



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L MISC. CIVIL APPLICATION NO. 62 OF 2011

JUDICIAL REVIEW

**IN THE MATTER OF AN APPLICATION BY ABEDNEGO OMayio MUSA AND JOSEPHINE
KWAMBOKA NYABUTO FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI**

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL, ACT NO. 18 OF 1990(NOW REPEALED)

AND

IN THE MATTER OF KENYENYA LAND DISPUTES TRIBUNAL CASE NO. 7 OF 2010

IN THE MATTER OF LAND PARCEL NOS. MAJOGE/BOKIMONGE/493 & 495

BETWEEN

REPUBLIC.....
.....APPLICANT

VERSUS

1. KENYENYA LAND DISPUTES TRIBUNAL
2. THE CHIEF MAGISTRATE'S COURT, KISII
3. THE ATTORNEY GENERAL.....
RESPONDENTS

AND

NAFTAL O. ONCHIEKU.....
INTERESTED PARTY

EXPARTE

1. ABEDNEGO OMayio MUSA
2. JOSEPHINE KWAMBOKA NYABUTO

JUDGMENT

1. Introduction:

The exparte applicants, **Abednego Omayio Musa** and **Josephine Kwamboka Nyabuto** (hereinafter referred to only as **“the applicants”**) obtained leave of this court on 20th June, 2011 to bring this application which was filed on 28th June, 2011. The application was brought on the grounds set out in the statutory Statement dated 16th June, 2011 and the Verifying Affidavits sworn by the applicants on the same date which were filed pursuant to the provisions of Order 53 Rule 1(2) of the Civil Procedure Rules together with the application for leave. The application was further supported by “Supporting affidavits” of the applicants that were sworn on 28th June, 2011. The applicants sought the following principal reliefs;

- i. **An order of certiorari to quash the proceedings and decision of the 1st respondent made in Kenya Land Disputes Tribunal Case No. 7 of 2010;**
- ii. **An order certiorari to quash the decision and subsequent decree of the 2nd respondent made on 13th May, 2011 adopting the 1st respondent’s decision as its judgment.**

2. BRIEF FACTS OF THE CASE;

The circumstances that gave rise to the application herein can be summarized from the affidavits and the statement filed in court by the applicants as follows; at all material times, the 1st applicant’s father one, **Intindi Onkundi**, deceased who was also the 2nd applicant’s father in law was the registered proprietor of all that parcel of land known as **LR. No. Majoge/ Bokimonge/ 493 (“the suit property”)** while the interested party’s father, one, **Onchieku Angata**, deceased, was the registered proprietor of all that parcel of land known as **LR. No. Majoge/Bokimonge/495** (hereinafter referred to as **“Plot No. 495”**). The applicants occupy the suit property while the interested party occupies Plot No. 495. Sometimes in the month of June, 2010 or thereabouts, the interested party lodged a complaint with the 1st respondent against the 1st applicant to the effect that the 1st applicant had blocked a foot path that he used to access his residence on Plot No. 495. The interested party sought the intervention of the 1st respondent to have the said foot path opened up. The 1st respondent heard the interested party, the 1st applicant and a number of witnesses on the complaint and made its decision in the matter on or about the 29th day of June, 2010. The 1st respondent held that the survey map for the area showed that the disputed path was actually in existence. The 1st respondent held further that the evidence that was presented before it indicated that the said path was in use previously but was closed sometimes back and the area chief had recommended that it be opened. The 1st respondent in its conclusion made a recommendation that the District Land Registrar should advise the Land Surveyor to visit the site of the path in dispute, observe it and fix beacons along the limits of the said path as shown on the survey map of the area. The 1st respondent’s decision aforesaid was lodged with the 2nd respondent for adoption as a judgment of the court pursuant to the provisions of section 7 of the Land Disputes Tribunals Act, 1990. The 2nd respondent adopted the said decision by the 1st respondent as a judgment of the court on 18th May, 2011. The applicant was aggrieved by the said decision of the 1st respondent and its adoption by the 2nd respondent as a judgment of the court on the grounds set out hereunder.

