



NO. 356

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

JR.MISC.CIVIL APPLICATION NO. 3 OF 2010

IN THE MATTER OF APPLICATION BY JENIPHER OYUGI AND GEORGE MICHAEL O. OYUGI FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)

AND

IN THE MATTER OF LAND DISPUTE TRIBUNAL ACT NO. 18 OF 1990

AND

IN THE MATTER OF SENIOR RESIDENT MAGISTRATE'S COURT AT RONGO

BETWEEN

REPUBLIC)
JENIPHER ATIENO OYUGI)
GEORGE MICHAEL O. OYUGI).....APPLICANTS

VERSUS

CHAIRMAN MIGORI DISTRICT LAND TRIBUNAL-AWENDO.....1ST RESPONDENT
RONGO RESIDENT MAGISTRATE'S COURT.....2ND RESPONDENT

AND

RULING

The applicants, **Jenipher Otieno Oyugi** and **George Michael Oyugi**, sought and obtained leave before **Musinga J** on 20th January, 2010 to apply for orders of Certiorari and Prohibition. Certiorari was aimed at removing into this court in order to quash the decision of Rongo District Land Disputes Tribunal, "**the respondent**" dated 22nd December, 2009 in which it allegedly, irregularly and illegally awarded the applicants' land parcel **North Sakwa/Kanyamgony/219**. "**the suit premises**" to **Francis Odoyo Okumu** and **Damaris Akeyo Okumu**, "**the interested parties**". Prohibition was directed against the senior resident magistrate's court at Rongo, prohibiting it and or any other court of co-ordinate and competent jurisdiction from adopting and enforcing the decision of the 1st respondent aforesaid. **Musinga J** whilst granting leave also ordered that leave so granted do operate as stay of any further proceedings with regard to the award.

Following the grant of leave as aforesaid, the applicants filed this substantive Notice of Motion on 2nd February, 2010. Save for the order of leave operating as stay, the applicants merely transferred the other prayers in the application for leave to issue into this application. The application is supported by the statutory statement, the verifying affidavit and the annexures thereto.

In a nutshell, the applicants' case appears to be that the 2nd applicant is the registered owner of the suit premises. However the interested parties lodged a claim with 1st respondent demanding the whole of the suit premises on the basis of ancestral land. Having heard both the applicants and the interested party, the respondent reached its verdict thus:-

The complainant is awarded his request and the objector who is now the holder of Land Title Deed N/Sakwa/Kanyamgony/219, Mr. Michael O. Oyugi is given six months to clear off from this parcel to enable this poor family have a place to live on. He will be allowed to harvest all that he had planted but shall not plant any new crops there again. If he were the alleged buyer he should have paid the family of Abisalom the profit he has earned on this land for the last six years at a Court of Law through Tribunals

The Court Executive officer is asked by the Land Dispute Tribunal to sign on behalf of the holder of the land title Deed if he cannot surrender the Title Deed and sign the transfer form to enable the Land Control Board urgently access the trans of this Land to Francis Odoyo Okumu who will now hold it on behalf of Abisalom Okumu's family....."

The applicants believe that the 1st respondent proceeded to determine the dispute without jurisdiction and contrary to the provisions of the Land Disputes tribunals Act and Registered land Act, entertained the claim contrary to the Limitation of Actions Act and the Law of Succession Act. The said award had since been lodged with the 2nd respondent and was pending adoption.

The application was duly served on the interested parties and the respondents. However, only the interested parties reacted by filing Notice of Appointment of Advocates and also a Notice of Preliminary Objection. No other papers in opposition to the application were filed by the interested parties. The respondents neither appeared nor filed any papers in opposition to the applicant. The Notice of Preliminary Objection filed was to the effect that at the hearing of the application the interested parties would raise a Preliminary objection on point of law that the application was fatally defective as the orders prayed for are

sought by parties who were not qualified in law to seek such orders.

When the application came before me for interpartes hearing on 16th November, 2010, **Mr. Kwanga** and **Mrs Odoyo**, both learned counsel for the applicants and interested parties respectively agreed to canvass the application by way of written submissions. The submissions were subsequently filed and exchanged together authorities. I have carefully read and considered them.

