REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Miscellaneous Civil Application 15 of 2009

IN THE MATTER OF: AN APPLICATION BY JEMIMA KEMUNTO MASARE

FOR JUDICIAL REVIEW

AND

IN THE MATTER OF: LAND DISPUTES TRIBUNAL ACT

AND

IN THE MATTER OF: BORABU DISTRICT LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF: THE SENIOR RESIDENT MAGISTRATE'S COURT AT KEROKA

AND

IN THE MATTER OF: KEROKA SRMCCC MISCELLANEOUS APPLICATION NO 4 OF 2009

BETWEEN

REPUBLIC…….....…….APPLICANT

VERSUS

BORABU DISTRICT LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE'S COURT,

KEROKA.....2ND RESPONDENT

AND

KERUBO S. MASARE…….....…….……INTERESTED PARTY

EX-PARTE

JEMIMA KEMUNTO MASARE

RULING

Kerubo S. Masare, hereinafter referred to as "***the interested party***" commenced proceedings against **Jemima Kemunto Masare**, hereinafter referred to as "***the applicant***" in the Borabu District Land Disputes Tribunal, hereinafter referred to as "***the 1st respondent***" in or about 14th October, 2008. Her claim then was that "***she wanted her share of land from her co-wife of which was for their deceased husband Simion masare. She further stated that her co-wife Jemimah Kemunto Masare has refused to let them share the land of their deceased husband. Therefore her main aim is to let her co-wife to share the land which is at Kineni settlement scheme….***" It would appear that the applicant did not respond to the interested party's claim aforesaid. However she appeared before the tribunal "***…and requested the court to refer the case to the family to settle the dispute…***" Her plea was granted and though they were given time to do so the dispute was never settled at the family level. The tribunal accordingly, resumed the hearing of the dispute. Apparently dispute was heard ex-parte as the applicant had been summoned severally to attend the tribunal to no avail. The tribunal having heard the interested party's side of the story only ruled thus on or about 17th February, 2009. ***"…..After the court had listened to the plaintiff who is Kerubo S. Masare ID.169344901 and her witnesses the court ruled that since the deceased Simion Masare had four wives according to kisii customary law the four wives of the deceased should get shares from the same plot because the total acreage of plot parcel number Kineni Settlement Scheme/49 is 99.4acres. Therefore the plaintiff who is Kerubo S. Masare ID.169344901 should get 18 acres (eighteen acres) from plot parcel number Kineni Settlement Scheme/49…"*** This award was subsequently lodged with the Senior Resident Magistrates court at Keroka hereinafter referred to as "***the 2nd respondent"*** as required by the relevant provisions of the Land Disputes Tribunals Act. The interested party in the fullness of time applied for adoption of the award as a judgment of the court. This was on 15th March, 2010. On 18th March, 2009 however, the applicant obtained orders from this court to thwart the adoption sought as aforesaid.

The above order was obtained by the applicant in the instant judicial review proceedings vide an application dated and filed in court on 13th March, 2009. In the said application, the applicant sought orders in the nature of certiorari to remove into this court and quash the proceedings and decision of the 1st respondent dated 17th February, 2009, prohibition to issue prohibiting the 1st respondent from hearing, deliberating and or in any way whatsoever and or in howsoever dealing with the suit premises, and further prohibition to issue prohibiting the 2nd respondent from adopting, ratifying and or entering judgment in terms of the1st respondent's decision dated 17th February, 2009. There was also a further prayer for the leave so granted to operate as stay.

The ex-parte application for leave came before **Musinga.J** on 17th March, 2009 for consideration. The learned Judge duly granted leave and also directed that the leave so granted do operate as stay of the proceedings before the tribunal. He also ordered that the substantive Notice of motion be filed within 21 days from the date thereof.

On 1st April, 2009, the applicant duly filed the substantive Notice of motion in which in the main she prayed:-

"1……...

