



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**MISCELLANEOUS APPLICATION 329 OF 2005**

**IN THE MATTER OF AN APPLICATION BY JOASH NGOME OPICHO TO APPLY FOR  
ORDERS OF CERTIORARI & PROHIBITION**

**AND**

**IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO.18 OF 1990**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE CHAIRMAN**

**KANDUYI LAND DISPUTES TRIBUNAL ..... RESPONDENT**

**EX-PARTE**

**JOASH NGOME OPICHO ..... APPLICANT**

**VERSUS**

**DAVID OPICHO NGOME ..... INTERESTED PARTY**

**RULING**

This is a notice of motion under Order LIII Rule 3 of the Civil Procedure Rules dated 16-11-2005. It seeks for an order of prohibition and certiorari to quash the decision of Ndivisi Land Disputes Tribunal to adjudicate in the matter in respect of land parcel *No.NDIVISI/MAKUSILWA/302*.

The Applicant JOSEPH NGOME OPICHO was the registered proprietor of land parcel *NO.NDIVISI/MAKUSELWA/302* since 10/03/1972. He bought the land from one Wafula Matanda. In the year 2005, the Applicant's brother David Opicho Ngome, the interested party herein filed a dispute at Ndivisi Land disputes Tribunal, the Respondent herein claiming that the land was originally his late father's land and that he was entitled to a portion. The tribunal proceeded to hear the case and ordered that the same be subdivided into three portions. The award conferred four (4) acres to Jaosh Fukwo, 1 ½

acres to the Applicant and 1 ½ acres to David Opicho.

The award was adopted as judgment of the court by Resident Magistrate Court, Webuye, on 7<sup>th</sup> June, 2005. The Applicant did not appeal to the Provincial Appeals Tribunal. He applied for leave of the High Court to file a notice of motion for judicial review.

The notice of motion was grounded on one principal reason that, the tribunal had no jurisdiction to entertain the matter since it did not fall under section 3(1) of the Land Disputes Act, Act No.18 of 1990, hence acted in excess of their powers.

The interested party, David Opicho Ngome filed grounds of opposition on 02/05/06 in which he challenged the application on grounds that it was vexatious, frivolous and an abuse of the due process of the court. Secondly, he stated that the decision of the tribunal was adopted by the court as judgment and the High Court therefore had no original jurisdiction to entertain or to issue an order of prohibition and certiorari and quash the decision of the tribunal. Thirdly, that the tribunal had jurisdiction under section 3(1) of the Land Disputes Act to hear the matter. Fourthly, it was contended that the Applicant did not appeal against the decision in the Provincial appeals Tribunal which ought to have done before filing this application. Other grounds in the grounds of opposition do not amount to ground but to facts as to how the tribunal proceeded with the case after the Applicant failed to appear to defend his case.

The interested party also filed a replying affidavit which explains the grounds in opposition. He urges the court to strike out with costs this application for being incompetent.

The Attorney General was served but did not appear for the Land Disputes Tribunal or file any papers.

It was stated that the Applicant failed to appeal to the Provincial Appeals Tribunal. I disagree that failure by the applicant to exercise his right of appeal removes his right to file an application for judicial review. The Applicant's failure to defend himself before the tribunal does not affect his remedy in this application.

I also wish to state that, this is a judicial review and not an appeal or a civil suit. The arguments that this court has no original jurisdiction to interfere with the tribunal's decision does not arise. This court has jurisdiction to hear the application before under Order LVIII being a judicial review. A judicial review, is not an appeal from a decision, but a review of the manner in which the decision was made, that is, the legality of the decision. On the other hand, an appeal will concern itself with the merits of a decision.

Mr. Khakula for the Applicant as he presented the application, argued that the claim before the tribunal was barred under the Limitation of Actions Act. This is a point of law and was not contained in the grounds of the application. Being a land matter, it ought to have been filed within twelve (12) years.

