

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
MISC. APPL. NO. 112 OF 2003

REPUBLIC.....APPLICANT

VERSUS

1. DISTRICT COMMISSIONER - NYANDO)

2. EZEKIEL OKINYO GOMBA)-RESPONDENTS

3. JOHN OWINO IMBIRA)

4. FANUEL ONGOMBE OGOLA)

RULING

By a notice of motion dated 24th July 2003 and filed on 25th July 2003, Fanuel Ongombe Ogola seeks an order of judicial review in the nature of a prohibition to forbid the District Commissioner, Nyando District from hearing and determining appeal No. 664 of 1985 on behalf of the Minister for Lands and Settlement. The application which is indicated to be brought under Order L111 rules 1 (1) and (4), 3, 4, 5 and 6 of CPR is supported by an affidavit of the applicant and a statement of facts. The application is opposed by John Owino Ombira named as 3rd Respondent who relies on grounds of opposition filed on 12th November 2003.

In his submission in support of the application Mr. Nyakongo said that by letters dated 10/4/2003 and 23/4/2003 the District Commissioner Nyando District had invited parties to his office for hearing of the Appeal to the Minister for Lands and Settlement No. 664 of 1985. According to Mr. Nyakongo this appeal has been dealt by the previous District Commissioner Nyando as shown by a letter addressed to the Permanent Secretary, Ministry of Lands and Settlement on 21/12/1990 .Mr. Nyabongo claimed that as the District Nyando had declined to hear the same appeal in 1990 on the ground that the matter had been dealt with by the Court of Law the same appeal cannot again be heard by the same officer. It was also Mr. Nyakongo's contention that in Nairobi HC. Misc. Civil Application No. 474 of 1991 which was between Jackson Owino Olango and Panuel Ongombe Ogola the application was dismissed. He therefore claimed that the matter is res judicata . He added that the land in dispute no longer exists as it has been subdivided and transferred.

In his response for the 3rd Respondent Mr. Nyamogo claimed that the application is defective in that the proceedings relied on are not annexed . He also claimed that it is contended that the application is res judicata but there is no evidence to support. It. According to Mr. Nyamogo the 2nd and 3rd Respondents were not parties to the suits relied on and that prohibition cannot be directed to those parties.

The claim that the application is defective for not annexing the proceedings relied on does not appear to be supported by the rules, only when one seeks orders of certiorari under Order L111 rule 7 (1) of the CPR that the copy of the documents sought to be quashed have to be lodged with the Registrar. On the issue that the matter is res judicata the applicant has copies of proceedings in the Nairobi HC Misc. Civil application No. 474 OF 1991 , Nyando African Court Land Case No. 11 of 1963 , District Magistrate's Court Civil Case No. 34 of 1978 and Court of Review No. 20 of 1965 which indicate that the parties had had their dispute heard and finalized by Law Court. In view of this evidence there is no indication that there was a consent of the Land Adjudication Officer granted before the appeal to the Minister was made.

In the result I find merit in this application and accordingly I order that an order of Prohibition do issue the District Commissioner from hearing and determining Appeal No. 664 of 1985 on behalf of the Minister for Lands and Settlement. The applicant will have costs of this application.

Dated and delivered this 17th May 2004.

B.K. TANUI

JUDGE