2. The Honourable Court be pleased to grant an Order of Judicial Review in the nature of Certiorari to remove unto the High Court and quash the proceedings and Decision of 1st respondent(Borabu Land Disputes Tribunal), dated 17th February, 2009, emanating from Land Dispute Cause No.12 of 2008 concerning and/or touching the Ex-parte Applicant's Land, LR.NO.ISOGE/KINENI/BLOCK I/49.

3. The Honourable Court be pleased to grant an Order of judicial Review in the nature of Prohibition, to issue prohibiting 1st Respondent(Borabu Land Disputes Tribunal) and/or such other Tribunal from hearing, further hearing, deliberating and/or in any other way whatsoever and/or howsoever dealing with issues pertaining to ownership and/or Title, in respect of LR.NO. ISOGE/KINENI/BLOCK I/49, registered in the name of Ex-parte Applicant or any portion thereof.

4. The Honourable court be pleased to grant an order of Judicial Review in the nature of certiorari, to issue to remove unto the High

Court and Quash the Decision and/or Decree of the 2nd Respondent, if any, issued on the 18th day of March, 2009.

5. The Honourable court be pleased to grant an order of Judicial Review in the nature of prohibition to issue prohibiting the 2nd Respondent(Senior Resident Magistrate's court, Keroka) from adopting, ratifying and/or entering Judgment, in terms of the 1st Respondent's Decision dated 17th February, 2009 and/or enforcing any resultant Decree that may arise therefrom, either as sought or at all.

6. Costs of this application be borne by the Respondents and the interested party jointly and severally."

It should be noted from the foregoing that the applicant has added prayer 4 in the Notice Motion. That prayer was not in the ex-parte application for leave. Accordingly no leave was given to the applicant to commence judicial Review proceedings in the nature of certiorari to issue so as to remove into the High Court and quash the decision and or decree of the 2nd respondent if any, issued on the 18th March, 2009. Leave having not been granted in respect of this prayer it is not available to the applicant at this stage. Accordingly that prayer is struck out.

The application was made on the grounds that the 1st respondent, had exceeded its jurisdiction and therefore acted ultra vires its statutory limits when it entertained a dispute touching on ownership and title to ***Isoge/Kineni/Block1/49***, hereinafter referred to as ***"the suit premises."*** Such proceedings were barred by dint of section 3(1) of the Land Disputes Tribunal Act. The proceedings were conducted in a vacuum as there was no complaint lodged, the 1st respondent delved into issues touching on and or concerning succession which by dint of the law of Succession Act it had no jurisdiction, the 1st respondent also addressed issues concerning acquisition of Title and ownership of land registered under the Registered Land Act and finally the 1st respondent was illegally constituted in so far as the panel of elders who sat and deliberated upon the issue were not Gazetted.

The application was further supported by an affidavit sworn by the applicant. The affidavit merely reiterated and

expounded on the grounds in support of the application aforesaid. Suffice to add that in so far as the applicant was concerned, the 1st respondent having acted without jurisdiction, there was no decision or verdict capable of adoption and that therefore the entire proceedings and determination by the 1st respondent were null and void as it recked of illegalities and violated the provisions of the Land Disputes Tribunal.

The application was duly served on the respondents and interested party. The interested party reacted first by appointing **Messrs Omariba & Company Advocates** to act for her. On 18th March, 2010 she filed a replying affidavit. In pertinent paragraphs she deponed that she was a co-wife to the applicant alongside **Kwamboka Masare** deceased and **Sarah Nyakerario Masare**. All in all their husband now deceased had four wives. He owned the suit premises prior to his death in 1974. Following his death aforesaid letters of administration with regard to his estate were not taken out. However, the applicant who was the 3rd wife proceeded in secrecy and fraudulently had the whole suit premises transferred and registered in her names solely and to the exclusion of all her co-wives and other beneficiaries. Upon that discovery, the interested party moved the 1st respondent to determine the dispute which resulted in ruling in her favour.

The respondents too through the provincial litigation counsel, one, **MS. T.W. Gathagu** filed notice of appointment. They did not however follow it up by filing any affidavit(s) in response or any other papers.

On 16th April, 2010, the application came up for interpartes hearing before me. However only the applicant and interested party appeared. Satisfied that the respondents had been duly served with the application in good time and had advanced no reasons for their failure to attend court for the hearing I allowed the parties present to canvass the application, the absence of the respondents notwithstanding. The applicant and the interested party then agreed to ventilate the application by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

The proceedings before the 1st respondent were founded upon the Land Disputes Tribunals Act. Under this statute, the 1st respondent by virtue of Section 3 thereof is only conferred with jurisdiction to deal with civil cases involving disputes with regard to:-

- ***Division of, or the determination for boundaries to land, including land held in common.***
- ***A claim to occupy or work land and;or***
- ***Trespass to land.***

From the foregoing it is quite clear that the 1st respondent is not seized of jurisdiction to entertain and determine a claim touching on ownership and or title to Land registered under the Registered Land Act, nor adjudicate or arbitrate on issues touching on and or concerning succession, neither does it have jurisdiction to direct the rectification of the register in respect of land registered under the Registered Land Act. Yet by the 1st respondent reaching the decision set out in extenso elsewhere in this ruling, it was simply doing what it was not supposed to do as stated above. The 1st respondent being a creature of statute can only do that, that the statute tells it to do. It cannot purport to act in excess of what the statutes allows it to do. Nor can it confer on itself jurisdiction that the statute has expressly or impliedly ousted it from. It cannot also not avoid to do what the statute expressly allows it to do. If the 1st respondent was to confer on itself jurisdiction which it does not have then, it will be acting in excess or want of jurisdiction and if it was to avoid such jurisdiction then it will be guilty of abduction of responsibility and or duty. Either way, the 1st respondent would have failed in its mandate and the resultant award would be liable to being quashed by an order of certiorari so long as the application for such remedy was made within the stipulated period of time-six months!

In this case it is quite clear from the interested party's opening remarks in her statement of claim before the tribunal that she wanted her share of her late husband's parcel of land, the suit premises. All the witnesses she called to support her in her claim, **Nehemiah Mariera, Fundi Elijah** and **Mishael Omboga Sagwe** all stated that the four wives of the deceased should share the suit premises. The 1st respondent in making the award actually agreed with that position. It is clear that in making that decision therefore, the 1st respondent was trespassing on the territory of the Law of Succession Act. The 1st respondent is not conferred with jurisdiction to entertain and or determine issues or matters pertaining to, or touching on inheritance and or succession. The interested party seems to have appreciated this fact but in her replying affidavit she acknowledges that her husband died in the year 1974 and that as a family they had not petitioned for a grant of letters of administration intestate to enable them deal with his estate. Clearly therefore the dispute before the 1st respondent was one of Succession and or inheritance. It matters not that the deceased passed on in 1974 before the Law of Succession Act came into force. It was still a succession matter which the 1st respondent had no jurisdiction to entertain. Further, since the matter touched on the estate of the deceased, it was incumbent for the 1st respondent to establish whether the interested party had the necessary locus standi to commence and prosecute the claim in the absence of a grant of letters of Administration intestate with regard to her deceased's husband's estate. The interested party has submitted that the claim lodged by the interested party was proper as it involved customary issues which are recognized by section 3(7) of the Land Disputes Act. This submission cannot possibly be correct. That section deals with the process by which a decision should be reached by the 1st respondent. It is to the effect that the tribunal should adjudicate upon the claim and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute any witnesses whom they wish to call and their submissions, if any. A literal interpretation of the said provision of the law is that in arriving at the decision the tribunal will be guided by recognized customary law. Thus it does not confer on the tribunal jurisdiction to deal with a succession or inheritance matter in a customary way.

