



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Judicial Review 135 of 2009

**IN THE MATTER OF THE LAND DISPUTE TRIBUNAL (ASEGO DIVISION) LAND CASE
NO. 153 OF 2008**

AND

**IN THE MATTER OF HOMA BAY SENIOR RESIDENT MAGISTRATE LAND DISPUTE NO.
65 OF 2009**

AND

(In the Matter of the Application for Leave to Apply for Judicial Review remedy of certiorari to quash the proceedings and the decision of the Land Dispute Tribunal (Asego) in Land Cause No. 153 of 2008 and the Order dated 29/10/2009 of the Homa Bay Resident Magistrate in Land Dispute No. 65 of 2009 adopting the decision of the Tribunal as the Decree of the Court)

REPUBLIC.....APPLICANT

VERSUS

LAND DISPUTE TRIBUNAL ASEGO DIVISION.....1ST RESPONDENT

RESIDENT MAGISTRATE HOMABAY.....2ND RESPONDENT

GEORGE SILAS OPIYO AUKO.....INTERESTED PARTY

AND

MOSES OTIENO OSOTI.....EX-PARTE APPLICANT

RULING

The applicant herein sought and obtained leave to have bring judicial review proceedings against Land Dispute Tribunal – Asego Division. In the Notice of Motion application filed on 7th December, 2009, the applicant an order of certiorari to quash the proceedings and the decision thereof of the Asego Division Land Disputes Tribunal in Land Dispute No. 153 of 2008 and the order of Homa Bay Senior Resident magistrate dated 29th October, 2009 adopting the decision of the Tribunal as its judgment; and costs of the application.

The application is premised on grounds that **Kanyada/Kanyabala/2479** (suit parcel) belongs to the applicant herein as the registered proprietor thereof. Other grounds are;-

- *That the applicant's parcel of land being a first registration, is in law indefeasible. That the said land is duly surveyed, registered and title deeds duly issued on the same and that this position is fortified by the records on the land registry, which indicate that the applicant's parcel is P/No. **Kanyaa/Kanyabala/2479** and is 4.0 hectares or thereabout.*
- *That Asego Division Land Dispute Tribunal has no jurisdiction to adjudicate any claim to the title of registered land and by purporting to deal with or cancel the applicant's title over the suit parcel; and*
- *That the Tribunal acted in excess of jurisdiction and thus its proceedings, decisions and all consequential orders flowing there from are void and should be quashed.*
- *That in any event, the interested party has no justiciable interest or rights over the suit parcel and thus has no locus standi to commence and pursue the proceedings aforesaid.*
- *That the applicant is apprehensive that the interested party shall move to execute the decree and have the applicant's title cancelled and a fresh one issued in the name of the interested party to the detriment of the applicant.*

The application is supported by an affidavit sworn by the applicant on 3rd December, 2009. He depones that prior to the survey and registration, the suit parcel was formerly part of **Kanyada/Kanyabala/526** which was registered in the joint names of **Mathayo Auko Oliech** (the Interested Party's father) and **Silfano Osofi Ogoma** (applicant's father). He further depones:-

- *That the joint registration was done on 8/6/1979 and the same was done without any objection from either party, who were aware of the first joint registration.*
- *That the Land Control Board on 4/11/1998 surveyed, subdivided **Kanyada/ Kanyabala/526** and partitioned into two: **Kanyada/Kanyabala/2478** and **Kanyada/ Kanyabala/2478** belonging to **Mathayo Auko Oliech** and **Silfano Osofi Ogoma**, respectively.*
- *That the subdivision was done on 25/11/1998 and a boundary was put, which he alleges was destroyed by the Interested Party herein.*
- *That the Interested Party has consistently and persistently tried to take his land on the pretext that his father was wrongly registered as a co-owner of **Kanyada/Kanyabala/526**, as a result of which he moved to the Asego Division Land Disputes Tribunal claiming that his father was wrongly registered.*
- *That the tribunal arrived at its decision on 13/10/2009 that the applicant should surrender the suit parcel as the same was wrongly allocated to his father.*
- *That the decision was adopted on 29/10/2009 by the Resident Magistrate at Homabay as its judgment and hence a consequential decree was issued.*

There are affidavits of service signifying that both the respondents and the Interested Party were served with the main application. The Interested Party filed a Replying Affidavit sworn on 15th June, 2010. He deponed that the joint registration of **Mathayo Auko Oliech** and **Silfano Osofi Ogoma** was done fraudulently by **Silfano Osofi Ogoma**, the ex-parte applicant's father.

