse of the order of conditional stay of proceedings that was issued by this court on 1st July, 2011. Counsel submitted that by the time the applicant moved this court on 29th June, 2011 to challenge the decision of the 1st respondent; the said decision had already been filed at the Nyamira Principal Magistrate's Court for adoption as a judgment of the court.

Counsel submitted that it was incumbent in the circumstances for the applicant to have joined Nyamira Principal Magistrate's Court as a party to this application. Counsel submitted that since the 1st respondent's decision had already been adopted by the Principal Magistrate's Court at Nyamira as a decision of that court, it ceased to be a decision of the 1st respondent and as such the same could not be quashed as such. In other words, counsel submitted that the decision of the 1st respondent ceased to exist upon adoption as a judgment of the court and for that reason there is nothing to be quashed by this court. In support of this submission, Mr. Nyambati cited two decisions of this court in the cases of, **R-vs-Suneka Land Disputes Tribunal & 2 others ex parte Sam Joseph Motari, Kisii, HC.Misc. Civil Application No. 92 of 2011 (unreported)** and **R-vs- Mosocho Land Disputes Tribunal & 2 others ex parte Yosifin Monari, Kisii, HC Misc. Civil Application No. 58 of 2010(unreported)**. Counsel

submitted further that the application was incompetent for offending the provisions of Order 53 rule 1 (2) of the Civil Procedure. Counsel submitted that the verifying affidavit filed by the applicant was not capable of verifying the facts that the applicant had relied on in support of this application. On the merit of the application, Mr. Nyambati submitted that the dispute between the applicant and the 2nd and 3rd respondents concerned the sub-division of ancestral land and a right to work and occupy ancestral land. Counsel contended therefore that the dispute was well within the jurisdiction of the 1st respondent who proceeded accordingly to direct how the said ancestral land was to be sub-divided. On the issue that the 1st respondent did not observe the rules of natural justice, counsel submitted that the 1st respondent's proceedings were not conducted in camera and as such whoever wished to be heard had the opportunity to appear. Counsel argued further that the

persons who are said to have been condemned unheard are not parties to this application and as such the applicant had no business urging their cause. In conclusion, counsel submitted that the application herein is not for granting since the same has been overtaken by events after the adoption of the 1st respondent's decision as a judgment of the court and due to the procedural blunders mentioned herein earlier.

9. In response to Mr. Nyambati's submissions, Mr. Ombachi submitted that the issues that had been raised by the 2nd and 3rd respondents in their submission were outside their replying affidavit filed in response to the application herein. He argued that he was not in a position to respond to the same as they were issues of fact that should have been contained in an affidavit. On the applicant's failure to join the Principal Magistrate's Court at Nyamira as a party herein so as to prohibit the adoption of the 1st respondents decision as a

judgment of the court, counsel submitted that this court had granted to the applicant an order of stay of proceedings when it granted leave to the applicant to institute these proceedings and as such the joinder of the said court in these proceedings was unnecessary. Counsel admitted that the 1st respondent's decision complained of herein had been adopted as a judgment of the court by the Principal Magistrates Court at Nyamira after the stay order that was granted to the applicant that was to last for 90 only days lapsed. Counsel submitted however that the Principal Magistrate at Nyamira had stayed the execution of its judgment entered upon the adoption of the 1st respondent's decision pending the hearing and determination of this application. Counsel submitted therefore that there is completely no impediment to the granting of the orders sought herein.

10. I have considered the applicants' application, the statutory

statement, the affidavits filed and the submissions made in support thereof. Equally, I have considered the replying affidavit filed by the 2nd and 3rd respondents in opposition to the application and the submissions made by their advocate. 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 was referred to it by the 2nd and 3rd respondent and to make the decision complained of;**
iii. **Whether the 1st respondent's decision dated 9th May, 2011 was valid;**
iv. **Whether the applicant is entitled to the reliefs sought against the respondents.**

Issue No.I:

11. The 2nd and 3rd respondents had submitted that the application herein is incompetent on two grounds namely; that, the application was not supported by a proper verifying

affidavit in compliance with the provisions of Order 53 rule 1 (2) of the Civil Procedure Rules, 2010 and, secondly, that the application has been overtaken by events since the decision of the 1st respondent challenged herein was adopted by the Principal Magistrate's Court at Nyamira on 4th April, 2012 as a judgment of the court and as such there is no decision of the 1st respondent capable of being quashed. Dealing with the first ground, I agree with the submission by the 2nd and 3rd respondent's advocate that the verifying affidavit that was filed by the applicant herein pursuant to the provisions of the Order 53 rule 1 (2) of the Civil Procedure Rules fell short what is expected of a verifying affidavit under the provisions of that rule. At the stage of seeking leave, the applicant filed two affidavits in support of the application for leave. One affidavit was titled, Supporting Affidavit. This affidavit was very detailed and contained all the facts that the applicant sought to rely on

