



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Miscellaneous Civil Application 361 of 2011**

**IN THE MATTER OF THE REGISTERED LANDS ACT CAP 300 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 SECTIONS 3  
91) (4) (7) AND (8)**

**AND**

**IN THE MATTER OF THE SUCCESSION ACT CAP 160 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE PARCEL OF LAND KNOWN AS SOUTH GEM/KAUDHA / 183**

**REPUBLIC .....APPLICANT  
VERSUS**

**THE CHAIRMAN SIAYA D. L. D. TRIBUNAL .....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATE'S COURT SIAYA.....2<sup>ND</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR SIAYA .....3<sup>RD</sup> RESPONDENT**

**THE DISTRICT LAND SURVEYOR SIAYA .....4<sup>TH</sup> RESPONDENT**

**PAUL NYAGOL WAGANDA.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

The applicants Notice of Motion dated 24<sup>th</sup> October 2011 prays for Orders of certiorari to quash the 1<sup>st</sup> and 2<sup>nd</sup> Respondents decision to award a portion of Land parcel number South Gem / Kaudha / 183 to the 5<sup>th</sup> Respondent. It further prays for Orders of prohibition so as to prohibit the 3, 4, and 5<sup>th</sup> respondent from enforcing the Order earlier issued. Finally it prays for the writ of mandamus to compel the 3<sup>rd</sup> and 4<sup>th</sup> respondent to restore the suit property to its original position. The application has been supported by the statements and the affidavit of William Odipo Nyagol.

The current registered owner of the suit property is Paul Odipo Nyagol. The 5<sup>th</sup> respondent filed his

claim at Siaya Land Disputes Tribunal Case No. 91 of 2006 where on 10<sup>th</sup> December 2008 the said tribunal ordered as follows:-

**(a)The suit land South Gem / Kaudha / 185 be resurveyed and sub – divided into two equal parts thus the upper part bordering the objectors home be registered in his names and the remaining portion to remain in the names of the objector Paulo Nyagol Othina.**

**(b)The land Registrar and District Surveyor to effect this Order as soon as possible.**

**(c)Rights of Appeal within 30 days**

The said judgment was adopted as the Order of the Court on 9<sup>th</sup> December 2010.

The gist of the applicant application is that the tribunal did not have jurisdiction to entertain this claim as this was land which had been registered. He further argued that by the time the Judgment was being read and adopted Paulo Nyagol Othina the registered proprietor had passed on.

The State Counsel supported the application and basically enjoined herself with the arguments of Mr. Ragot Counsel for the applicant.

The 5th respondent did file a response vide his replying affidavit filed on 6<sup>th</sup> February 2012 and sworn the same day. He claimed that the suit land belonged to his grandfather Nyagol Okwe who gave it to his father Johannes Waganda Nyagol who passed the land to him and his brother Lucas Otieno Waganda.

I have read the pleadings herein and heard the rival oral arguments. It is trite law now that the repealed Land Disputes Tribunal Act Chapter 303 A Laws of Kenya did not empower the tribunal to determine issues to do with title to land. By ordering the land to be divided into two the tribunal acted ultra vires.

It is further argued by the applicant and admitted that the later Paul Nyagol Othina died on 8<sup>th</sup> August 2008 before the judgment of the tribunal was delivered on 10<sup>th</sup> December 2008. It follows therefore that the tribunal although they may have heard the case during the lifetime of the deceased ought to have inquired whether there was any legal representative of the estate of the late Paul Nyagol Othina.

Further the lower court equally err by failing to inquire before adopting the orders of the tribunal. Without going into other merited points raised by Mr. Ragot this application ought to succeed. The same is allowed as prayed. The applicant's costs shall be shared however by all the respondents.

**Dated, signed and delivered at Kisumu this 31<sup>st</sup> day of October 2012.**

**H.K. CHEMITEI  
JUDGE**

In the presence of:

Ragot for the applicant

Mwamu for Ochieng for the defendant

*HKC/aa0*