The interested parties solely relied on their Notice of Preliminary Objection in opposing the application. In their written submissions, they have amplified on that Notice of Preliminary Objection. First and foremost, they claim that an individual who wishes to seek orders of Certiorari, Prohibition or Mandamus, must seek leave to use the name of the Republic in the proceedings. That submission clearly has no basis in law at all. At the leave stage, an application is not made by the Republic or in the name of the Republic. It is made by the ex-parte applicant himself and once leave is granted, the Notice of Motion seeking the prerogative orders is then made in the name of the Republic. That is the essence of order LVIII rule 1 of the **Civil Procedure rules**. See generally also **Mohamed Ahmed .v. Republic (1957) E.A.323, Farmers Bus Service & Others .v. Transport Licensing appeals Tribunal(1959) E.A.779.** I have looked at both the chamber summons application for leave as well as the Notice of Motion. I do not think that the applicants can be faulted on the intitlement or the format adopted in presenting the two applications. The exparte application for leave was clearly made in the names of the applicants as it should be. Similarly the substantive Notice of motion was taken out in the name of the Republic contrary to the submissions of the interested parties. There is no requirement in law for leave to be granted for the use of the name of the republic in judicial review proceedings.

The interested parties have also argued as part of their preliminary objection that the applicants' statement of facts dated 19th January, 2010 only seeks leave to apply for orders of certiorari and prohibition which leave has been granted, hence it is not clear what reliefs the applicants were now craving for in the substantive Notice of Motion. Again this submission is misplaced. Under Order LIII rule (1) (2) of the **Civil Procedure rules**, statement of fact should contain the name and description of the parties to the application, reliefs sought and the grounds on which they are sought. I have again looked very carefully at the statement of facts filed with the application on 20th January, 2010. The reliefs sought therein are very clear to wit:-

“1. An order of certiorari.....

2. An order of prohibition.....”.

Nowhere in that statement are the applicants praying for leave to apply for those orders. Unless perhaps the interested parties are reading from a different script not filed in court.

Having disposed off the preliminary objection raised by the interested parties, there is nothing left in opposition to the application. As already stated elsewhere in this ruling the interested parties and the respondents did not file any affidavits in reply to the facts deposed to by the applicants. Thus these facts are uncontroverted and the court ought to take those facts as

representing the correct position in this case.

The application for leave was made within the statutory six (6) months as required since the decision was made on 22nd December, 2009 and leave was granted on 21st January, 2010. Their substantive motion was filed on 2nd February, 2010 also within 21 days of the grant of leave. Procedurally therefore the proceedings upto now are perfect.

The jurisdiction of the land Disputes Tribunals established under the Land Disputes Tribunals Act is circumscribed by section 3(1) thereof. Such jurisdiction is limited to hearing all cases of Civil nature involving a dispute as to:

- a) **The division of or determination of boundaries to, land including land held in common;**
- b) **A claim to occupy or work land; or**
- c) **Trespass to land.**

The 2nd applicant is the registered proprietor of the suit premises. The claim before the 1st respondent by the interested parties was for the ownership of the entire suit premises. On the basis of ancestral land. The 1st respondent acceded to the request and awarded the 2nd interested party the entire suit premises. That claim was not founded on division of or determination of boundaries, nor was it anchored to a claim to work or occupy land. Neither was the claim based on trespass. That being the case the 1st respondent had no jurisdiction to entertain the dispute as it related to registered land under the Registered Land Act. The implementation of the award would entail the transfer of the 2nd applicant's suit premises to the 2nd interested party. Indeed there is an application pending before the 2nd respondent seeking the adoption of the award. The implementation of the award no doubt will entail the closure of the register and opening up of a new one in favour of the 2nd interested party. It is clear that the proceedings before the 1st respondent related to title to land. This dispute in my view could only be tried by the High Court or by the Resident magistrate's court where such court has jurisdiction in terms of section 159 of the **Registered Land Act**. In the case of **Jotham Amunars .v. Republic KSM C.A.No. 256 of 2002 (UR)**, the court of appeal observed that Land Disputes Tribunals had no jurisdiction to deal with proceedings relating to title to land or beneficial interest therein.

Having come to same conclusion in the circumstances of this case, I find and hold that the 1st respondent acted outside its jurisdiction which renders its decision **null** and **void ab Initio**. Accordingly the order of Certiorari shall forthwith issue, to quash the award of the 1st respondent dated 22nd December, 2009. The award having been quashed, there is nothing left for the 2nd respondent to adopt. The applicants' second prayer for prohibition has thus been rendered otiose. As the mistakes or omissions that occasioned these proceedings were committed by the 1st respondent and who did not appear, I make no order as to costs.

Ruling dated, signed and delivered at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA

JUDGE