in support of the judicial review application. The other affidavit was titled, Verifying affidavit. This was a three paragraph affidavit in which the applicant deposed that the contents of the judicial review application(sic) were true and correct. As I had observed in the two cases that were cited by the 2nd and 3rd respondent's advocate, in an application for judicial review, there is no need for filing a verifying affidavit and a supporting affidavit. What are required under Order 53 rule 1 (2) of the Civil Procedure Rules are a statement and a verifying affidavit and nothing more. It is this affidavit that should contain all the facts to be relied on in support of the application. In this case, the applicant had, a supporting affidavit which had all the facts and a verifying affidavit which had nothing and as such could not verify the facts the applicant wished to rely on in support of the application. As I held in the two cases that I have referred to herein above, this procedural blunder is not fatal to the

application. It is a procedural technicality that this court would overlook pursuant to the provisions of Article 259 (2) (d) of the Constitution of Kenya for the sake of substantive justice. For all intents and purposes, it was the affidavit that the applicant titled, Supporting Affidavit which should have been a Verifying Affidavit and throughout these proceedings it was treated as such. The said affidavit caused no prejudice or injustice to the 2nd and 3rd respondents. Due to the foregoing, I am unable to hold that the application herein is incompetent for lack of a proper verifying affidavit.

12. On the second ground of objection, the 2nd and 3rd respondents had contended that this application

has been overtaken by events and as such the orders sought cannot issue. I am fully in agreement with the contention by the 2nd and 3rd respondent's advocate that where a decision of a Land Disputes Tribunal has been filed in the Magistrate's Court and

adopted as a judgment of that court pursuant to the provisions of section 7 of the Land Disputes Tribunals Act, 1990 (now repealed), whoever is aggrieved by the said decision must challenge both the decision and the judgment of the court that adopted it as the said decision after its adoption ceases to exist independently and even if it is quashed, the judgment arising therefrom may still be executed unless such execution is prohibited or stayed. The circumstances of this application are however unique and the position of the law that I have stated above may not apply. In this case, when the application for judicial review was filed to challenge the decision of the 1st respondent, the said decision had not been adopted by the Principal Magistrate's Court at Nyamira as a judgment of that court. There was therefore no decision from that court that the applicant herein could have sought to quash in these proceedings. It should be noted further that when the applicant

sought leave herein to institute these proceedings, the court granted a stay of the decision and proceedings of the 1st respondent pending the hearing and determination of this judicial review application. With that stay, it was not mandatory for the applicant to join the Principal Magistrate's Court at Nyamira Court in these proceedings although good practice would have required it. The stay that was granted to the applicant was for a period of 90 days within which the applicant was supposed to file the judicial review application and have it heard and determined. This did not happen and the stay that had been granted to the applicant lapsed. The 2nd and 3rd respondents then proceeded to the Principal Magistrates Court at Nyamira while this application was pending and had the 1st respondent's decision adopted as a judgment of that court. The said decision is said to have been adopted as a judgment of the court on 4th April, 2012 about 4 months after

the institution of these proceedings. The court was not furnished with a copy of the application made at the Principal Magistrates Court at Nyamira seeking the adoption of the said decision or the Court's order thereon. The 2nd and 3rd respondents who had the said decision adopted by the said court while these proceedings were pending are now asking this court to lay down its tools and cease considering the applicant's application herein because the same has been overtaken by events in which they fully participated during the pendency of this application. As I had mentioned earlier, when this court was moved by the applicant to quash the decision of the 1st respondent, the said decision had not been made a judgment of the court and as such the applicant's application which sought the quashing thereof was properly before this court.

13.The question that begs for an answer is whether the

application herein has since become improper due to subsequent events that took place while the

application was pending hearing. The other question is whether the Nyamira Principal Magistrate's Court order made during the pendency of this application can stop this court from considering the applicant's application that was properly filed prior to the date of that order. My answer to the foregoing questions is in the negative. I am of the view that what took place at the Principal Magistrate's Court at Nyamira subsequent to the filing of these proceedings cannot negate these proceedings. This court being a superior court of record cannot lay down its tools because of the adoption by the lower court of the 1st respondent's decision which is challenged herein while this application was pending. I am relieved to note that the judgment of the Principal Magistrates Court at Nyamira was stayed by the same court pending the hearing and determination of these proceedings.

