



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**JUDICIAL REVIEW NO.22 OF 2011**

DAUDI ODHIAMBO MIGOT.....APPLICANT

VERSUS

THE CHAIRMAN KISUMU WEST DISTRICT LAND

DISPUTES TRIBUNAL.....1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT KISUMU.....2ND RESPONDENT

JEMIMA AKINYI OYARE (INTERESTED PARTY).....3RD RESPONDENT

**JUDGMENT**

On 15/6/2011, the **EX PARTE** Applicant herein – **DAUDI ODHIAMBO MIGOT** - filed a Notice of Motion dated 14/6/2011. The application was brought under order 53 Rule 3(1) of Civil Procedure Rules, Section 8 and 9 of Law Reform Act (Cap 26), Section 3A of Civil Procedure Act (Cap 21) and all other enabling Provisions of law.

The application was filed against **THE CHAIRMAN KISUMU WEST DISTRICT LAND DISTRICT TRIBUNAL and CHIEF MAGISTRATE'S COURT, KISUMU**, as respondents, while **JEMIMA AKINYI OYARE** was named as **INTERESTED PARTY**.

The filing of the application followed leave granted by Court on 3/6/2011, which was the outcome of an application for the same filed on 25/5/2011 and dated 24/5/2011.

The orders sought are as follows:-

1. **THAT** the court be pleased to make order of certiorari to remove to itself and quash the proceedings and decision of the Kisumu West District Land Disputes Tribunal Case No.25/2010 and adopted as judgment of Chief Magistrate's Court at Kisumu in Land case No.24/2011.
2. **THAT** cost of the application be provided for.

The grounds advanced in support allege that the applicant is the registered owner of Land Parcel No. **KISUMU/OTHANY/3727** (hereafter the suit land); that under Section 3(1) of the Dispute's Tribunal's Act (No.18 of 1990) the tribunal lacks jurisdiction to hear and determine disputes relating to registration of a person as proprietor of land registered under Registered Land Act (Cap 300); that the directive by the tribunal to the applicant and others to transfer the suit land to the interested party was in excess of jurisdiction and therefore **NULL** and **VOID**; and that the adoption of the tribunal's decision by Chief Magistrate's Court, Kisumu was **NULL** and **VOID**.

The supporting affidavit sworn by the applicant reiterates much that is on the face of the application and the grounds advanced. It also gives some background as to what transpired at the tribunal.

It appears to the court that in the application for leave, the applicant also intended to apply for an order of prohibition but that appears to have been abandoned as it does not appear in the present application. Ultimately, what is prayed for is an order of **CERTIORARI** and costs.

The respondent conceded to the application herein on 5/6/2013. The interested party filed a replying affidavit on 26/10/2011. She said, inter alia, that the applicant does not deserve the orders he is seeking as he has concealed material facts to the court. She explained that at the time she purchased the suit land, Nathaniel Adero and not the applicant, was the registered owner. She purchased the suit land, she deponed, after being prevailed upon to do so by Adero's family so that the said family could raise money for funeral expenses of the late Tom Odhiambo who had been killed in the 2007/2008 post election violence. At the time the applicant was in Mombasa and could not be reached.

The applicant is said to have later secretly obtained letters of Administration from court and proceeded to register the suit land in his name. The 1st interested party maintained that the tribunal's decision was proper. The interested party also swore a further affidavit to, among others, avail the proper sale agreement and also expunge the earlier sale agreement that had been erroneously availed. The further affidavit was filed on 21/11/2011.

The applicant made submissions on 5/6/13. The submission was largely a re-statement of what is contained both in the application for leave and the current application.

Ochuka appeared for the interested party on the day the submissions were made. He said that the applicant participated in the sale of land and should the court find the tribunal had no jurisdiction then it should order the applicant to refund the purchase price. The applicant countered by saying he didn't participate in the sale and was not even aware of it.

The court has scrutinized and carefully considered what was laid before it by both sides.

The thrust of the interested party's submission and affidavit focus on the merits of the case rather than its legality.

It is always necessary to bear in mind that in suits of this nature, merit is not what the court considers. What is relevant is the legality of the decision made. The interested party was therefore wrong.

In the matter, the decision of the tribunal was as follows:

“(1) The entire Adero family led by William Odongo and David Odhiambo Migot the second objector and the administrator of the estate of the late Adero to assist the claimant to get the title deed for the land in dispute she paid for.

2. Alternatively, and as pleaded by the claimant **JEMIMA AKINYI OYARE** the first objector **WILLIAM ODONGO ADERO** take the lead to immediately refund her the full purchase price, including interest and all expenses incurred in the case shall be determined and approved by a court of law.(3)
3. Status Quo be maintained until the above requirement are fulfilled. Any utterances may amount to threat of life must stop and peace be maintained even after conclusion of this case.
1. Right of Appeal within 30 days from the date of reading of the judgment to the Provincial land dispute's Appeals Committee.”

The jurisdiction of the tribunal is to be found in Section 3(1) of the Land Dispute Tribunal's Act (No.18 of 1990) and is as follows:-

“Section 3(1) subject to this Act, all cases of a 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,

Shall be heard and determined by a Tribunal established under Section 4.”

For clarity, the Section 4 referred to establishes the Land Disputes Tribunal and spells out its composition.

A consideration of what the tribunal decided and what the law mandates it to decide shows clearly that the tribunal acted under serious misdirection. It was not mandated to order anybody to help another to get a title deed. It was not mandated to order a refund of purchase money or even issue an order concerning utterances or maintain Status Quo. It acted without jurisdiction when it purported to do so. Its orders are therefore **VOID** and as **LORD DENNING** observed in **MACFOY VS UNITED AFRICA COMPANY LTD (1961) 3 ALL E.R 1169**.

*“.....if an act is void, then it is in law a nullity. It is not only bad, but incurable 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 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...”*

The same position emerges in **KARANJA VS ATTORNEY GENERAL: HCC NO.310/1997 Nyeri**, where the Court of Appeal observed.

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

The position then is clear. The tribunal's decision herein was a nullity as it was made without jurisdiction.

The ex Parte Applicant is therefore granted an order of **CERTIORARI** as prayed for in the present application plus cost of the suit.

**A.K. KANIARU**

**JUDGE**

**21/8/2013**

**21/8/2013**

A.K. KANIARU – Judge

Roseline O. - Court Clerk

Applicant – Present

Respondent – absent

No counsel present

Interpretation – English/Kiswahili

**COURT:** Judgment read and delivered in open **COURT**.

Right of appeal 30 days.

**A.K. KANIARU**

**JUDGE**

**21.8.13**