



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**JUDICIAL REVIEW 38 OF 2010**  
**BARNABA KIMELI KICHWEN.....APPLICANT**  
**VERSUS**  
**BENJAMIN MAYO & 3 OTHERS.....RESPONDENT**

**RULING:**

The Ex-parte Applicant herein is Barnaba Kimeli Kichwen who brings this application by way of Notice of Motion dated the 3<sup>rd</sup> Nov, 2010 seeking orders of Certiorari, Prohibition and Mandamus.

The Applicant filed an Ex-parte Chamber Summons dated the 1<sup>st</sup> November, 2010 brought under Order 53 Rule 2 of the Old Civil Procedure Rules seeking leave of the court to bring into court an application for orders of Certiorari, Prohibition and Mandamus. The said leave was granted by the Honourable Mwilu J on the 1<sup>st</sup> November, 2010 and the Applicant proceeded to file the Substantive Notice of Motion on the 3<sup>rd</sup> November, 2010.

The parties opted to argue the Substantive Motion by way of Written Submissions.

Counsel for the Ex-parte Applicant relied on the Statutory Statement of Facts and the Verifying Affidavit of the Ex-parte Applicant. A further Affidavit made on 7<sup>th</sup> June, 2011 was also filed with the leave of the court and Counsel also relied on the same.

**FACTS:**

The land in issue is Title Number **NANDI/NDURIO/117** was registered in the name of KICHWEN S/O KIBARNO who was the father of the Ex-parte Applicant.

The suit land is registered under the Registered Land Act (Chapter 300) Laws of Kenya and a copy of the Title and Official Search are annexed and marked BK 2 (b) and BK 7(b).

**SUBMISSIONS**

Counsel submitted that the 2<sup>nd</sup> Respondent on the 23<sup>rd</sup> July 2010 purported to hear a dispute and

proceeded to make a decision and determined that the whole suit land belonged to the 1<sup>st</sup> Respondent's father and ordered that the land be transferred to the family of the 1<sup>st</sup> Respondent.

On the 21<sup>st</sup> September, 2010 the award made by the 2<sup>nd</sup> Respondent was adopted by the 3<sup>rd</sup> Respondent and a decree was issued on the 12<sup>th</sup> October, 2010.

The 1<sup>st</sup> Respondent lodged the decree with the 4<sup>th</sup> Respondent and entries were made in the Lands Register at the Lands Office.

The Ex-parte Applicant argues that the 2<sup>nd</sup> Respondent did not have jurisdiction to hear and determine a dispute touching on ownership and Title to land.

The 2<sup>nd</sup> Respondent also had no jurisdiction to hear and determine a dispute touching on rectification and extinction of rights on land registered under the Registered Lands Act (Chapter 300) Laws of Kenya.

The Ex-parte Applicant further argued that the 2<sup>nd</sup> Respondent did not have jurisdiction to entertain and determine a dispute pertaining to adverse possession.

The 1<sup>st</sup> Respondent also had no locus standi to prosecute the purported claim as he had not taken out Letters of Administration.

Counsel for the Ex-parte Applicant prayed that the orders sought be granted as the 2<sup>nd</sup> Respondent decision was unfair, unreasonable, oppressive punitive and adversely and irreparably affected the proprietary rights of the Ex-parte Applicant over the suit land NANDI/NDURIO/117.

That the Ex-parte Applicant had a good case and the orders sought ought to be granted in the interest of justice.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent opted not to contest the substantive application and made no submissions.

The 1<sup>st</sup> Respondent opposed the Application and argued that the Land Disputes Tribunal had jurisdiction to entertain and determine the dispute.

Counsel submitted that the 1<sup>st</sup> Respondent and his family had been in occupation of the suit property for over a period of thirty seven (37) years. Counsel further submitted that the (repealed) Land Disputes Tribunal Act at Section 3 (i) empowered the Tribunal to hear and determine matters pertaining to occupation. The proceedings before the Aldai Division Land Disputes Tribunal was on the issue of such occupation of the suit property.

That the Aldai Division Land Disputes Tribunal had been properly constituted as per the provisions of Section 4 of the Act and the procedures thereto were fully adhered to.

The 1<sup>st</sup> Respondent therefore prayed that the application be dismissed with costs to the 1<sup>st</sup> Respondent as the application lacked merit.