3. THE GROUNDS ON WHICH THE APPLICATION WAS BROUGHT;

The application herein was brought on the following main grounds;

- i. **That the 1st respondent had no jurisdiction to make the decision complained of since the dispute between the parties concerned ownership of land whose registered owners were deceased and with respect to whose estates no letters of administration had been issued ;**
- ii. **That the interested party had no locus standi to lodge a complaint before the 1st respondent as he had not obtained letters of administration with respect to the estate of his deceased father who owned Plot No. 495;**

- iii. **That the decision of the 1st respondent was made in breach of the rules of natural justice because the 2nd applicant who was affected by the said decision was not a party to the proceedings before the 1st respondent and as such she was condemned unheard;**
- iv. **That the adoption of the decision of the 1st respondent by the 2nd respondent on 18th May, 2011 was null and void.**

4. The application was not opposed by the respondents. They neither filed replying affidavits nor grounds of opposition. The application was opposed however by the interested party who filed a replying affidavit sworn on 24th February, 2012. The interested party contended that its complaint before the 1st respondent concerned a surveyed pathway that had been blocked and which he sought to have opened. The interested party contended that the said pathway was not on the suit property and as such there is no way in which the 1st respondent's decision that recommended the beacons marking the said path to be fixed by a surveyor could affect the interest of the applicants on the suit property or that of their deceased father and father in law respectively. The interested party contended that the 1st respondent had jurisdiction to determine the dispute that he had taken before it which mainly concerned the blocking and occupation of access path by the 1st applicant. On 11th February, 2013, the court directed that the applicants' application be argued by way of written submissions. The interested party's advocates filed their submissions on 29th May, 2013 while the applicant's advocates did not file any submission even after the matter was adjourned on several occasions to enable them do so. In their written submissions, the interested party supported the 1st respondent's decision and its adoption as a judgment of the court by the 2nd respondent. The interested party submitted that the 1st respondent's decision was lawful and there is no basis for quashing the same. The 1st interested party submitted further that the 1st respondent had jurisdiction to determine the issues that the interested party had presented before it for determination.

5. I have considered the applicants' application, the statutory statement and the affidavits filed in support thereof. I have also considered the interested party's replying affidavit and the written submissions filed on his behalf. This is the view that I take of the matter. The 1st respondent was established under The Land Disputes Tribunals Act, No.18 of 1990 (now repealed) (hereinafter referred to 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."**

It is clear from the foregoing that the 1st respondent had jurisdiction to determine disputes over; a claim to occupy or work land and trespass to land. The interested party's complaint before the 1st respondent was that the 1st applicant had blocked and/or occupied a surveyed path that was used by the 1st interested party to access his premises on Plot No. 495. In my view the dispute between the interested party and the 1st applicant involved a claim to occupy land and some element of trespass all which were within the jurisdiction of the 1st respondent to determine. The Survey Map for Majoge Location, Bokimonge Registration Section, Kisii District that was annexed as an exhibit to the interested party's replying affidavit shows that there is an official surveyed path running from Plot No. 495 along the suit property to the main road in the area. The path is not on the suit property but runs along it to the said road. This is the path that the interested party had claimed to have been blocked by the 1st applicant and with respect to which the assistance of the 1st respondent was sought to have unblocked. The interested party's claim before the 1st respondent had nothing to do with the ownership or title to either the suit property or Plot No. 495. The issue of the 1st respondent having deliberated over title and/or ownership

of properties owned by deceased persons before the issuance of grant of letters of administration does not therefore arise. As I have stated above, the interested party's claim was that the 1st applicant had trespassed into a surveyed footpath and blocked it. The interested party who was personally and directly affected by the 1st applicant's action had the *locus standi* to lodge a claim against the 1st applicant. The interested party did not lodge the claim with the 1st respondent on behalf of his deceased father but on his personal account. The argument that the interested party lacked the *locus standi* to move the 1st respondent does not therefore hold. The interested party's complaint was against the 1st applicant alone and it concerned as I have said, a path that the 1st applicant was alleged to have blocked. I am unable see how a determination of such a dispute would have affected the 2nd applicant herein against whom no claim was lodged. The decision

of the 1st respondent which was merely advisory in nature recommended that a land surveyor be called upon to fix the beacons of the disputed foot path in accordance with the survey map for the area that I have referred to herein above. In my view, the 1st respondent did not make any adverse order against either the 1st or the 2nd applicant. I find the argument by the 2nd applicant that she was condemned unheard to be without basis in the circumstances.

6. Due to the foregoing, I am not persuaded by the applicants' contention that the 1st respondent acted outside its statutory powers when it entertained the interested party's complaint and proceeded to make the decision complained of herein. I am also not persuaded that the decision by the 1st respondent was made in breach of the rules on natural justice. Having come to this conclusion, I am unable to agree with the applicants that the decisions of the 1st and 2nd respondents' complained of were

illegal, null and void. Due to the foregoing, I am not satisfied that this is an appropriate case to grant the orders of certiorari sought by the applicants. The applicants' Notice of Motion application dated 28th June, 2011 is therefore not well merited. The same is hereby dismissed with costs to the interested party.

Dated, signed and delivered at Kisii this 15th day of November 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

.....for the Applicants

.....for the Respondents

.....for the Interested Party

.....Court Clerk

S. OKONG'O,

JUDGE.

E&LJR.NO. 62 OF 2011