



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**Misc. Civ. Appli. 36 of 2008**

**PIUS OCHUONY ODONGO ..... APPLICANT**

**VERSUS**

**NYANDO SRM ..... RESPONDENT**

**AND**

**THOMAS OWINO POLO ..... INTERESTED**

**PARTY**

**RULING:**

The applicant Pius Ochuony Odongo filed an ex-parte chamber summons on 3<sup>rd</sup> April 2008 seeking leave to apply for orders of judicial review in the nature of *certiorari* removing into this court for purposes of being quashed, the decision of the Nyando District Land Disputes Tribunal adopted as judgment by the respondent in Nyando SRM Misc. Case No. 14 of 2007. The grounds for the application were expressed thus:

- (i) The tribunal acted *ultra vires* the provisions of the Land Disputes Tribunal Act.
- (ii) The award is incompetent in that it is undated unsigned nor is it a decision of the majority of the panel of elders.

Accompanying the said grounds was a statement of facts dated 1<sup>st</sup> April 2008, describing the applicant as the absolute registered proprietor of all that parcel of land known as SOUTH NYAKACH/KOGUTA WEST/1925 generally known as SOUTH NYAKACH/KOGUTA WEST and having obtained the first registration in respect thereof in the year 1974.

The relief sought is for an order of *certiorari* removing into this court for the purposes of being quashed, the decision of the Nyando District Lands disputes tribunal adopted as judgment by the respondent in Nyando SRM Misc. Case No. 14 of 2007. The basic ground for the relief is that the said Tribunal acted in excess of its jurisdiction as conferred to it by S.3(1) of the Land Disputes Tribunal Act and in excess of its powers by purporting to deliberate on issues of ownership and award the land to the interested party. Thomas Owino Polo and by accepting that there was encroachment without using the disputed land to establish if the boundaries had been tampered with.

The leave sought by the applicant was granted on 18<sup>th</sup> April 2008 pursuant to the provision of Order 53

Rule (1) of the Civil Procedure Rules.

Upon service of the application to all the appropriate parties only the interested party deemed it fit to file grounds of opposition and a supporting affidavit thereto. His grounds of objection are that:-

- (i) The Nyando District Land Dispute Tribunal is empowered to hear and determine land ownership within the district the same found that the applicant is a trespasser.
- (ii) The tribunal witness included locals and clan elders who knew the material pieces of land and did not have to visit the scene to prove the applicant, a trespasser.
- (iii) The respondent is the legal administrator of the estate of the deceased Polo Atanga.
- (iv) The applicant encroached onto the respondent's land No.1926 with impunity having been proved wrong by clan elders and the tribunal and has refused to vacate the land.

At the hearing of the application M/s. Opondo representing

the applicant argued that the interested party lacked the capacity to institute the proceedings at the lands tribunal as he is not the administrator of the estate of the late Polo Atanga and that the tribunal acted in excess of its powers in reaching a finding that there was encroachment yet the disputed land was not visited. M/s. Opondo further argued that the decision of the tribunal is incapable of implementation as the alleged encroachment is said to have occurred in 1956 and 1974 land Adjudication commenced in the area yet no dispute regarding boundary was raised with the Survey Board and the applicant became the sole registered proprietor of the land upon adjudication.

The interested party appeared in person and argued that the material parcel No. 1925 borders parcel No. 1926 which is registered in the name of his late father of whom he is the administrator of his estate. He argued that the boundary separating the two parcels of land was erected in the 1950's before his birth and was identified by planted trees but after adjudication in 1974 his father learnt that part of his land had been registered in favour of his neighbours including the applicant herein. Consequently the matter was referred to the elders and eventually the land Tribunal which ruled in his (interested party) favour. He contended that the tribunal did not have to visit the land to arrive at its decision.

In considering grounds for awarding judicial relief the author S.A. D.C. Smith stated in his second edition of Judicial Review of Administrative Action that

“..... it may be said that the courts may award relief where an administrative body has acted without authority or has stepped outside the limits of its authority or has failed to perform its duties that bodies exercising judicial” Functions will be required to observe the Rules of natural justice. Those basic principles of fair procedure which demand a deciding authority free from interest or bias and the right to a fair hearing for those who are immediately affected by its decision, that a statutory discretion may beheld to have been unnaturally exercised if its repositioning acts in bad faith, capriciously, in furtherance of an unauthorized purpose, without regard to relevant consideration or on the basis of irrelevant consideration, or if he fails to exercise an independent discretion in a particular case, but that in the absence statutory provision for appeal errors of law and fact committed by an administrative body do not, in general afford grounds for relief unless they have carried it to go outside its jurisdiction or to misconceive the surge of its discretionary powers or unless an error of law is disclosed by the “record” of the determination issued by it.”

From the foregoing pertinent statement the basic issue that arise for determination herein is whether the Nyando District Land Disputes Tribunal had the necessary jurisdiction to deal with the matter pertaining to the material land parcels No. 1925 and 1926 Koguta West. The proceedings of the tribunal exhibited herein Annexure marked P002 indicate that the dispute revolved around allegations of trespass in that parcel No. 1926 had been encroached by parcel No. 1925 belonging to the applicant. The interested party stated herein that parcel No.1926 is registered in the name of his late father and that he is the legal

administrator of his late father's estate. He did not however produce the appropriate grant of the letters of administration and hence the contention by the applicant that he lacked the capacity or "*locus standi*" to institute the proceedings in the Lands Tribunal. A person instituting proceedings before a tribunal without necessary *locus standi* be engaging would be an improper act thereby rendering the tribunal powerless and without jurisdiction to deal with the matter in dispute.

The interested party did not disprove by cogent evidence the alleged lack of capacity to institute the proceedings before the material Land Tribunal.

The proceedings of the tribunal (P002) clearly show that the interested party's capacity to raise a complaint regarding a parcel of land registered in the name of his late father was never put into consideration. That tribunal was thus not required to listen to a person whose legal rights have not been infringed. By so doing, it acted in excess of its legal authority (*ultra vires*) and ruled in favour of a person who may be described as a meddler considering that the applicant possess a valid title deed (Annexure marked "P001") respecting parcel No. 1925.

Although the interested party says in his supporting affidavit that he is not disputing the title held by the applicant it was apparent that his allegation of encroachment involved invariably impact on the applicant's legal ownership of the entire portion of land. Indeed, the land tribunal directed that the boundary between land parcels No. 1925 and 1926 be rectified by the survey or yet the interested party's capacity to raise the allegation of encroachment was highly doubtful for lack of any legal rights over land parcel No. 1926.

Save as hereinabove indicated the tribunal was possessed of the jurisdiction to resolve the dispute in so far as it related to determination of the common boundary and/or trespass to land, whether or not it arrived at the correct decision by visiting or not visiting the scene of the dispute is of no object as it is trite law that judicial review is concerned with the decision making process, and not with the merit or demerits of any decision.

Nonetheless, it is instructive to note that the alleged encroachment and/or trespass allegedly occurred in the 1950's even before the interested party was born. It escaped that tribunal's wisdom that the likely decision was incapable of being effected due to the passage of time. The decision would thus serve no useful purpose considering that the determination of proper boundary relating to the material parcels No. 1925 and 1926 must have been concluded during the adjudication exercise that took place in the year 1974. If there was any genuine complaint regarding the boundary then it would have been made at the time. The "Johnny came lately" conduct of the interested party further fortified the fact that he had no "*locus standi*" in the matter from the very beginning and ought not have been indulged by the tribunal whatsoever for want of jurisdiction to deal with a stranger in the matters arising.

Consequently, the Order of *certiorari* must and does hereby issue in favour of the applicant removing into this court for purposes of being quashed the decision of Nyando District Land Disputes Tribunal adopted as judgment by the respondent in Nyando SRM Misc. Case No. 14 of 2007. The costs of the application shall be borne by the interested party.

Ordered accordingly.

Read and Signed this 30<sup>th</sup> day of January 2009.

**J. R. KARANJA**

**JUDGE**

Read and Signed this 30<sup>th</sup> day of January 2009 in the presence of the M/s. Opondo and interested party.