#### **ISSUES FOR DETERMINATION:**

Upon reading the Written Submissions of both parties and after perusing the Affidavits, I find that the following issues for determination;

- (a) Jurisdiction.
- (b) Does the Ex-parte Applicant merit all the orders sought.

(c) Costs.

The purpose of judicial review proceedings is best explained in the case of **R-VS- PERMANENT SECRETARY/SECRETARY TO THE CABINET AND HEAD OF PUBLIC SERVICE OFFICE OF THE PRESIDENT & 2 OTHERS EX-PARTE STANLEY KAMANGA NGANGA {2006} eKLR** where it was held;

**“.....the purpose was to check that public bodies do not exceed their jurisdiction, and carry out their duties in a manner that is detrimental to the public at large.....”**

From the submissions, I have noted that the Ex-parte Applicant's father **KICHWEN S/O KIBARNO a.k.a DANIEL KICHWEN BARNO** was registered as proprietor of the suit property. The property is registered under the Registered Lands Act Chapter 300 Laws of Kenya. In support of ownership the Ex-parte Applicant has annexed Annexures marked as **“BK 2(a) and BK 2(b)”** which are a Certificate of Official Search and a copy of the Green Card. The initial Title document dated 16<sup>th</sup> May, 1975 is not annexed but the one issued on the 25<sup>th</sup> June, 2010 is annexed and is marked **“BK 7(a)”**

I have also noted that the Ex-parte Applicant proceeded to file Succession Cause Number 74 of 2010 in the Principal Magistrates Court at Kapsabet. The Grant is dated the 1<sup>st</sup> October, 2010 and the Certificate of Confirmation of Grant. Immediately thereafter the Ex-parte Applicant proceeded to acquire a New Title Deed which is dated the 5<sup>th</sup> October, 2010 yet the Certificate of Confirmation of Grant was issued and is dated the 21<sup>st</sup> October 2010.

This court has taken cognizance of this whole process which can only be described as devious and mischievous.

#### **FINDINGS:**

The property is registered under the Registered Lands Act and the issue for determination as between the parties relates to ownership.

The 1<sup>st</sup> Respondent claims that his late father bought the property from ISAAH SAMOEI who had purchased the same from KICHWEN BARNO and that his late father and the family had been in possession for a period of over 37 years.

The court finds that the Aldai Division Lands Disputes Tribunal acted ultra vires as it had no jurisdiction to hear and determine matters relating to adverse possession and ownership. That it is only the High Court and the Resident Magistrates Court that has jurisdiction to entertain suits of a civil nature pertaining to ownership and Title to land.

The court senses a lot of mischief on the part of the Ex-parte Applicant especially in the manner in which the Title Document was obtained. The same was obtained even before the Certificate of Confirmation was granted and issued which is contrary to the laid down procedure, which makes the whole process illegal.

Again this court reiterates, that the court reads mischief in the manner the Title was acquired by the Ex-parte Applicant and it appears the Ex-parte Applicant did not act in good faith.

Non-the less the court's hands are bound and the court finds that the 2<sup>nd</sup> Respondent had no jurisdiction to hear and determine the dispute as the property is Registered under the Registered Lands Act (Cap 300) and the dispute relates to ownership and Title to land.

The Ex-parte Applicant's application is partially successful on the issuance of the order of Certiorari as prayed for in the application.

Orders for prohibition are for stopping contemplated future acts which if made would be contrary to the law. In this case, this has already been overtaken by events.

**CONCLUSION:**

It is hereby ordered that:

- a) An order for Certiorari shall hereby issue forthwith to remove into this Honourable Court and to quash the decision of the Aldai Lands Disputes Tribunal made on the 23<sup>rd</sup> July, 2010 and adopted by the Kapsabet Principal Magistrates Court in LDT No. 17 of 2010 in respect to the parcel of land known as Title Number **NANDI/NDURIO/117**.
- b) The Order sought for Prohibition fails.
- c) Each party shall bear their own costs.

**Dated and delivered at Eldoret this 22<sup>nd</sup> day of June 2012.**

**A.MSHILA**

**JUDGE**

Coram: Before Hon. A Mshila J

CC: Andrew

Counsel for the Applicant – Wafula

Counsel Wainaina holding brief for Boinet for 1<sup>st</sup> Respondent

**A.MSHILA**

**JUDGE**