The Interested Party contends that the partitioning and the surveying of the suit parcel was not legal and proper, as he was neither involved nor informed and that the surveyor could not have acted without the involvement of both parties. Further that neither the applicant nor his father had set foot or occupied the

suit parcel, and therefore that the damage of the boundary could not have arisen as alleged by the applicant. He further depones that the Land Dispute Tribunal has jurisdiction over this matter and their findings can only be challenged by way of an appeal on the merits of the case.

The application came up for hearing before me on 25th June, 2012 Counsel for the applicant reiterated the contents of the application and asked the court to find that the Tribunal acted *ultra vires* of its jurisdiction and that its decision of 6th October, 2009 as adopted by the Learned Magistrate sitting in Homabay on 29th October, 2009 be quashed/nullified. The respondents and the Interested Party did not attend the hearing though duly served.

The issue before this court is whether the Land Dispute Tribunal – Asego Division acted in excess of its jurisdiction when it adjudicated over the matter between the Interested Party then as claimant and the applicant as the objector. In the proceedings before the Tribunal both parties appeared in person and called witnesses in support of their case. The Tribunal in its finding observed that the applicant's father and the Interested Party's father were registered as joint proprietors of **Kanyada/Kanyabala/ 526**. The Interested Party claims that the joint registration was fraudulent, and that the applicant's father being literate could have used his position while working at the Land's Office to have himself registered as a joint proprietor of **Kanyada/Kanyabala/526**.

The Tribunal ordered the objector (applicant herein) to surrender the Title Deed for **Kanyada/Kanyabala/2479** to the Lands Registrar to cancel it and issue a new Title Deed of the same parcel to the claimant (Interested Party herein). It is therefore apparent that the issue before the Tribunal was the ownership of **Kanyada/Kanyabala/2479** which is a subdivision of **Kanyada/Kanyabala/526**.

The Land Dispute Tribunal derives its jurisdiction from the **Land Disputes Act** Cap 303A (now repealed by Act No. 19 of 2011) at section 3(1) thereof. The section reads,

“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.”

As is stated hereinabove, the Land Dispute Tribunal Asego Division found in favour of the claimant and directed the objector to surrender the Title to the Land Registrar so that the same can be cancelled and a new one be issued in the name of the claimant.

The powers to order a title cancelled or rectified is derived from statute. The suit parcels, **Kanyada/Kanyabala/2479** that was subdivision from **Kanyada/Kanyabala/526** are registered under the **Registered Land Act** (now repealed by Act 3 of 2012). Sections 143 of the **Act**, gives the Court the power to direct that any registration be cancelled or amended where it is satisfied that any registration (other than the first registration) has been obtained, made or omitted by fraud or mistake.

The respondent herein deponed in his Replying Affidavit that the joint registration of his father and that of the applicant's father for **Kanyada/Kanyabala/526** was fraudulently done by the applicant's father. On this issue alone, the respondent ought to have filed a claim at the High Court to determine the issue of acquisition of title fraudulently pursuant to section 143 of the **Registered Land Act**.

This court finds that the Tribunal acted *ultra vires* its jurisdiction in adjudicating over title to registered land. The power of the Land Dispute Tribunal to deliberate over issues related to land is limited by Section 3 of the **Act** to disputes relating to trespass to land, disputes relating to boundaries and one's right to occupy and work on land. It must not act outside its jurisdiction as limited by statute.

The court is guided by the Court of Appeal's decision case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd Civil Appeal No 50 of 1989, Per Nyarangi, J.**

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The is also guided by the Court of Appeal's decision in the case of **Marete – Vs – Republic & 3 others Civil Appeal No. 259 of 2000 (2004) eKLR** held,

"In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupy or work the land, but a claim to ownership. Taking into account the provisions of Section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction."

For the foregoing reasons I allow the application dated 3rd December 2009 and order that an order of certiorari do issue quashing the decision of the Land Disputes Tribunal Asego Division and the consequential order of the Homa Bay Senior Resident Magistrate's court. The Interested Party may pursue his claim to the suit land through an appropriate suit. Each party will bear their costs in this application.

Ruling dated, signed and delivered at Kisii this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for applicant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE