



No. 205

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

JUDICIAL REVIEW NO. 132 OF 2009

REPUBLIC APPLICANT

-VERSUS-

CHAIRMAN NYAMUSI LAND DISPUTES TRIBUNAL 1st RESPONDENT
SENIOR RESIDENT MAGISTRATE NYAMIRA 2nd RESPONDENT
SAMWEL MOMANYI MABIRIA 3rd RESPONDENT
ELKANA NYAMBEGA MABIRIA 4th RESPONDENT
JOSHUA NYANGAU MABIRIA.....5th RESPONDENT

EX-PARTE

DANIEL OMBATI MABIRIA

RULING

By a Notice of motion dated 25th November, 2009 and filed in court on the same date, **Daniel Ombati Mabiria**, hereinafter, **“the applicant”** sought the following orders:-
“a. An order of certiorari to move (sic) and bring (sic) this Honourable court the order or decision of Nyamusi land disputes tribunal dated 19th August, 2009 which was adopted as a judgment of the court on the 29th day of October, 2009 vide Nyamira land Case No. 35 of 2009 for purposes of being quashed.
b. An order of prohibition against the respondent from executing the decree and/or order in land case No. 35 of 2009 at Nyamira or in any manner interfere with the suit land.
c. Costs of this application be provided for...”.

The application was expressed to be brought under order 53 rule 3 of the **Civil Procedure rules**, sections 3 and 3A of the **Civil Procedure Act** and 8 and 9 of the **Law Reform Act** respectively. The grounds urged in support of the application were that the 1st respondent was not seized with jurisdiction to hear and determine issues involving land parcel No. **North Mugirango/Magwagwa/888, “the suit premises”**.

Secondly, the said tribunal was not seized with jurisdiction to hear and determine the claim by the 3rd through to 5th respondents and also it exceeded its jurisdiction in ordering sub-division and transfer of the suit premises to the 3rd, 4th and 5th respondents and finally that the award as a whole was null and **void abnatio** and the adoption of the same thereof by the 2nd respondent was unlawful and illegal.

In support of the application, the applicant swore and filed an affidavit in which the history of the dispute becomes apparent. The applicant was sued by his brothers **Samuel Momanyi Mabiria, Elkana Mabiria** and **Joshua Nyangau Mabiria**, the 3rd, 4th and 5th respondents respectively before, the 1st respondent to be compelled to subdivide the suit premises as directed by their late mother, **Paulina Moraa Mabiria**. However, the applicant's response was that the suit premises belonged to him solely having bought the same and his brothers had no interest legal or otherwise in the same.

The 1st respondent having listened carefully to the parties to the dispute and their witnesses made an award in terms:-

“Both parties were present when verdict was read, and signed against their names. The board members recommend that the land which is in dispute North Mugirango/Magwagwa 1/318 be subdivided into two portions upper and lower.

The upper portion to be subdivided again into three portions among three brothers namely 1. Samuel Momanyi Mabiria 2. Elikanah Nyambega Mabiria 3. Joshua Nyangau Mabiria. The lower portion to remain to (sic) Mr. Daniel Ombati mabiria.

Also the land which is at Bisembe North Murigrngo/Magwagwa 1/888 bearing the names Paulina Moraa Mabiria the mother of both parties be subdivided into four portions among here (sic) four sons namely 1. Daniel Ombati Mabiria 2. Samuel Momanyi Mabiria 3. Elikanah Nyambega Mabiria 4. Joshua Nyangau Mabiria. Since the mother of both parties died the sons to do succession. Also the board requests the honourable court to order executive officer to sign consents to enable the complainant to get land title deeds. Also to order Nyamusi land control board to sign the same forms. Also to order Nyamira land district officer to issue title deeds.....”

On 29th October, 2009, that award was adopted as a judgment of the court by the 2nd respondent. The award and subsequent adoption by court as judgment triggered these proceedings. As required, the interested party first obtained ex-parte, leave to commence these Judicial Review Proceedings. This was on 5th November, 2009 before **Muchelule J.** The substantive Notice of motion was duly filed and served on the respondents. However none of them filed any papers in opposition to the application. It can therefore be safely assumed and concluded that they did not intend to oppose the application.

When the application came up for interpartes hearing before me on 13th July, 2010, apparently the 3rd, 4th and 5th respondents had instructed **Mr. Ochwangi**, learned counsel to represent them. It was agreed then that the application be canvassed by way of written submissions. The applicant subsequently filed his written submissions. For reason (s) best known to the 3rd, 4th and 5th respondents and or their counsel, they failed to file their written submissions. Be that as it may, I have carefully read and considered the written submissions of the applicant.

The decision of the 1st respondent touched on 2 parcels of land namely, **North Mugirango/Magwagwa 1/318 and 888**. The said parcels of land were registered in the name of the applicant and **Paulina Moraa Mabiria**, the parties deceased mother, respectively. The effect of the award as I understand it is that the suit premises were each to be subdivided into four portions and the same be transferred and registered in the names of the applicant, 3rd, 4th and 5th respondents respectively. It is not in dispute and all parties agree that land parcel No. **North Mugirango/Magwagwa1/888** is solely registered in the name of the deceased mother. It thus forms part of the estate of the deceased. It is also clear and conceded to, that none of the parties have sued and obtained a grant of letters of Administration intestate to her estate. It is a legal requirement that for one to deal with the estate of a deceased person he or her must first obtain a grant of letters of Administration. The award of the 1st respondent and its subsequent adoption by 2nd respondent with regard to the said suit premises had the effect of distributing the deceased estate in violation of the provisions of the **Law of Succession Act**. That being the case, the said orders were unlawful and since the 1st respondent had no jurisdiction to hear and determine any matters arising out of or involving the estate of the deceased person, it exceeded its jurisdiction.

The jurisdiction of the 1st respondent is donated by section 3 of the **Land Disputes Tribunal Act**. It is limited to dealing with civil disputes involving trespass, right to occupy or work land and finally

boundaries. disputes. In this case, the 3rd to 5th respondents demanded a share and or ownership of land parcel **North Mugirango/Magwagwa 1/318** registered solely in the name of the applicant. The 1st respondent proceeded to order for its subdivision. It had no jurisdiction first to entertain the dispute leave alone make the order complained of. It had no right to interfere with the title. It had no right to make orders of subdivision. As the court of appeal observed in the case of **Asman Maloba Wepukhulu –vs- Francis Wakwabubi Biketi KSM c. A No. 157 of 2001 (UR)** “.....*The title relating to the suit land Bokoli/Kituni/169, was unlawfully interfered with by bodies which lacked jurisdiction and all orders made by them were illegal*”. This holding applies with equal force to the circumstances obtaining in this case.

Since the award was null and **void ab initio**, it follows that its adoption by the 2nd respondent was equally unlawful and illegal. Out of nothing comes nothing and whatever the 2nd respondent did was of no legal consequence and effect.

For all the foregoing reasons, I would allow the application in terms of prayers (a) and (b) on the face of it. As the parties involved are siblings, I make no order as to costs.

Ruling dated, signed and delivered at Kisii this 16th day of September, 2010.

ASIKE-MAKHANDIA
JUDGE