If the award was to be carried into effect, it would entail the subdivision of the suit premises so that the interested party gets her 18 acres out of the suit premises. That being the case it must be apparent that the 1st respondent in the process of making the award digressed into the issue of ownership and or title to land which jurisdiction is not conferred with. That jurisdiction is strictly conferred to the High Court by virtue of section 159 of the Registered Land Act. It is this court and this court alone which has jurisdiction to entertain civil suits and proceedings relating to the title to or possession of land registered under the said act as long as the value of the same is above twenty five thousand pounds. Any dispute involving a lesser amount than aforesaid is however triable by the Resident Magistrate's court. In entertaining the dispute in the manner aforesaid, the 1st respondent again exceeded its statutory mandate by conferring on itself jurisdiction which it did not have.

Again, if the award was to be executed, it would involve the cancellation and or rectification of the register of the suit premises. The 1st respondent has no jurisdiction to make an award with such far reaching consequences. The rectification of the register can only be addressed and ordered by a court of law and not a quasi judicial tribunal as the 1st respondent. In this regard, the provisions of sections 143 and 159 of the Registered Land Act come in handy.

Faced with similar situations in the past, the court of appeal and the High court have always maintained that the tribunals established pursuant to the provisions of the Land Disputes Tribunals Act have no jurisdiction to deal with and determine issues pertaining to ownership and title to land. Sample these!

In the case of ***Asman Maloba Wepukhulu & another V Francis Wakwabubi Biketi, KSM C.A. No. 157 of 2001(UR)***, the court of appeal observed ***"…..The title relating to the suit land, Bokori/Kituhi/169, was unlawfully interfered with by bodies which lacked jurisdiction and all orders made by them were illegal…."*** In the matter of ***R V Kajiado Land Disputes Tribunal ex-parte Lilian Muranja Misc.Application No. 689 of 2001(UR), Nyamu. J*** as he then was observed ***"……The competency of the application does place the court in an awkward dilemma firstly because if the contention on jurisdiction is correct as stated above the award is a nullity and anything out of a nullity is a nullity i.e. the judgment, decree or order by the magistrate. The irregularities mentioned above notwithstanding this court cannot countenance nullities under any guise. This court would like to apply the principle enunciated in the landmark case of Animistic v Foreign Compensation 1962 ac 147*** *"If a tribunal mistook the law applicable to the fact as it had found them, it must have asked itself the wrong erestin i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine its purported determination" not being a determination with the meaning of the empowering legislation was accordingly a nullity…"* ***"It follows that both the award and the purported entering of the judgment in terms of the award were nullities. This is so because the maximum(sic) exhihilo nilil fit applies-"Out of nothing comes nothing. The High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role…."*** The same situation obtains here.

Finally, the applicant raised the issue of the composition of the 1st respondent. It is her contention that as at the time the

1st respondent was entertaining the claim by the interested party, it was not properly constituted. In terms of section 4 of the Land Disputes Tribunal Act, the 1st respondent is deemed to be properly constituted if it is composed of the chairman appointed by the District Commissioner and either two or four elders. The minister then by a notice published in the Kenya Gazette, appoints them as such. If I understood the applicant's contention properly, it is that much as the 1st respondent's membership were appointed, they were never Gazetted as required. In response to this submission, the interested party stated that ***"the composition of the 1st respondent was properly and or legally constituted as it fulfilled the conditions required under section4 of the Land Disputes Tribunal Act No. 18 of 1990…"*** This is a mere assertion without any proof at all. What was so difficult for the interested party to obtain a copy of the Kenya Gazette that Gazetted the appointment of 1st respondent's members? I cannot think of any. The applicant having asserted that the members of the 1st respondent had not been Gazetted as required, it now fell upon the interested party to prove her otherwise by tendering in evidence the Gasette Notice. However, since no such evidence was forthcoming it must therefore be deemed and assumed that the 1st respondent was not legally constituted.

From what I have said so far, it must be apparent that I am satisfied that the application is merited. Accordingly I grant prayer 2, 3, and 5 in the application. The parties involved in this contest are co-wives. It would thus not be fair to award costs to any of them. Each party shall therefore bear her own costs. Those then are the orders I make in this application.

JUDGMENT DATED, SIGNED and **DELIVERED** at **KISII** this 14th day of May, 2010.

M.A. MAKHANDIA

JUDGE.