Going to the relevant provisions of the Land disputes Tribunal Act, section 3(1) of the Act states as follows:

***“Subject to this Act, all cases of a civil nature involving a dispute as to:***

- a) the division of, or the determination of boundaries to land, including land held in common;***
- b) a claim to occupy or work land;***
- c) trespass to land;***

***shall be heard and determined by a tribunal established under section 4.”***

Section 4 established the tribunal, including the tribunals composition states in subsection (1):

***“There shall be established a tribunal, to be called the Land Disputes Tribunal, for every registration district.”***

Subsection (2) sets out the composition of the tribunal. Section 8(1) is the authority setting up the Provincial Appeals Tribunals in the provinces. If one is aggrieved by the decision of the tribunal, he may appeal in the Provincial Appeals Tribunal of the province where the land in dispute is situated. This means that any party appealing to the Provincial Tribunal will have his dispute heard and decided under the jurisdiction given by section 3(1).

It is important to trace the origin of the jurisdiction conferred by section 3. this is derived from the provisions of section 159 of the Registered Land Act (Cap 300). The relevant part states as follows:

***“Section 159 Civil suits and proceedings relating to the title to, or possession of, land ..... Shall be tried by the High Court and where the value of the subject matter does not exceed twenty five thousands pounds, by the Resident Magistrate’s Court, or where the dispute comes within the provisions of section 3(1) of the Land Disputes Tribunal Act, in accordance with that Act.”***

The issue before this court is to determine whether the Ndivisi Land Disputes Tribunal had jurisdiction to determine whether the Ndivisi Land Disputes Tribunal had jurisdiction to determine the dispute before it on 31.03.2005. The dispute involved land ***L.R. No.NDIVISI/MUKUSELWA/282*** which was registered under the Registered Land Act as shown by the extract of the register. The land was registered in the name of Wafula Mutanda on 16.7.1963. Wafula transferred the land to Joash Ngome Opicho on 10/03/1972. The Respondent and his brother claimed ownership of part of the land. The tribunal heard them and granted their orders by ordering sub-division of the land in three portions.

The nature of this dispute is that it was claiming ownership thus challenging the Applicant’s sole right to the title. The relevant legal provisions in the foregoing paragraphs have the effect of depriving the Land Disputes Tribunal of jurisdiction in matters relating to title or claim of ownership.

The tribunal has no jurisdiction to adjudicate in a dispute over title to land registered under the Registered land Act unless the dispute comes within the provisions of section 3(1). The claims under section 3 (1) are set out as follows:

- a) division of, or the determination of boundaries to land***
- b) claim to occupy or workland***
- c) trespass to land.***

The dispute before the tribunal did not fall within the provisions of section 3 (1). The tribunal therefore had no jurisdiction to hear and determine the dispute before it. It had no jurisdiction to order sub-division of the disputed land into portions as proposed by the interested party. Jurisdiction to hear and determine such a matter lay with the courts depending on the value of the subject matter.

On the issue of the claim being time barred, I refer to the extract of the register. It shows that land was registered in the name of the Applicant in 1972. The claim before the tribunal came more than twelve years later. The Limitation of Actions Act provides that any cause of action relating to land shall be instituted within twelve (12) years. The claim before the tribunal was already time barred at the time it was instituted.

The application before me is brought under Order LIII, Rule 3 of the Civil Procedure Act. The provisions of the law are in conformity with the facts of the application. It is not frivolous, vexatious or an abuse of the process of the court.

It is my finding that the Ndivisi Land Disputes Tribunal had no jurisdiction to hear and determine the land dispute involving land parcel **No. NDIVISI/MUKUSELWA/302**. It was, therefore, in excess of its powers by hearing the dispute. The Applicant has satisfied this court that his application is merited.

I therefore allow the application dated 16/11/2005 by issuing an order of prohibition and certiorari and quash the decision of the Ndivisi Land Disputes Tribunal in respect of L.R. **No.NDIVISI/MUKOSELWA/302**.

The costs of the application to the Applicant.

**Dated, Delivered and Signed at Bungoma**

**this 8th day of June 2009 in the presence of Mr. Khakula for applicant.**

**F. N. MUCHEMI**

**JUDGE**