



**REPUBLIC OF KENYA**

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

**MISC. CIVIL.APPL. NO. 98 OF 2011**

**JUDICIAL REVIEW**

**IN THE MATTER OF AN APPLICATION BY JEMIMAH MORAA NYABOGA FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF : THE LAND DISPUTES TRIBUNAL ACT, NO. 18 OF 1990 (NOW REPEALED)**

**AND**

**IN THE MATTER OF : THE ENVIRONMENT AND LAND COURT ACT, NO. 19 OF 2011**

**AND**

**IN THE MATTER OF : MOSOCHO LAND DISPUTES TRIBUNAL(MOSOCHO DIVISION)**

**AND**

**IN THE MATTER OF : KISII CMCC MISC. APPL.NO. 114 OF 2011**

**BETWEEN**

**REPUBLIC.....  
APPLICANT**

**VERSUS**

**MOSOCHO LAND DISPUTES TRIBUNAL.....1<sup>ST</sup>  
RESPONDENT**

**THE CHIEF MAGISTRATE, COURT KISII.....2<sup>ND</sup>  
RESPONDENT**

**AND**

**SISILIA NYAKOE.....1<sup>ST</sup>  
INTERESTED PARTY**

EXPARTE

**JEMIMAH MORAA**

**NYABOGA**

JUDGMENT

**1. Introduction:**

The applicant, **Jemimah Moraa Nyaboga** (hereinafter referred to only as “**the applicant**”) obtained leave of this court on 10<sup>th</sup> November, 2011 to bring the application herein that was filed on 14<sup>th</sup> November, 2011. The applicant sought the following reliefs;

- i. **an order of certiorari to bring before this court and quash the proceedings and decision of the 1<sup>st</sup> respondent dated 28<sup>th</sup> September, 2011 in Land Dispute Cause No. 54 of 2011 concerning and/or touching on the applicant’s parcel of land known as LR No. West Kitutu/ Bogusero/ 2234 (hereinafter known as “the suit property”);**
- ii. **an order of prohibition to prohibit the 2<sup>nd</sup> respondent from adopting, ratifying and/or entering judgment, in terms of the 1<sup>st</sup> respondent’s said decision dated 28<sup>th</sup> September, 2011 concerning and/or touching the suit property.**

2. The application was brought on the grounds set out on, the face thereof, the Statement of facts dated 7<sup>th</sup> November, 2011 and a Verifying Affidavit of the applicant sworn of the same date. The said statement and affidavit 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 1<sup>st</sup> respondent had no jurisdiction to make the decision dated 28<sup>th</sup> September, 2011;**
- II. **that the said decision was illegal, null and void ; and**
- III. **that the 2<sup>nd</sup> respondent had no jurisdiction to adopt the said decision by the 1<sup>st</sup> respondent as a judgment of the court.**

3. The circumstances that gave rise to the application as far as I can gather from the facts contained in the applicant’s verifying affidavit together with the annexures thereto and the applicant’s statement of facts are as follows; the 1<sup>st</sup> interested party was a daughter in law to one, **Nyakoe**. The 2<sup>nd</sup> interested party is the 1<sup>st</sup> interested party’s son. The 1<sup>st</sup> interested party’s father in law, **Nyakoe** aforesaid had two wives, namely, **Kerubo Nyakoe** and **Sanganga Nyakoe**. Sanganga Nyakoe bore to Nyakoe two daughters one of whom was named Bitutu Nyakoe. Sanganga Nyakoe had no son. Kerubo Nyakoe bore two sons, Nyakoe Nyakoe and Keronga Nyakoe. Nyakoe Nyakoe was the 1<sup>st</sup> interested party’s husband and the 2<sup>nd</sup> interested party’s father. The 1<sup>st</sup> interested party’s father in law, Nyakoe and her husband, Nyakoe Nyakoe are both deceased. The 1<sup>st</sup> interested party’s father in law, Nyakoe, owned a parcel of land known as **LR No. West Kitutu/ Bogusero/ 648** (hereinafter referred to as “**Plot No. 648**”). Plot No. 648 being ancestral land was supposed to be shared equally between Nyakoe’s two wives, Sanganga

Nyakoe who was the 1<sup>st</sup> interested party’s mother in law and 2<sup>nd</sup> interested party’s grand-mother and Kerubo Nyakoe. After Nyakoe’s death, Bitutu Nyakoe, Kerubo Nyakoe’s daughter caused Plot No. 648 to be sub-divided for the purposes of curving out there from her mother’s share. Bitutu Nyakoe sub-divided Plot No. 648 into three portions, namely, LR No. West Kitutu/ Bogusero/ 2233 (Plot

