



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

MISC. APPL. NO. 104 OF 2009

**IN THE MATTER OF APPLICATION BY WAY OF JUDICIAL REVIEW BY WAY OF
CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF REGISTERED LAND ACT

BETWEEN

REPUBLIC APPLICANT

-VERSUS-

CHAIRMAN MARANI LAND DISPUTES TRIBUNAL1st RESPONDENT

CHIEF MAGISTRATE’S COURT, KISII 2nd RESPONDENT

ELMEDA MORAA MOGAKA 3rd RESPONDENT

EXPARTE

1. JANE MANWA

2. MECHA MANWA

RULING

Before me is a notice of Motion application brought pursuant to the provisions of Order 53 Rule 3 of **Civil Procedure rules**, sections 3, 3A of **Civil Procedure act**, 8 and 9 of the **Land Reform Act** and all other enabling provisions of the law. It seeks an order of certiorari to remove into this court the award by Marani Land Disputes Tribunal in case No. 8 of 2009 dated 18th June, 2009 and adopted as a judgment of court in Kisii Chief Magistrate’s court on 26th August, 2009 vide **Kisii CM MISC. APPL. No. 87 of 2009** and have both quashed and also an order of prohibition to issue restraining all the respondents from executing the decree in **Kisii CM Misc. Appl. No. 87 of 2009**. Finally the applicant prayed for costs of the application. The application was filed pursuant to leave sought and obtained by the applicants before **Muchelule J.** sometimes in October, 2009.

From the documents filed in support of the application the brief background to the dispute appears to be that the subject matter of the dispute is land parcel **No. WEST KITUTU/MWAMONARI/740** hereinafter “the suit premises”. It forms part of the estate of one **Manwa Mwebi** deceased. The 3rd

respondent is the daughter-in-law of the said deceased **Manwa Mwebi** whilst the applicants are daughter and son respectively. The 3rd respondent lodged a complaint with the 1st respondent seeking that the suit premises be sub-divided and she be given her late husband's share out of the same and that the applicants be left with the residue thereof. She also claimed a share of the proceeds of land at Manga which had been given to her by her Mother-in-law but was secretly sold without her knowledge by the co-applicant **Mecha Manwa**.

The applicants of course denied the 3rd respondent's claim stating that their deceased father had shared out his land to his 2 sons, the co-applicant and the 3rd respondent's late husband.

The 1st respondent upon hearing the dispute allowed the 3rd respondent's claim, the effect of which was to sub-divide the said land parcel into 2 portions. It also ordered the applicant, **Mecha Manwa**, to pay to her Kshs. 37,500/= being her share of the proceeds of sale of the land parcel at Manga. The said award was subsequently filed and adopted as a judgment of the court as provided for by Section 7 of the **Land Disputes Tribunals Act**. It is that award and decision that the applicants now seek to have quashed by this court and the said respondents also be prohibited from executing the same.

The first ground advanced by the applicants in support of the instant application and which entirely agree with is that the 1st respondent was not seized with jurisdiction to hear and determine the dispute. This is so because the powers of the **Land Disputes Tribunal Act** to hear land disputes is donated by section 3 of the **Land Disputes Tribunals Act**. The tribunals established under the said act have only jurisdiction to hear disputes related to trespass, right to work or occupy land and boundaries. In the instant case, the matter in dispute had nothing to do with division of or the determination of boundaries to land including land held in common; a claim to occupy or work land or trespass to land. If anything the dispute involved administration of the deceased's estate. In the premises the 1st respondent in entertaining the dispute and arriving at the decision complained of exceeded its mandate. Accordingly the award arrived at as aforesaid and adopted as a judgment of the court was null and void. As already stated the dispute involved the suit premises which formed part of the estate of the deceased, **Manwa Mwebi**. His estate has yet to be administered since neither the 3rd respondent and or the applicants have taken out letters of administration to the said estate. In spite of that fact, the 1st respondent it would appear proceeded to make orders effectively sub-dividing the suit premises that form the estate of the deceased. If this order is implemented, it will be contrary to the provisions of section 45 of the **Law of Succession Act**. The gist of the order by the 1st respondent is that it will intermeddle in the estate of the deceased which would be unlawful. In order to remedy the situation the only option available to the applicants and as correctly submitted by **Mr. Soire** and more so to protect the estate of the deceased is to quash the award by way of certiorari as prayed for in the notice of motion and also issue an order of prohibition to the respondents to stop them from implementing or executing the said award and the consequent decree.

Another aspect of the award which was contrary to the clear provisions of section 3 of **Land Disputes Tribunal Act** is the order made by the 1st respondent that the co-applicant pays the 3rd respondent a sum of Kshs. 37,500/= being her entitlement from the proceeds of the sale of the piece of land at Manga given to her by her Mother-in-law and which was sold by the co-applicant without her knowledge and or consent. That aspect of the award is clearly ultra-vires the powers donated to the tribunal under section 3 of the **Land Disputes Tribunal Act**.

Though the application was served on the respondents, none of them bothered to file any papers in response. Again when the application came up for interpartes hearing, the respondents never appeared to oppose the same though served in good time. As it is therefore this application was unopposed at the hearing. Though unopposed, **Mr. Soire**, learned counsel for the applicants nonetheless opted to converse the same through written submissions which I have carefully read and considered together with cited authorities. As the application was unopposed, I see no reason why it should not be allowed.

Accordingly, I allow the application in terms of prayers (a) and (b) on the face of the same. The applicants too shall have the costs of this application.

Ruling dated, signed and delivered in Kisii this 30th July 2010.

ASIKE-MAKHANDIA

JUDGE