14. I would wish to point out also that the facts of this case are distinguishable from the facts of the case that was cited by the 2nd and 3rd respondents advocate, namely, **R-vs-Suneka Land Disputes Tribunal & 2 Others ex parte Sam Joseph Motari(supra)** in which this court had held that the decision of the Land Disputes Tribunal once adopted cannot be challenged independently. In that case unlike in the present application, the application for judicial review was filed after the decision of the Land Disputes Tribunal had been adopted as a judgment of the court by a Magistrate Court and in fact the Magistrate's Court concerned was made a party to the application. The problem that a rose was that instead of the applicant seeking the quashing of both the decision of the Land Disputes Tribunal and that of the Magistrate that adopted it, the applicant sought only the quashing of the decision of the Land Disputes Tribunal and the prohibition of the Magistrate Court from executing the

said Land Disputes Tribunal's decision. The court observed that the proper procedure was for the applicant to seek the quashing of both the decision of the Tribunal and of the Magistrate's court that adopted it as the court could not have prohibited the Magistrate's Court from executing its own judgment that had not been set aside, stayed or reversed. In this case, the application for judicial review was filed before the decision of the 1st respondent was adopted as a judgment of the court. The applicant cannot therefore be faulted for failing to join the court in these proceedings and seeking the quashing of its decision. Furthermore, in this case the possibility of the Magistrate's court's judgment being executed even if this court quashes the decision of the 1st respondent would not arise as the judgment of the Magistrate's court has been stayed by the said court. As to what will happen to the said judgment after the determination of this application, that is not for this ruling.

The disposal of the two preliminary issues that were raised by the 2nd and 3rd respondents now paves the way for consideration of the application herein on merit.

Issue No. II:

15. The 1st respondent was established under The Land Disputes Tribunals Act, No.18 of 1990 (now repealed) (hereinafter referred to only 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."**

From the foregoing, it is clear that the 1st respondent did not have jurisdiction to determine disputes over ownership and/or title to land or the disposal of land. The 1st respondent also lacked jurisdiction to determine matrimonial disputes including the legality or otherwise of matrimonial relationships. The 1st respondent did not also have jurisdiction to determine disputes over the mode and manner of distribution of land be it ancestral land or otherwise. The 1st respondent did not therefore have the power to order the applicant to stop selling his land. The 1st respondent did not also have the power to determine the legitimate or legal wives of the applicant. The same applies to the determination of the bona fide purchasers of the applicant's land. Due to the foregoing, I am persuaded by the applicant's advocate's submission that, the 1st respondent acted outside its statutory powers when it entertained the 2nd and 3rd respondents claim against the applicant and proceeded to make the decision dated

9th May, 2013 complained of herein. The dispute between the 2nd and the 3rd respondent on one hand and the applicant on the other as clearly set out in the proceedings and decision of the 1st respondent arose as a result of the decision by the applicant to sell his land without involving or consulting the 2nd and 3rd respondents and other family members and the decision by the applicant to divide his remaining land among his 4 wives and their children. It is not correct as submitted by the 2nd and 3rd respondents advocate that the dispute between the parties herein concerned the sub-division of ancestral land and a right to work and occupy land. As submitted by the advocate for the applicant, that submission was is supported by the material that was placed before the court that speaks for themselves. Due to the foregoing, I am in full agreement with the submission by the advocate for the applicant that the 1st respondent acted ultra vires its powers in making the decision dated 9th May, 2011.

Issue No.III:

16. 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 2nd and 3rd respondents, it is my finding that the proceedings before the 1st respondent and its decision made on

9th May, 2011 were nullities.

Issue No.IV:

17. This issue concerns the question whether this is an appropriate case to grant the order of certiorari sought by the applicant. Certiorari is a public law remedy available to persons whose legally recognized interests have been infringed by public bodies, inferior courts or tribunals or officers exercising quasi-judicial powers. This court has power under section 13(7) (b) of the Environment and Land court Act, 2011 to grant the prerogative order sought. As I have already concluded herein above, the 1st respondent had no jurisdiction to entertain the 2nd and 3rd respondent's claim. Its decision on the said claim was therefore made without jurisdiction and as such was a nullity. I am satisfied that this is an appropriate case to grant the order of certiorari sought by the applicant. I have not come across any special circumstance that may militate against

the granting of the order sought. The worry that had been raised that the quashing of the 1st respondent's decision herein may embarrass the execution of the judgment of the Principal Magistrate's Court at Nyamira was laid to rest when the court was informed that the execution of the said judgment had been stayed by that court pending the hearing and determination of this application. I find the applicants' Notice of Motion application dated 11th July, 2011 well merited. The same is allowed in terms of prayer 1 thereof. Due to the relationship between the parties, each party shall bear its own costs of the application.

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

S. OKONG'O,

JUDGE.

In the presence of:-

No appearance for the Applicant

No appearance for the Respondents

Mr. Nyambati for interested party

Bibu Court Clerk

S. OKONG'O,

JUDGE.