



No. 134
REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
MISC. APPLIC. NO. 72 OF 2009
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS BY WAY
OF PROHIBITION
AND
IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT.

BETWEEN

REPUBLIC APPLICANT

-VERSUS-

EKERENYO LAND DISPUTES TRIBUNAL..... 1st RESPONDENT
CHIEF MAGISTRATE’S COURT, KISII 2nd RESPONDENT
JOYCE GECHAMBA KIAME3rd RESPONDENT

EX-PARTE

ALFRED NYAMWEYA NYANUMBA..... INTERESTED PARTY
RULING

The instant application is a judicial review application seeking an order of prohibition to issue against the respondents. It has its genesis in an action lodged in **Ekerenyo Land Disputes Tribunal** hereinafter “the 1st respondent” by **Joyce Gechamba Kiame**, “the 3rd respondent” on behalf of her deceased mother-in-law one, **Alixina Nyanchoka Manyara**. The claim was against **Alfred Nyamweya Nyanumba**, “the interested party”. The dispute basically centred on a boundary. In her evidence before the 1st respondent, the 3rd respondent stated that there was a boundary on the lower side of their parcel of land which had been altered and a building erected thereon presumably by the interested party. In response the interested party stated that the 3rd respondent was a wife to his late cousin. She had never complained about the interference of the boundary. His shop was not on the boundary as far as he was concerned.

Upon hearing the parties the 1st respondent made an award dated 13th August, 2008 which was subsequently adopted as the judgment of the court by Kisii Chief Magistrate’s Court in Miscellaneous Civil application number 110 of 2008 hereinafter “2nd respondent” in accordance with the provisions of section 7 of the **Land Disputes Tribunals Act** on 27th November 2008. The award was in these terms:-

- (a) The board observed keenly the site and dispute with the help of mutations and part of the Registry Index map comprising the two parcels.**
- (b) There has been several sub-divisions and extensive construction of (sic) both parcels. A Standard Road Reserve has been constructed of 36m wide.**

(c) *The board therefore ruled that a qualified surveyor to come with the help of a mathematical accuracy ruler (sic) to determine the certainty of the boundary under dispute.*

(d) *Enclosures*

(i) Official searches NM/BOISANGA/4145 and 3222.

(ii) Registry Index Map

(iii) Mutation page three dated 14th June 1995

(e) *Right of appeal granted within 30 days from the date of this ruling*

(f) *We pray that the court grant court orders to these effects.(sic)*

It is against that award that the interested party initiated these proceedings. Essentially he is seeking for an order of prohibition to issue against the respondents prohibiting them from implementing and or executing the decree arising from **Kisii C.M Misc Appli. No. 110 of 2008** which adopted the award of the 1st respondent aforesaid. Ideally I do not think that this prayer is available as against the 1st and 3rd respondents respectively. Prohibition looks to the future and not to the past. There is nothing left for the 1st and 3rd respondents that they can be prohibited from doing. Nor is the 3rd respondent an inferior tribunal whose decisions are subject to judicial review proceedings.

Pursuant to the leave granted by **Musinga J** on 29th July, 2009 the interested subsequently filed the substantive Notice of motion and served the same on the respondent. None of them however entered appearance nor filed any papers in response to the application. Thus this application has proceeded as uncontested. It was however canvassed through written submissions which I have carefully read and considered together with cited authorities.

The first ground in support of the application is that the 3rd respondent who commenced these proceedings at the tribunal and also in the Chief Magistrate's Court Kisii lacked the *locus standi* to sue for and on behalf of her deceased Mother-in-law one, **Alixina Nyaboke Manyara** as she did not or had not obtained a grant of letters of administration. Without capacity the proceedings before the tribunal and the chief magistrate's court were all a nullity. It is trite law that capacity is one of the fundamental and essential requirements that a party should have before or at the commencement of any legal proceedings. In the instant case since the 3rd respondent did not have such capacity it goes without saying that the proceedings, the resultant award and the decree before both the tribunal and the court were all but a nullity.

The second ground advanced by the interested party in support of the application is that the award of the tribunal which was adopted as a judgment of the court, if implemented will in one way or another, involve touch or affect the estate of the deceased. If that be so then it will be in contravention of section 45 of the law of **Succession Act**. Hence the said award and decree are unlawful.

In the case of **Commissioner of Lands and Another Vs Coastal Aqua culture Ltd KLR (E & L) 264** the Court of Appeal laid down conditions upon which a prohibition can issue. It stated thus:-

“Suffice it to say, there cannot be a comprehensive list of acts in respect of which prohibition will issue, but it in the words of Atkin LJ in the English case Rv Electricity Commissioners Ex-parte London Electricity Joint Committee co (1920) Ltd (1924) 1 KB 171, 20-4, 205, prohibition may issue wherever anybody of persons having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially exceeds its legal authority. An inferior tribunal is such a body of persons and it has a duty to act judicially. Such an inferior tribunal exceeds its legal authority when in want or excess of jurisdiction or when it acts in breach of the rules of natural justice. For example, where the tribunal is without competence by reason of the status of the parties or the nature

of the subject-matter there is a total want of jurisdiction. In such a case prohibition will issue if there remains something to be done which the court can prohibit” ***(Emphasise added.)***

Similarly **Hancox** (as he then was) in the case of **Re Kisima Farm Ltd KLB (E&L) 56** in which he quoted the holding by **Brett in R-VS- Local Government Board (1882) 10 WBD 309** said:

“... My view of the power of prohibition at the present day is that the court should not be chary of exercising it, and that wherever the legislation entrusts to anybody or persons other than superior courts the power of imposing an obligation upon individuals, the court ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament..”

From this authorities it is apparent, that the remedy of prohibition is available to the interested party as against the 2nd respondent. Afterall according to the interested party, the decree issued by the 2nd respondent has yet to be executed. Further, when leave was granted to the applicant to commence these proceedings, it was to operate as stay as well. Accordingly and in the premises I will grant prayer (a) of the substantive Notice of Motion. Since parties involved in the disputes are close relatives I make no order as to costs.

Ruling dated, Signed and Delivered at Kisii this 16th July, 2010.

ASIKE-MAKHANDIA

JUDGE