No. 2233), LR. No. West Kitutu/ Bogusero/ 2234 (the suit property) and a third portion whose particulars were not disclosed. Bitutu Nyakoe sold the suit property to the applicant sometimes in the year 1979 and Plot No. 2233 to a third party, one, Mercy Nyabate Osoro on a date that is not clear from the record. Plot No. 648 comprised of about 3.42 hectares. Plot No. 2233 and the suit property that Bitutu Nyakoe curved therefrom as her mother's share together comprised of about 2.42 hectares. The portion of Plot No. 648 that was left for the 1<sup>st</sup> interested party's mother in law by Bitutu Nyakoe after the said sub-division comprised of approximately 1 hectare. The 1<sup>st</sup> interested party's husband Nyakoe Nyakoe was aggrieved by this unequal sharing of ancestral land and tried unsuccessfully to have it reversed before his death. The 1<sup>st</sup> interested party's said husband was advised to lodge a claim against the applicant herein who purchased a portion of Plot No. 648 with the 1<sup>st</sup> respondent but he died in the year 2011 before doing that. In the same year, the interested parties lodged a claim against the applicant with the 1<sup>st</sup> respondent. They sought assistance of the 1<sup>st</sup> respondent to compel the applicant to surrender the suit property so that Plot No. 648 may be sub-divided equally between Nyakoe's two wives, Kerubo and Sanganga. The 1<sup>st</sup> 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 contested the respondents' claim before the 1<sup>st</sup> respondent. The applicant maintained that the suit property was lawfully sold to her by Bitutu Nyakoe. The 1<sup>st</sup> respondent heard the parties and delivered its decision on the dispute on 28<sup>th</sup> September, 2011. In the said decision, the 1<sup>st</sup> respondent made a finding that Bitutu Nyakoe had sold to the applicant the suit property secretly without involving other family members and that the applicant and the other purchaser, Mercy Nyabate Osoro had a duty to inquire whether or not Plot No. 648 was divided equally between the two wives of Nyakoe. The 1<sup>st</sup> respondent held that the sale of the suit property to the applicant in the circumstances was unlawful. The 1<sup>st</sup> respondent directed that Plot No. 648 be sub-divided afresh and this time, equally between Nyakoe's two houses, represented by his two wives. The 1<sup>st</sup> respondent ordered further that Sanganga Nyakoe's share of Plot No. 648 be further sub-divided into two between Sanganga's two sons, Nyakoe Nyakoe who was the 1<sup>st</sup> interested party's late husband and his brother, Kerongo Nyakoe. The 1<sup>st</sup> respondent's decision aforesaid was lodged with the 2<sup>nd</sup> respondent on or about 27<sup>th</sup> October, 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 proceedings before 2<sup>nd</sup> respondent were stayed by this court on 10<sup>th</sup> November, 2011 before the said decision was adopted by the 2<sup>nd</sup> respondent as a judgment of the court. The applicant was aggrieved by the said decision and its filing before the 2<sup>nd</sup> 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.

4. The application was not opposed by the respondents. They neither filed replying affidavits 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 parties who filed both grounds of opposition and a replying affidavit. In their replying affidavit sworn on 18<sup>th</sup> November, 2012, the interested parties supported the 1<sup>st</sup> respondent's decision. The interested parties contended that Plot No. 648 was supposed to be sub-divided equally between Nyakoe's two wives and that the applicant ought to have consulted other family members of Bitutu Nyakoe before she purchased the suit property. In their grounds of opposition, the interested parties contended that the applicant's application was fatally defective and that the applicant had acquired the suit property fraudulently.
5. The application came up for hearing before me on 13<sup>th</sup> May, 2013, Mr.Oguttu, advocate appeared for the applicant while the interested parties appeared in person after Mr.Okenye who had appeared on their behalf as holding brief for Mr. Mokua,advocate asked to be discharged from record after the court declined to grant adjournment to the interested parties. In his submission on behalf of the applicant, Mr.Oguttu relied on the applicant's statement of facts and verifying affidavit. Mr. Oguttu submitted that the applicant is the lawful owner of the suit property which

she acquired through a lawful agreement for sale between the applicant and the previous owner of the suit property. Counsel submitted that the applicant's title to the suit property could only be impeached by a court of competent jurisdiction. Counsel submitted that the 1<sup>st</sup> respondent had no jurisdiction to impeach the applicant's title and as such its decision of 28<sup>th</sup> September, 2011 was ultra vires, null and void. Counsel submitted further that the Land Disputes Tribunals Act, 1990 was repealed on 30<sup>th</sup> August, 2011 by coming into operation of the Environment and Land Court Act, 2011. Counsel submitted that the 1<sup>st</sup> respondent was not in existence as at 28<sup>th</sup> September, 2011 when it purported to make the decision complained of. Mr.Oguttu submitted further that since the decision of the 1<sup>st</sup> respondent was made without jurisdiction, the 2<sup>nd</sup> respondent had no jurisdiction to adopt the same as a judgment of the court. Counsel cited two cases in support of his submission that the 1<sup>st</sup> respondent had no jurisdiction to determine a dispute over title to land. In their submission in reply, the interested parties supported the decision of the 1<sup>st</sup> respondent and maintained that they are the lawful owners of the suit property.

