



**No. 2786**

**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISC. CIVIL APP. NO. 37 OF 2008**

**IN THE MATTER OF TITLE NUMBER KAMAGAMBO/KANYIMACH/82**

**AND**

**IN THE MATTER OF MIGORI DISTRICT LAND DISPUTE TRIBUNAL MISCELLANEOUS CASE NO. 38 OF 2007 (REF: MIG/RNG/LDT/07/LPN/82)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF REBECCA NYAMUSI MOSE.....APPLICANT**

**AND**

**MANASSE SABARA OTWERE.....1ST RESPONDENT**

**ZABLON ODARI OTWERE.....2ND RESPONDENT**

**JOASH KIVONI OTWERE.....3RD RESPONDENT**

**MIGORI DISTRICT LAND DISPUTES TRIBUNAL.....4TH**

**RESPONDENT**

## RULING

By a Notice of Motion application dated 29th June, 2009 and filed in court one year later, **Zablon Odari Otwere** on behalf of his brothers, the 1st and 3rd respondents respectively moved this court for the following order in the main ***"…That this honourable court be pleased to set aside the said order/ruling dated 30th April, 2009 and determination of this applicant (sic)…"***.

The application was expressed to be brought under the **Law Reform Act**, section 3A of the **Civil Procedure Act** and **all other enabling provisions of the law**.

The grounds advanced in support of the application were that there was a mistake or error apparent on the face of the record which the respondent's counsel ought to have disclosed to court, this court has inherent power to prevent an abuse of its process and set aside an order wrongfully obtained on the basis of non-disclosure of material facts and finally, that the applicants counsel never disclosed to court the various cases involving the parties over the parcel of land.

The applicant swore an affidavit in support of the application. Where pertinent he deponed that there were eleven sons surviving in their family. That at the time of filing the judicial review application, the court was never given full disclosure of the civil cases in several courts touching on the parcel of land in dispute. In total there were 15 of such cases in which various orders touching on the land had been made.

On 28th February, 2011, **Rebecca Nyamusi Mose**, the applicant in the judicial review application filed grounds of objection to the application filed by the respondents as aforesaid. It was her view that the application was incompetent and did not lie in law, the court lacked jurisdiction to set aside the order and or ruling dated 30th April, 2009 and no good or sufficient grounds had been set out to justify the court to set aside the same, the application being in the nature of a review, this court is not seized of such jurisdiction, the affidavit in support of the application was bereft of substance and pertains to matters solely within the respondent's knowledge, the same which were not disclosed. The affidavit is in any event argumentative and offends the provisions of order 19 of the **Civil Procedure Rules**. The respondents having only obtained grant of letters of Administration on 17th January, 2011, over their father's estate, **Justo Otwere Obara**, they were non-suited and this application does not lie as they have all along lacked ***locus standi*** and were mere busybodies.

The 4th respondent did not appear in these proceedings and therefore did not file any papers either supporting or opposing the application.

When the application came up for interpartes hearing before me on 21st March, 2011, **Mr. Sagwe** for the respondents and **Mr. Oduk** for the applicant, learned counsel respectively agreed to canvass the application by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

The orders sought to be set aside were in these terms:-

***"1. That an order of certiorari do and is hereby issued quashing all the proceedings findings and decision of the 4th respondent in Migori District Land Disputes Tribunal Misc. Case No. 38 of 2007 (Manaste Sabara Otwere, Zablon Odari Otwere, Joash Kivoni Otwere –vs- Rebecca Nyamusi Mose) Ref: MIG/RNG/LDTI) AND LPN/82 and the decision of the Resident Magistrate's court at Rongo in RM Misc. App. No. 38 of 2007.***

***ii. That the applicant do transfer three (3) acres of the suit land being Kamagambo/Kanyimach/82 to the 1st respondent, Manase Sabara Otwere pursuant to the consent order record on 19th October, 2004 in Rongo RMCCC No. 95 of 2004.***

***iii. That the respondents do pay the costs of the chamber summons and Notice of Motion herein…".***

The undisputed facts leading to this application are that the 1st, 2nd and 3rd respondents had the decision made in their favour by the 4th respondent, Migori District Land Disputes Tribunal quashed in terms aforesaid. In the same ruling, **Musinga J.** ordered the applicant to transfer to the 1st respondent 3 acres of land out of the suit premises, **Kamagambo/Kanymach/82**. In the course of effecting the order, the applicant encountered some difficulties or obstacles. When she went to Migori District Lands office to effect the order, she was informed that she was no longer the registered proprietor of the suit premises since it had been transferred to **Justo Otwere Sabara**. A certificate of official search showed that the said registration was done on 2nd April, 2008 although the said person died on 23rd July, 2004. The applicant had earlier on conducted an official search which confirmed that she was the registered proprietor of the suit premises.

