



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**MISCELLANEOUS CIVIL APPLICATION 52 OF 2006**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
CERTIORARI, MANDAMUS AND PROHIBITION.**

**AND**

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

**AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT, 1990**

**AND**

**IN THE MATTER OF MOIBEN/MOIBEN BLOCK 2 (SEGERO) 1322**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHAIRMAN, LAND DISPUTES TRIBUNAL SOY DIVISION.....1<sup>ST</sup> RESPONDENT**

**UASIN GISHU DISTRICT RESIDENT MAGISTRATE ELDORET.....2<sup>ND</sup> RESPONDENT**

**AMBROSE KIMARU MUNAI.....3<sup>RD</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR ELDORET.....4<sup>TH</sup> RESPONDENT**

**EX PARTE:**

**NORAH ONCHONGA ONWONGA**

**GEORGE ARUNGA T/A JONE BROOKS CONSULTANTS LTD**

**PAUL K. MASWAI**

**JUDGMENT**

Pursuant to leave granted on 23<sup>rd</sup> February 2006 the ex parte applicants filed a Notice of Motion seeking the following reliefs:

- 1. THAT orders of judicial review by way of certiorari do issue bringing before this court the proceedings, decision and or the undated order of the Land Disputes Tribunal in Soy Division of Uasin Gishu District together with the Resident Magistrate's order dated 27.1.2006 which read and adopted the said Tribunal's decision as a judgment and decree for purposes of having both decisions quashed.**
- 2. THAT orders of judicial review do issue by way of Prohibition directed to the 2<sup>nd</sup> respondent and the 4<sup>th</sup> respondent being the District Land Registrar Eldoret prohibiting and/or restraining them from transferring the title deed of Moiben/Moiben Block 2 (Segero) 1322 to the 3<sup>rd</sup> respondent in accordance with the decision of the above Land Disputes Tribunal and Chief Magistrates Court or otherwise cancelling the registration of the 1<sup>st</sup> Applicant as the proprietor of that parcel of land known as Moiben/Moiben Block 2 (Segero) 1322 from the relevant register held and kept by the 4<sup>th</sup> respondent or otherwise interfering with the 1<sup>st</sup> applicant's use and enjoyment of this parcel of land and the enjoyment or her rights thereon or otherwise implementing or enforcing the decision of the Tribunal and the court in any manner at all.**
- 3. THAT orders of judicial review do issue by way of prohibition restraining the Land Disputes Tribunal Soy Division or any other land disputes Tribunal from entertaining or maintaining or otherwise hearing or determining the same issues herein arising in respect of Moiben/Moiben Block 2 (Segero) 1322.**
- 4. THAT in the alternative, in the event the 2<sup>nd</sup> and 4<sup>th</sup> respondents have already executed the orders of the Land Disputes Tribunal then orders of judicial review do issue by way of Mandamus compelling the land registrar to register a prohibition restraining any disposition or otherwise any transaction in relation to the said parcel of land and to compel him and the 2<sup>nd</sup> respondent to set aside any execution process and/or cancel the said transfer of title if any to the 3<sup>rd</sup> respondent and in its place to reinstate the 1<sup>st</sup> applicant or otherwise reinstate the parties in their original positions as it was before the decision of the land disputes Tribunal complained of.**
- 5. That the costs of this application be borne by the respondents except the 4<sup>th</sup> respondent.**

The grounds are set out in the Statement and are summarized as follows.

- 1. The 1<sup>st</sup> applicant is the registered proprietor of Moiben/Moiben Block 2 (Segero) 1322 and was condemned unheard by the 1<sup>st</sup> respondent.**
- 2. That because the 1<sup>st</sup> applicant was condemned unheard the decision of the 1<sup>st</sup> respondent is a nullity.**
- 3. That the Tribunal lacked jurisdiction to investigate the subject matter of the complaint.**
- 4. That the 1<sup>st</sup> applicant will lose her title if the decision of the 1<sup>st</sup> respondent is executed.**
- 5. That the decision of the 1<sup>st</sup> respondent interferes with rights under section 27 and 28 of the Registered Land Act.**
- 6. That the 1<sup>st</sup> respondent lacked jurisdiction to make orders cancelling title.**

The Verifying affidavit deponed that the 1<sup>st</sup> applicant is the registered proprietor of all that parcel of land known as Moiben/Moiben Block 2 (Segero) 1322. A photocopy of the title was exhibited as

NOO/1. That on 26<sup>th</sup> January 2006 the court read and adopted an award of the land disputes Tribunal Soy Division whose effect was to cancel the 1<sup>st</sup> applicants title and transfer it to the 3<sup>rd</sup> Respondent. The certified copy of proceedings were annexed as NOO/2. That the 1<sup>st</sup> applicant was never heard before the Tribunal and there was breach of natural justice. That the question before the Tribunal was breach of contract between the 3<sup>rd</sup> Respondent, 2<sup>nd</sup> applicant and 3<sup>rd</sup> applicant. The 2<sup>nd</sup> applicant as agent of 1<sup>st</sup> applicant appears to have sold the land twice at the same price to both the 3<sup>rd</sup> respondent and 3<sup>rd</sup> applicant. That the Tribunal had no jurisdiction to resolve the dispute. That the orders made by the Tribunal were *ultra vires*.

The 3<sup>rd</sup> respondent filed a replying affidavit. He denied that the 1<sup>st</sup> applicant is the owner of land known as Moiben/Moiben Block 2 (Segero) 1322. That the 1<sup>st</sup> applicant obtained the title fraudulently. That he bought the land from the applicant who had entrusted Mr. George Sino of Jone Brooks Consultants Ltd commission agents to transact the sale on her behalf. That he paid Kshs. 130,000/= in total together with surveyors fee of Kshs. 7,000/= . That he then occupied the land after being shown by the surveyor. That the evidence he gave before the Tribunal and its findings are true and correct. That he lodged a caution claiming purchasers interest. That by virtue of his occupation he has overriding interest in the title. That the 1<sup>st</sup> applicant sought registration of the title in her name in breach of the purchase agreement. That on 19.6.2003 the 1<sup>st</sup> applicant applied for consent of land control board to transfer the land to the 3<sup>rd</sup> applicant without his consent.

On 17.3.2009 the Notice of Motion came up for hearing. Counsel for 3<sup>rd</sup> respondent sought an adjournment through an advocate holding his brief. The application was opposed. In a short ruling I rejected the application for adjournment and fixed the application for hearing at 10.30am. At 10.50 there was still no appearance for counsel for the 3<sup>rd</sup> respondent. Being satisfied that all parties had been served I allowed counsel for the ex parte applicant to proceed. Counsel submitted that the Tribunal lacked jurisdiction to deal with registered land under Cap 300. That the 1<sup>st</sup> applicant as registered proprietor was never served with any process before the Tribunal. She was ordered to transfer her property to the 3<sup>rd</sup> respondent while she was not a party to the proceedings. She was threatened to be jailed and charged with corruption. The entire proceedings were a nullity. Counsel cited the case of **Adolf Gitonga Wakahihia and four others v. Mwangi Thiongo** in support of the proposition that it is basic law that no one should be condemned to a judgment passed against him without being afforded a chance of being heard. Such a judgment is a nullity it would be set aside in the interests of justice. Counsel also cited **Prime Salt Works Limited v. Kenya Industrial Plastics Limited, Civil Appeal No. 186 of 2000** where the Court of Appeal stated that “implicit in the concept of fair adjudication lie the cardinal principle, namely that no man shall be a judge in his own cause and that no man shall be condemned unheard. These two principles, the rules of natural justice, must be observed by courts save where their application is excluded expressly or by implication. In the instant case it has not been suggested that the rule has been excluded”. In support on the ground of lack of registration counsel cited **Republic v. The Chairman Kapsabet Division Land Disputes Tribunal and Another**, where I affirmed the position that the land Tribunal lacked jurisdiction to determine questions or disputes relating to title and ownership of registered land.

Counsel for 3<sup>rd</sup> respondent relied on the replying affidavit sworn by 3<sup>rd</sup> respondent and on two cases decided by Justice AG.A. Etyang’ **Misc. civil App No. 150 of 2001 (Kitale) R v. Kitale Senior Principal Magistrates Court and anor. and Misc. civil App No. 69 of 1999 (Kitale) Moses Okiring v Saboti Land Disputes Tribunal and Another**, to the effect that where one fails to invoke the provision of section 8 and 9 in the main Motion then the main is defective and liable to be struck out. In response counsel for 1<sup>st</sup> applicant submitted that it was not fatal.

I have considered the submissions made by counsel for the *ex parte* applicants and the 3<sup>rd</sup> respondent. I have no doubt in my mind that the Tribunal acted in excess of jurisdiction when it cancelled the title deed of the 1<sup>st</sup> applicant. It rendered its verdict as follows:

**“5. The panel orders that Ms. Norah Onwonga Onchonga transfer officially the said title deed**

**MOIBEN/MOIBEN BLOCK 2 (SEGERO) 1322. to the first buyer already settled on the farm Mr. Ambrose K. Munai with immediate effect. Failure to which she be subjected to jail and charged for corruption.**

**6. Failure to which the panel recommends the court to transfer on her behalf the said title deed MOIBEN/MOIBEN BLOCK 2 (SEGERO) 1322 to Mr. Ambrose K. Munai at her cost.**

**7. THAT the said title deed MOIBEN/MOIBEN BLOCK 2 (SEGERO) 1322 is hereby handed over to the court for cancellation of the transactions by Mr. Arunga George...”**

It is also very clear that the 1<sup>st</sup> applicant was not a party to the proceedings before the Tribunal even though the Tribunal proceeded and made orders touching on her and her title. Section 3 of the Land disputes Tribunal Act (as it then was) provided as follows:

**“Subject to this Act, all cases of a civil nature involving a dispute as to—**

- a) The division of, or he determination of boundaries to land, including land held in common;**
- b) A claim to work or occupy land; or**
- c) Trespass to land shall be heard and determined by a Tribunal established under section 4.”**

It is clear that the dispute over sale of land to two or more people is not of such a nature as was contemplated by the Legislature. The fear by the 1<sup>st</sup> applicant that she might lose her title was therefore very real. The applicant has sought several reliefs in the Motion filed on 1<sup>st</sup> March 2006. Since the award is a nullity any transaction based on it would be a nullity and a usurpation of power. To prevent such an eventuality it is necessary to quash the decision of the Tribunal and to restrain those likely to execute from so acting on it. I grant reliefs 1, 2 and 3 of the Motion dated 25<sup>th</sup> February 2006. The 1<sup>st</sup> respondent and 3<sup>rd</sup> respondent will bear costs of the Motion. It is so ordered.

Dated and delivered at Nairobi on this 22nd day of August 2012.

**M. K. Ibrahim**  
**Judge**

DATED AND Delivered at Eldoret on this 19th day of SEPTEMBER 2012.

**F. AZANGALALA**  
**Judge**

In the presence of: Mr. Kiplimo holding brief for Mr. Rangot for the Applicant.

Mr. Cheluget holding brief for Mr. Chebii for Respondent