6. I have considered the application, the statement of facts and the affidavit filed in support thereof. I have also considered the applicant's advocate's submissions and the case law cited in support thereof. Equally, I have considered the interested parties' grounds of opposition and affidavit in reply to the application and the submissions that were made by the interested parties 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 1<sup>st</sup> respondent had jurisdiction to determine the dispute that the interested parties had with the applicant and to make the decision complained of;**
- III. **Whether the said decision was valid;**
- IV. **Whether the 2<sup>nd</sup> 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.**

7. **Issue No. I:**

The interested parties objected to the applicant's application on the ground that the same is fatally defective. I am unable to accept this objection. The interested parties did not come out clearly in what respect the application herein is defective. In the circumstances, I see no merit at all in this objection. This paves the way for consideration of the application on issues of substance.

8. **Issue No. II**

The 1<sup>st</sup> respondent was established under The Land Disputes Tribunals Act, No.18 of 1990 (now repealed) ("the Act"). The powers of the 1<sup>st</sup> respondent were spelt out in the Act. The 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> respondent did not have jurisdiction to determine disputes over ownership of or title to land. The 1<sup>st</sup> respondent also lacked jurisdiction to determine disputes arising from agreements for sale of land. In the circumstances, the 1<sup>st</sup> respondent did not have the power to cancel the applicant's title to the suit property or to order that the original title from which the suit property originated be re-surveyed and sub-divided afresh. Due to the foregoing, I am in agreement with the submission by the applicant that, the 1<sup>st</sup> respondent acted outside its statutory powers when it

entertained the interested parties claim over the suit property. The dispute between the applicant and the interested parties 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 two cases that were cited by the applicant. Due to the foregoing, I am persuaded that the 1<sup>st</sup> respondent acted ultra vires its powers in making the decision dated 28<sup>th</sup> September, 2011 in favour of the interested parties.

#### 9. 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 1<sup>st</sup> respondent had no jurisdiction to entertain the claim that was brought before it by the interested parties, it is my finding that the proceedings before the 1<sup>st</sup> respondent and its decision made on 28<sup>th</sup> September, 2011 were nullities.

#### 10.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 1<sup>st</sup> respondent was a nullity, there was nothing in law that could be filed before the 2<sup>nd</sup> respondent for adoption. I am in agreement with the submission by the applicant's advocate that, Section 7 of the Land Disputes Tribunals Act, 1990 (now repealed) pursuant to which the decision of the 1<sup>st</sup> respondent was filed before the 2<sup>nd</sup> respondent for adoption as a judgment of the court envisaged a lawful and intra vires decision by the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent had no jurisdiction under section 7 of the Land Disputes Tribunal Act aforesaid to adopt annul and void decision by the 1<sup>st</sup> respondent. It is my finding that since the decision of the 1<sup>st</sup> respondent was a nullity for want of jurisdiction, there was nothing on the basis of which the 2<sup>nd</sup> respondent could enter judgment and issue a decree.

#### 11.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 applicant. Certiorari and Prohibition 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. This court has power under section 13(7) (b) of the Environment and Land court Act, 2011 to grant these remedies. As I have already found herein above, the 1<sup>st</sup> respondent had no jurisdiction to entertain the interested parties' claim against the applicant. The 1<sup>st</sup> respondent's decision on the said claim was therefore made without jurisdiction and as such was a nullity. Likewise, the 2<sup>nd</sup> respondent had no jurisdiction to adopt a decision that was a

nullity as a judgment of the court. I am satisfied that this is an appropriate case to grant the orders sought herein by the applicant. Since the orders sought are discretionary, I have reviewed the facts of this case to see if any special circumstances exist that may militate against the granting of the same. I have not come across any such circumstance. Due to the foregoing, I allow the Notice of Motion application dated 14<sup>th</sup> November, 2011 in terms of prayers 2 and 3 thereof. In view of the history of the dispute herein which I have set out herein above in detail, each party shall bear its own cost of the application.

**Dated, signed and delivered at Kisii this 27<sup>th</sup> day of September, 2013.**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

**Mr. Ochwangi for the Applicant**

**No appearance for the Respondents**

**No appearance for the Interested Party**

**Mobisa Court Clerk**

**S. OKONG'O,**

**JUDGE.**