



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Miscellaneous Civil Application 32 of 2011

**IN THE MATTER OF AN APPLICATION BY NICODEMUS MOMANYI FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW BY WAY OF CERTIORARI AND PROHIBITION**

AND

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

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNALS ACT NO 18 OF 1990

AND

IN THE MATTER OF LAND PARCEL NO NYARIBARI CHACH/BIRONGO/543

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN KEUMBU LAND DISPUTES TRIBUNAL

ONCHIRI KEGENI

THE CHIEF MAGISTRATE KISII.....RESPONDENTS

NICODEMUS MOMANYI EXPARTE

JUDGMENT

The ex-parte applicant, **Nicodemus Momanyi**, approached this court by way of an application dated 23rd March 2011 seeking leave to apply for orders of:

- 1. Certiorari to bring before this court the order and decision of Keumbu Land Disputes Tribunal Case No 4 of 2010 and the decree of the Chief Magistrate in Kisii CMC Misc Civil Application No 7 of 2011 for purposes of being quashed;*
- 2. Prohibition directed to the Respondents prohibiting them from effecting or implementing the decision of the Tribunal in Keumbu Land Dispute Tribunal Case No 4 of 2010 and the Decree in Kisii CMCC No 7 of 2011.*

3. *Orders of stay of execution of the decision of the Tribunal in Keumbu Land Dispute Tribunal Case No 4 of 2010 and of the decree in Kisii CMC Misc Civil Application No 7 of 2011 pending the hearing and determination of the judicial review proceedings.*

4. *Costs of the Application.*

Prayers 2 and 3 were granted by **Sitati J.** and the substantive application was filed on 28th April 2011. The application is based on the grounds that:

- a) *The proceedings of the Tribunal and the Chief Magistrate in Kisii Misc civil Application no. 7 of 2011 were subjudice Kisii HCC No 250 of 2010.*
- b) *The decision of the Tribunal sought to be quashed is unlawful as the Tribunal in arriving at the same contravened the rules of natural justice by denying the applicant the right to be heard;*
- c) *The proceedings before the Tribunal were contrary to the provisions of the Land Disputes Tribunal Act No. 18 of 1990 relating to service of process.*
- d) *The applicant is apprehensive that unless stopped by an order of this Honourable Court the Respondents may proceed to implement the said unlawful decision on a wrong parcel of land.*
- e) *Succession needs to be done on the estates of the registered owners of the [suit property] both of whom are deceased before the subject parcel of land can be transacted in, otherwise the actions of the respondents amounts to intermeddling with the estate of the deceased under the provisions of the Law of Succession Act.*
- f) *The decision of the Tribunal to the effect that the applicant be arrested was ultra vires its powers as provided for under the Land Disputes Tribunal Act No 18 of 1990.*

In support of the application, the applicant relies on the statement of facts dated 23rd March 2011 and a supporting affidavit verifying the statement of facts of even date.

The applicant's case is that the 2nd respondent, **Onchiri Kegeni**, filed a suit in the High Court of Kisii, being HCC No 250 of 2010 which is yet to be heard and determined. The 2nd respondent later lodged a complaint against him at the Land Disputes Tribunal at Keumbu over the same parcel of land. The applicant maintains that he was not notified of the claim at the Tribunal to enable him attend, and that he only became aware of the proceedings at the Tribunal when the members of the Tribunal visited the land (on which he has his home). He was later served with summons to enter appearance before the Senior Resident Magistrates Court at Keroka for hearing of an application to enter judgement in accordance with an award or decision of the Tribunal.

The applicant takes issue with the fact that the Tribunal did not seek the assistance of a surveyor to determine the position of the suit land. He further avers the decision of the Tribunal is faulty because one of the registered owners of the suit property, who is his father, is deceased, and that the decision of the respondents amounts to intermeddling of the estate.

The application is opposed by the 2nd respondent, **Onchiri Kegen** by way of a Replying Affidavit dated 4th April 2011. It is the 2nd respondent's case that the Tribunal made a decision regarding **Nyaribari chache/Birongo/543**, of which he is the 'legal absolute proprietor', and not land parcel number **Nyaribari/ Chache/Birongo/347**. He states that he has no interest on **Nyaribari/Chache/347** which would require him to go through the process of succession for purposes of claiming an interest on the land.

The 2nd respondent has attached to his pleadings a copy of a title deed with respect to **Nyaribari/Chache/Birongo/543** which shows that he is the registered owner of the said parcel of land. He has also attached a

certificate of official search which shows that he is the owner of the property known as **Nyaribari/Cache/Birongo/543**.

From my reading of the pleadings, and in the absence of evidence to the contrary, it is obvious that the properties to which both the applicant and the 2nd respondent lay claim to are different. The applicant has an interest in the land known as **Nyaribari/ Cache/Birongo/347** while the 2nd Respondent lays claim to the property known as **Nyaribari/Cache/ Birongo/543**. Whatever the case, it seems that the decision of the Land Disputes Tribunal was that the applicant was a trespasser on the property of the 2nd respondent. The applicant claims that this property is **Nyaribari/Cache/Birongo/347**, while the 2nd Respondent claims that it is **Nyaribari/Cache/ Birongo/ 543**.

One of the prayers of the applicant is that the proceedings of the Land Disputes Tribunal be quashed for being *ultra vires* since the rules of natural justice, i.e he was not served, were not complied with and that the **Land Disputes Tribunal Act** was not complied with.

Counsel for the applicant took issue with the exercise of jurisdiction of the Land Disputes Tribunal. Counsel submitted to this court that the Tribunal had no jurisdiction to deal with land that had already been registered, and that the Tribunal had no jurisdiction to decide who owns the land. Section 3 of the **Land Disputes Tribunal Act** provides:

3. (1) *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.

In this case, the issue to be determined by the Tribunal did not have to do with ownership of the land, but rather with trespass. I therefore find that the claim made to the Tribunal fell under section 3 (c) of the Act, and that the Tribunal acted properly in entertaining this claim.

On service of summons, the **Land Disputes Tribunal Act** provides that:

“Every claim shall be served on the other party, or, where there are more than one, on each of the other parties to the dispute and the provisions of the Civil Procedure Act as regards service of summonses shall thereafter apply.”

Order 5 of the **Civil Procedure Rules** deals with service of summons and therefore would apply in this case. Rule 15, Order 5 requires that an affidavit of service be filed indicating the time and manner in which service was done, and the name of the person served. In this case, counsel for the respondent submitted in court that during the Tribunal hearing, the respondent was served through the chief, but he failed to appear before the Tribunal, and as a result, the Tribunal proceeded *ex parte*. I note from the proceedings of the Tribunal that on 11th November 2010, the chairman simply stated that, *“I think it is very bad for the objector to refuse to come to court. As such, let it be ex parte. But we should visit the disputed parcel tomorrow and give verdict (sic)”*. There is nothing in the proceedings, nor in the submissions of counsel, to show that the applicant (who was the objector in those proceedings) was properly served, and therefore aware of the proceedings before the Tribunal. In view of this, I have serious doubts on whether the applicant was indeed properly served with the summons, and as to whether he was aware of the proceedings of the Tribunal.

A reading of the proceedings of the Tribunal also does not show how the Tribunal arrived at the decision that the property which they visited was the same one which was the subject of the claim before it. While

counsel for the respondent submitted that the Land Registrar and the Surveyor visited the land to mark the boundaries, there is no evidence this was the case. In my view, if this was indeed the case, it would have been noted that the surveyor had pointed out the boundaries of the parcel **Nyaribari/Chache/Birongo/543**. I think the surveyor would also have settled the issue as to the correct title to the parcel of land claimed by both the applicant and the 2nd respondent.

The upshot of this is that I find that the proceedings of 11th November 2010 of the Tribunal were conducted in violation of the rules of natural justice in that the applicant was not given an opportunity to be heard.

For the foregoing reasons I grant the order of certiorari sought and quash the decision of the Resident Magistrate Court in Civil Miscellaneous Application Number 7 of 2011 which entered judgment in accordance with the decision of the Keumbu Land Dispute Tribunal. I also grant an order of prohibition directed at the respondents prohibiting them from implementing the decision dated 11th October 2010.

The applicant shall also have the costs of the application.

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

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for appellant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE