



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS CIVIL APPLICATION NO. 66 OF 2011

IN THE MATTER OF AN APPLICATION BY ASETA NGWACHO SEBASTIAN & KERESENSIA
ASETA

FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI

AND

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT, NO. 18 of 1990

AND

IN THE MATTER OF LR.NOS. WANJARE/BOGITAA/1123 & PLOT NO. 12 RIANA MARKET

BETWEEN

REPUBLIC.....APPLICANT

AND

1. SABINA RABERA ASETA
2. SUNEKA LAND DISPUTES TRIBUNAL
3. THE RESIDENT MAGISTRATE'S COURT AT KISII.....RESPONDENTS

EXPARTE

1. ASETA NGWACHO SEBASTIAN
2. KERESENSIA ASETA

JUDGMENT

1. The exparte applicants, **Aseta Ngwacho Sabastian** and **Keresensia Aseta** (hereinafter referred to only as “**the applicants**”) moved this court on 30th June, 2011 by way of a Notice of Motion application for judicial review of the same date. In the said application, the Applicants sought an order of certiorari to remove into this court and quash the proceedings and award of the 2nd

- Respondent made in land case No. 7 of 2011 on 15th April, 2011 and the consequential orders made by the 3rd Respondent in Kisii Chief Magistrate Miscellaneous Application No. 48 of 2011 adopting the said award as a judgment of the court. The application was supported by the affidavit of the 1st applicant sworn on 30th June, 2011 and on the grounds set out on the face thereof.
2. In his affidavit in support of the application, the 1st Applicant stated as follows; the 1st Respondent and the 2nd Applicant are the wives of the 1st Applicant with the 1st Respondent being the 1st wife and the 2nd Applicant the 2nd wife. The 1st Applicant owned (4) parcels of land namely, LR. Nos. Wanjare/ Bogitaa/ 1323, Wanjare/ Bogitaa/ 1089, Wanjare/ Bogitaa/ 1089, Wanjare/ Bogitaa/ 1123 and Plot No. 12, Riana Market (“hereinafter known as **“Plot Nos. 1323, 1089, 1123 and 12”**”). The 1st Applicant decided to share the said parcels of land among his said two wives and gave the 1st Respondent Plot Nos. 1323 and 1089. The 2nd Respondent got Plot No. 1123 while Plot No. 12 was retained by the 1st Applicant. Thereafter, the 1st Applicant caused Plot No. 1123 to be formally transferred to the 2nd Applicant. Before he could do the same with the parcels of land that he had given to the 1st Respondent, the 1st Respondent lodged a claim against him with the 2nd Respondent. The 1st Respondent’s claim against the 1st Applicant concerned the ownership of Plot Nos. 12 and 1123. The 2nd Respondent assumed jurisdiction over the claim, heard the same and made an award on 15th April, 2011 in which the 2nd Respondent ordered the said two parcels of land to be registered in the names of the 1st Respondent. The Applicant annexed to his affidavit, copies of the title deeds and land certificates for Plot Nos. 1123, 1089 and 1323. He also annexed a copy of Plot card for plot No. 12. These documents show that Plot No. 1123 is registered in the name of the 2nd Applicant while Plot Nos. 1089, 1323 and 12 are all registered in the name of the 1st Applicant. The Applicants’ contention in the present application is that, the 2nd Respondent had no jurisdiction to determine a dispute over title to land. The Applicants have contended further that since Plot No. 1123 was registered in the name of the 2nd Applicant, the 2nd Respondent could not determine a dispute over the ownership thereof in a claim in which the 2nd Applicant was not a party. The Applicants have contended that the 2nd Respondent’s award with respect to the said plot was arrived at in breach of the rules of natural justice in that the 2nd Applicant was condemned unheard. The 1st Applicant had annexed to his affidavit in support of the application herein a copy of the proceedings and award of the 2nd Respondent dated 15th April, 2011 from which it is clear that the 2nd Applicant was not a party to the claim that was before the 2nd Respondent. The 2nd Respondent’s award aforesaid was filed before the 3rd Respondent pursuant to the provisions of Section 7 of the Land Disputes Tribunals’ Act, 1990 (now repealed) and adopted as a judgment of the court on 27th May, 2011. The Applicants contended that the 3rd Respondent had no jurisdiction to adopt as a judgment of the court, the 2nd Respondent’s award that was made without jurisdiction and in breach of the rules of natural justice.
 3. The Applicant’s application was opposed by the 1st and 2nd Respondents. The 3rd Respondent did not respond to the same.
 4. In her replying affidavit sworn on 27th July, 2011, the 1st Respondent contended that the 2nd Respondent acted within its jurisdiction and as such its decision cannot be faulted. The 1st Respondent contended further that this court cannot quash the decision of the 2nd Respondent because it had already been adopted by the 3rd Respondent as a judgment of the court. The 2nd respondent through affidavit sworn by its chairman on 28th July, 2011 maintained that the 1st Respondent’s claim against the 1st Applicant that was the subject of the award complained of concerned sub-division and claim to work and occupy land and as such the same was within its jurisdiction. The 2nd Respondent contended that it gave all the parties an opportunity to be heard before it made the award complained of.
 5. On 26th February, 2013 the advocates for the parties agreed to argue the application by way of

written submissions. The Applicants filed their submissions on 14th May, 2013 while the 1st Respondent filed her submissions on 10th May, 2013. The 2nd Respondent did not file any submissions. In their submissions, the Applicant's advocates argued that the 2nd Respondent had no jurisdiction to determine a dispute relating to ownership and/or title to land. The Applicants submitted further that the 2nd Respondent had no jurisdiction to order the transfer of parcels of land that were registered in the names of the Applicants to the 1st respondent. The Applicants submitted further that the 2nd Applicant was condemned unheard by the 2nd Respondent in breach of the rules of natural justice. The Applicants contended further that, the 2nd Respondent's award that was made without jurisdiction is null and void and as such its adoption by the 3rd respondent was likewise annulity. In conclusion the Applicants' submitted that they have established a case to warrant the granting of the order sought.

