



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Miscellaneous Civil Application 129 of 2008**

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT (ACT No. 19 of 1990)

AND

IN THE MATTER OF THE LAND CASE NO. 3 OF 2008 BEFORE CHIEF MAGISTRATE'S COURT AT KISUMU

AND

IN THE MATTER OF MISCELLANEOUS CIVIL APPLICATION NUMBER 3 OF 2004 BEFORE THE PRINCIPAL MAGISTRATE'S COURT AT MIGORI

BETWEEN

REPUBLIC APPLICANT

AND

**THE CHAIRMAN NYANZA PROVINCIAL
LAND APPEALS COMMITTEE 1ST RESPONDENT
CHAIRMAN MIGORI DISTRICT LAND**

DISPUTES TRIBUNAL SUB WEST

DIVISION 2ND RESPONDENT

AND

PITALIS OGINDO OJUKO INTERESTED PARTY

EX-PARTE

**JOHN AKOTO SOI 1ST EX-PARTE
CAREN ADOYO 2ND EX-PARTE**

RULING

The applicants prayed for an order of certiorari to remove and being into this court for purposes of quashing an award by the 1st respondent dated 17th July, 2008 which was adopted by the Senior Principal Magistrate's Court

at Migori vide Misc. Application No. 3 of 2004. The applicants also sought an order of prohibition to prohibit the District Land Registrar and Surveyor, Migori, from implementing the decree issued by the aforesaid court with respect to land parcel No. **SUNA WEST WASIMBETE/28** and **30**.

According to an affidavit sworn by the 1st applicant, he is the registered proprietor of a parcel of land known as **SUNA WEST/WASIMBETE/28** WHILE LAND PARCEL **SUNA WEST/WASIMBETE/30** is registered in the name of **DAMINUS OJOWI AWICHO** who died intestate on 23rd April, 1989.

The interested party is the proprietor of SUNA WEST/WASIMBETE/29, which borders parcels numbers 28 and 30 aforesaid.

The second applicant is the widow of the late Daminus Ojowi Awicho.

The interested party filed a case before the second respondent. He was claiming portions of land parcels numbers 28 and 30. He was alleging that the boundaries were not properly fixed. The tribunal heard the dispute without any assistance of a surveyor and ordered as follows:

“1. On parcel No. SUNAWEST/WASIMBETE/28, the surveyor should give 20 steps to Pitalis from the bottom of the samba (sic) and in the middle the surveyor will give Pitalis 15 steps and the sold land at the top should be given back to Pitalis claimant.

2. On parcel No. SUNA WEST/WASIMBETE/30, the District Surveyor should give Pitalis 20 steps from the bottom of the samba (sic), 26 steps at the middle of the samba (sic) and 21 steps at the top end of the samba (sic).”

The Tribunal further directed the

area Land Registrar to abandon

the old title deed for the three parcels of land and issue new ones with measurements conforming with its decision.

The first applicant appealed to the 1st respondent against the decision of the 2nd respondent. On 17th July, 2008 the 1st respondent dismissed the appeal and confirmed the decision by the 2nd respondent.

In the matter before this court, the applicants stated, *inter alia*, that:

- ~~€€€€€€€€~~ The respondents acted outside their jurisdiction as granted by **section 3 (I) of the Land Disputes Tribunals Act.**
- ~~€€€€€€€€~~ That the 2nd respondent is not legally constituted.
- ~~€€€€€€€€~~ That land parcel SUNA WEST/WASIMBETE/30 is registered in the name of a dead person and no letters of administration had been obtained in respect of his estate.

The interested party filed a replying affidavit and stated, *inter alia*, that according to his advocate's advice, which he verily believed to be true, the respondents had jurisdiction to handle the dispute and make the

decisions as aforesaid. He further stated that the 2nd respondent made its decision on 19th October 2004 and the second applicant did not prefer any appeal against the decision, only the first applicant filed an appeal. Consequently, after lapse of six months, the second respondent could not institute judicial review proceeds to seek an order of certiorari to quash the 2nd respondent's decision. As far as the claim regarding land parcel No. 30, the same was time barred.

As regards the second applicant's contention that land parcel No. 30 was registered in the name of her deceased husband and that she did not have letters of administration, the interested party contended that the 2nd applicant did not adduce such evidence before the 2nd respondent.

As regards the appeal by the 1st applicant, since the same was dismissed, the decision by the 2nd respondent was intact and this court has no jurisdiction at this point to interfere with the aforesaid award.

Mr. Kisera for the applicants and Mr. Otieno for the interested party made brief submissions which I have duly considered. The respondents did not file any affidavits nor were they represented.

The all important issue that must first be determined is whether the 2nd respondent, whether properly constituted or not, had jurisdiction to handle the claim that was before it and to make the award that it did. Jurisdiction is everything, without it, a court's decision is a nullity.

Section 3 (I) of the **Land Disputes Tribunals Act, 1990**, gives power to Land Disputes Tribunals to hear civil 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; or
- (c) trespass to land.

Such a tribunal does not have jurisdiction to hear disputes over title to land or cancel title deeds and order a Land Registrar to issue others.

It is therefore clear beyond peradventure that the 2nd respondent acted **ultra vires** and its decision is a nullity in law.

A decision made by a tribunal which had no jurisdiction cannot be implemented and any appeal on the same is an academic exercise.

If the interested party had any valid claim over parcels numbers 28 and 30 aforesaid, he should have filed the same before the High Court.

The second applicant could not file an application to seek leave to commence judicial review proceedings when the decision of the 2nd respondent was subject to an appeal before the 1st respondent. She could only do so upon determination of the appeal, see **Order LIII rule 2** of the **Civil Procedure Rules**. It cannot therefore be said that her claim is time barred.

Having established that the respondents acted without jurisdiction, this application must be allowed. It will be superfluous to proceed to consider other arguments that were raised by counsel. The respondents and

the interested party shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT KISII THIS 3RD DAY OF DECEMBER, 2009.

**D. MUSINGA
JUDGE**

3/12/2009

Before D. Musinga, J.

Mobisa - cc

Mr. Kisera for the Applicant

Mr. Otieno for the Respondent

Court: Ruling delivered in open court on 3rd December, 2009.

**D. MUSINGA
JUDGE.**