



**NO.267  
REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**MISCELLANEOUS CIVIL APPLIC. NO. 33 OF 2011**

**IN THE MATTER OF: AN APPLICATION BY DENIS OTUOMA OJIJO FOR ORDERS OF  
JUDICIAL REVIEW IN THE NATURE OF MANDAMUS**

**AND**

**IN THE MATTER OF: SECTION 7 (2) OF THE LAND DISPUTES  
TRIBUNALS, ACT NO. 2 OF  
1990 KENYA**

**AND**

**IN THE MATTER OF: SECTION 8 & 9 OF THE LAW REFORM ACT,  
CAP 26, LAWS OF KENYA**

**AND**

**IN THE MATTER: OF SECTION 165 OF THE CONSTITUTION OF  
KENYA, 2010**

**AND**

**IN THE MATTER OF: RESIDENT MAGISTRATE'S COURT AT OYUGIS**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE RESIDENT MAGISTRATE OYUGIS LAW COURTS ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SAMUEL OGOLO OTUOMA ..... INTERESTED PARTY/RESPONDENT**

**AND**

**.EX-PARTE  
.DENIS OJIJO OTUOMA**

**RULING**

1. The Ex-parte Applicant, Denis Otuoma Ojijo has moved this honourable court vide the chamber summons dated 29<sup>th</sup> March 2011 for an order in terms of prayer (2) thereof, namely an order of Judicial Review in the nature of mandamus directed unto the Respondents herein to compel the magistrate/Magistrate's court at Oyugis to adopt the decision of the Land Disputes Tribunal dated 5<sup>th</sup> October 2010, and enforce the said decision as if it were a judgment of the said Resident Magistrate's court in accordance with the mandatory provisions of **section 7 (2) of the Land Disputes Tribunals Act, No.18 of 1990**.
2. The application is supported by the grounds on the face thereof, the main one being that the honourable Resident Magistrate Oyugis Law Courts, vide its ruling dated 1<sup>st</sup> February 2011 declined to adopt the award of the Tribunal as by law mandated. The application is also grounded on the Supporting Affidavit sworn by Denis Ojijo Otuoma on 29<sup>th</sup> March 2011. The deponent reiterates the averments found on the face of the application and urges this court to allow the application as prayed. There is also the Statement of Facts and Verifying Affidavit of the applicant to support the application.
3. The application was opposed vide the Grounds of Opposition dated 3<sup>rd</sup> May 2010 filed on behalf of the Interested Party. First it was contended that the application does not lie because the Senior Resident Magistrate's court at Oyugis has already made a ruling refusing to adopt the Tribunal's award as an order of the court. What the applicant should have done is to seek for an order of certiorari and not mandamus to bring before this court the decision of the said court for quashing. It was further submitted that the authorities relied upon by the applicant, which authorities I have carefully considered, are properly concerned with issues of certiorari and not mandamus.
4. For the avoidance of doubt in this matter, **sections 7 and section 8 of the Land Disputes Tribunals Act, No.18 of 1990** provide as follows:-

**“7 (1) The chairman of the Tribunal shall cause the decision of the tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the tribunal.**

**(2) The court shall enter judgment in accordance with the decision of the tribunal and upon judgment being entered a decree shall issue and shall be enforced in the manner provided under the Civil Procedure Act.**

**8 (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.**

**(2) The appeal shall be registered in a register of appeals in the same manner as the register of claims under section 3 (3); and a notice thereof shall be served on the other party or parties to the dispute in the same manner as provided in sub section (4) of section 3.**

**(3) The appeal shall be in documentary form and shall contain a brief statement, to be divided into separate grounds of appeal, of the**

reasons upon which the party appealing wishes to rely.

- (4) The appeal shall then be set down for hearing by the Appeals Committee at a date, time and place to be notified to the parties thereto.
- (5) The appeal shall then be determined by the Appeals Committee, which shall consist of three members appointed under section 9.
- (6) At the hearing of the appeal, the party bringing the appeal shall begin.
- (7) After giving each party an opportunity to state his case the Appeals Committee shall determine the appeal giving reasons for its decision.

**Provided that the Committee may in its discretion permit the party appealing to reply to the other party's submission if that submission contains any new matter not previously introduced at the hearing or on the appeal.**

- (8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.
- (9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:

**Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law), is involved.**

- (10) A question of customary law shall for all purposes under this Act be deemed to be a question of fact.”

5. The purpose of a mandamus application is to issue a command so as to arrest a situation where there is a duty of a public or quasi – public nature, or a duty imposed by statute; it compels the fulfillment of a duty where there is lethargy on the part of a body or officer concerned. Like certiorari and prohibition, an order of mandamus would issue so as to right a recognizable public law wrong such as unlawfulness, unreasonableness or unfairness. See “**An Outline of Judicial Review in Kenya: P.L.O. Lumumba, 1999.**”

6. As is clear in this case, the Senior Resident Magistrate's Court did not enter judgment in accordance with the decision of the Tribunal, but instead made a ruling refusing to enter judgment. What should

ordinarily follow then is for the applicant herein to seek the leave of this honourable court to bring into court the said decision for purposes of being quashed, if it appears to the applicant herein that the process adopted by the said court in reaching the said decision/ruling was questionable. The procedure adopted by the applicant for the present application therefore cannot lie.

7. I have considered the authorities relied upon by the applicant in this case and note that the said authorities are clearly distinguishable from the present case. In **Misc. Application No.47 of 2004 – Harrison Ndungu –vs.- Nakuru CM’s Court & another [2005] e KLR**, the issue before the court was an application for the Judicial Review orders of certiorari and prohibition to have the proceedings before the CM’s court at Nakuru in **Nakuru CMC Land Dispute No. 7 of 2002 – Kimunya Kamemia – vs.- Harrison Ndungu Kungu** and particularly the order relating to the reading and adoption of the award made by Bahati Land Disputes Tribunal in its Land Disputes Tribunal Case 47 of 2002 brought to the High Court for quashing. That is the kind of application which the applicant herein should have brought, to question the ruling by the court at Oyugis refusing to adopt the award as a judgment of the court. That was also the position in **Misc. Civil Application No.14 of 2009 – R. –vs.- Ng’arua Land Disputes Tribunal & another [2010] e KLR**. This latter case dealt with the issue of leave to bring the judicial review proceedings, where it was argued that the leave had been sought and obtained outside the 6 months’ window fixed by law. The two authorities are therefore irrelevant in the circumstances of this case.

8. In conclusion, and without going into further detail, this application is bad in law is incompetent and cannot stand. The same is hereby dismissed with costs to the Interested Party.

9. It is so ordered.

**Dated and delivered at Kisii this 04<sup>th</sup> day of November,2011**

**RUTH NEKOYE SITATI**  
**JUDGE.**

In the presence of:

Mr. Nyachae for O.M. Otieno (present) for Ex-parte Applicant

Mr. Ochoki for Bosire Gichana (present) for Interested Party

N/A for Respondents

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**  
**JUDGE.**