6. In their submission, the 1st Respondent's advocates contended that the orders sought by the Applicants cannot issue because the decision of the 2nd Respondent which is sought to be quashed had already been adopted by the 3rd Respondent as a judgment of the court. In support of this submission, the 1st Respondent cited this court's decision in the cases of **Sam Joseph Motari –vs- The A.G. & 3 others, Kisii HC. Judicial Review No. 92 of 2011(unreported)** and **Yosifin Monari –vs- The A.G. & 2 others, Kisii HC. Judicial Review No. 58 of 2010**. The 1st Respondent submitted further that the Applicant's application was bad in law for failure to comply strictly with the procedures laid down for instituting judicial review applications. In this regard, the 1st Respondent contended that the relief sought as indicated in the Applicants' statutory statement was not consonant with the relief set out in the Notice of Motion application. The 1st Respondent contended that there is no basis for quashing the decision of the 2nd Respondent as it was proper procedurally and in substance. In conclusion the 1st Respondent submitted that the Applicant's application lacks merit and should be dismissed with costs.
7. I have considered the Applicant's application and the affidavit filed in support thereof. I have also considered the affidavits filed by the Respondents in response thereto and the submissions of the advocates for both parties. In my view the issues for determination in this application are as follows:-
 - I. **Whether the application is competent?**
 - II. **Whether the 2nd Respondent had jurisdiction to determine the claim that was brought before it by the 1st respondent?**
 - III. **Whether the 2nd Respondent's award was made in breach of the rules of natural justice?**
 - IV. **Whether the 2nd Respondent's award was null and void?**
 - V. **Whether the 3rd Respondent had jurisdiction to adopt the decision of the 2nd Respondent as a judgment of the court.**

I see no merit at all in the 1st Respondent's objection to the application herein on the ground that the order sought cannot issue because the 2nd Respondent's decision sought to be quashed had been adopted by the 3rd Respondent. The Applicant's application is not seeking to quash only the decision of the 2nd Respondent. The order of certiorari is sought against both the decision of the 2nd Respondent and the order of the 3rd Respondent that adopted the same as a judgment of the court. This court has jurisdiction to quash the order of the 3rd Respondent if the court arrives at the conclusion that the same was made in excess or without of jurisdiction. The cases cited by the 1st Respondent are all distinguishable. In the cases cited by the 1st Respondent, the Applicants had sought the quashing of decisions of the Land Disputes Tribunal after they had been adopted by the court as judgments. Unlike in the present case, the Applicants in those cases did not seek the quashing of the said judgments.

8. ISSUE NO.II

There is no doubt on the material before me that the claim that was brought by the 1st Respondent against the 1st Applicant before the 2nd Respondent concerned ownership of Plot Nos. 1123 and 12. This is clear from the proceedings of the 2nd Respondent and from its award dated 15th April, 2011. I am unable to agree with the contention by the 1st and 2nd Respondent's that the dispute between the 1st Applicant and the 1st Respondent concerned sub-division of family land. The 1st Respondent claimed ownership of the two parcels of land as of right and the 2nd Respondent awarded the same to her. The 2nd Respondent's jurisdiction was set out in section 3(1) of the Land Disputes Tribunals Act, 1990 (now repealed) ("the Act"). Under that section, the 2nd Respondent's jurisdiction did not extend to the determination of disputes over title and/or ownership of land. Even if it is to be assumed for argument's sake that the dispute concerned division of matrimonial property, still the 2nd Respondent had no jurisdiction over such dispute. Due to the foregoing, I am in agreement with the submission by the Applicant's advocate that the 2nd Respondent's award dated 15th April, 2011 was made without jurisdiction and as such was ultra-vires the 2nd Respondent's powers. It is not disputed that Plot No. 1123 was registered in the name of the 2nd Applicant. It is also not in dispute that the 2nd Applicant was not a party to the 1st Respondent's claim before the 2nd Respondent. The decision and/or award of the 2nd Respondent was therefore arrived at without giving the 2nd Applicant an opportunity to be heard. The said decision that was prejudicial to the 2nd Applicant's interest was made in breach of the rules of natural justice and as such is liable to review by this court.

10. ISSUE NO. IV

A decision that has been arrived at without jurisdiction is null and void. The same applies to a decision that has been arrived at in breach of the rules of natural justice. Having reached the conclusion that the decision of the 2nd Respondent complained of herein was arrived at without jurisdiction and in breach of the rules of natural justice, I have no hesitation in declaring the same as null and void.

11. ISSUE NO. V

The 3rd Respondent had no jurisdiction to adopt as a judgment of the court, a decision that was null and void. The 3rd Respondent's order dated 27th May, 2011 by which it purported to adopt the award of the 2nd Respondent as a judgment of the court is therefore annulity.

12. CONCLUSION:-

I am satisfied that the Applicant's application is well merited. The 2nd Respondent is at liberty to pursue her claim over Plot No. 1123 and Plot No. 12 Riana market in a court of competent jurisdiction. The Applicants' Notice of Motion application dated 30th June, 2011 is allowed. In view of the relationship that exists between the parties, each party shall bear its own costs.

Dated, signed and delivered at Kisii this 27th day of September, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Minda for the Applicants

No appearance for the 1st Respondent

No appearance for the 2nd and 3rd Respondent

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

E&L.JR.MISC.NO.66 OF 2011