As a result on 2nd September, 2009 she mounted an application seeking the cancellation forthwith of the suit premises in the name of **Justo Sabara Otwere** and in place the name of **Rebecca Nyamusi Mose**, the applicant be restored, the District Land Registrar to forthwith rectify the register to reflect the applicant as proprietor of the suit premises, an injunction against the 1st, 2nd and 3rd respondents, the Deputy Registrar of this court to execute all or any necessary transfer forms, or documents on behalf of the respondents and or **Justo Sabara Otwere** in respect of the suit premises. That application was on 28th September, 2010 allowed in its entirety.

Neither the two decisions have been the subject of any appeal. Instead, what do the respondents do, they have opted to take us back to the ruling of 30th April, 2009. The decision sought to be set aside or stayed is in my view incapable of being stayed or set aside. Once an order of certiorari issues, it quashes something. What then is left capable of being stayed? I cannot think of any. Further it is not clear why the setting aside is sought. In the first prayer of the application, the applicant wants an order of stay pending the hearing and determination of the application. It is clear from this prayer that no specific order has been stated that ought to be stayed. None can therefore be granted. And even if such an order had been identified, the respondents are not telling us what the stay of execution is meant to achieve. Is it for purposes of an appeal or so that the case is reopened for fresh hearing. I note though that in their submissions, the respondents allude to an intended appeal. However written submissions cannot replace the prayers in a pleading. The respondents having not stated specifically what they intended to achieve by an order of stay, the same is not available to them.

With regard to the 2nd prayer on the face of the application, the respondents wish to set aside the ***"order/ruling dated 30th April, 2009 and determination of this applicant" (sic)***. Once again the respondents are not telling me what they intend to do if I was to grant the order. It is not just enough to pray for an order of setting aside without telling the court what one intends to do once he obtains such an order. Indeed it would even appear to me that the orders in the two prayers in the application may clash. If in prayer (a) the respondents are seeking stay pending appeal, how then can they seek the setting aside of the order that is the very subject of the intended appeal. Further the order to set aside is only meant to last until the determination of this application. It would appear to me in the circumstances that the 2nd prayer

as framed is an exercise in futility for if is granted, it should last until the determination of this application. Once this ruling is delivered, the order of setting aside the ruling dated 30th April, 2009 will automatically lapse. That order could have benefited the respondents if they had asked for it in the interim. They did not do so and therefore it will be a waste of court's valuable judicial time to even consider it.

Judicial Review proceedings are special proceedings that are neither civil or criminal. They are anchored on the **Law Reform Act** and order 53 of the **Civil Procedure Rules**. Save for this, no other provisions of the **Civil Procedure Act** and the rules made thereunder are applicable. Under the **Law Reform Act** and order 53 of the **Civil Procedure Rules**, there is no provision for Review of decisions made under Judicial Review Proceedings. Thus the application does not lie and is misplaced. Essentially the respondent's application is in the nature of a review application though couched differently. There is no jurisdiction or power conferred on this court to entertain application seeking to review and set aside an order of ***certiorari***, ***prohibition*** and ***mandamus***. The provisions of order 53 of the **Civil Procedure Rules** are a complete set of procedure.

The applicant has claimed that the respondents had no ***locus standi*** to mount the proceedings. They had no ***locus standi*** to prefer a case regarding the suit premises that is now theirs and had ceased being their fathers as correctly submitted by counsel for the applicant. They ought in any event not to have preferred the case before obtaining letters of Administration. This fact has neither been challenged nor rebutted by the respondents. It must therefore be true. The grant they subsequently obtained whilst the case had been determined cannot be valided their ***locus standi***. Accordingly, if the court was to grant the orders sought, it will be acting in vain.

The history of this dispute shows that there have been fourteen (14) plus suits involving various parties and touching on the suit premises. The respondent must now be told that time is nigh that litigation must at some point come to an end. It is indeed in the interest of public policy that litigation must come to an end. The alleged error apparent on the face of the record is nothing new. The respondents knew very well about the previous suits. With abit of diligence they would have been able to bring that information to the fore. The duty of disclosure was upon them even as they preferred the quashed decision before the Land Disputes Tribunal. That burden cannot be shifted. In any event, and as correctly submitted by counsel for the applicant, multiplicity of suits does not confer a property interest or right over the subject suit premises.

The application lacks merit. It is dismissed with costs to the applicant, **Rebecca Nyamusi Mose**.

**Ruling dated, signed** and **delivered** at Kisii this 4th day of May, 2011

**ASIKE-MAKHANDIA**

**JUDGE**