



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**MISC. APP. NO. 200 OF 2006**

**IN THE MATTER OF AN APPLICATION BY EZEKIEL O. ONGONGA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF LAND DISPUTE ACT NO. 8 OF 2005**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**HOMABAY LAND DISPUTE TRIBUNAL..... 1<sup>ST</sup> RESPONDENT**

**THE SENIOR RESIDENT MAGISTRATE’S COURT AT HOMABAY.. 2<sup>ND</sup> RESPONDENT**

**AND**

**PATRICK AMALA LWORE ..... INTERESTED PARTY**

**EZEKIEL OCHIENG ONGONGA ..... APPLICANT**

**J U D G M E N T**

1. The ex parte applicant was on 29<sup>th</sup> November 2006 granted leave to commence judicial review proceedings by way of prohibition and certiorari against the Homa Bay Land Disputes Tribunal and the Senior Resident Magistrate against proceeding to deliver judgment in its tribunal case filed by Patrick Amala Lwore against the applicant. The leave granted was to operate as a stay of proceedings of the cases before the Land Disputes Tribunal and the Senior Resident Magistrate’s court.

2. That pursuant to the leave granted the ex parte applicant filed the Notice of Motion application dated 19<sup>th</sup> December 2006 seeking the following orders:-

**1. An order of certiorari removing into the High Court for purposes of quashing all the proceedings and order made by the Principal Magistrate Case No. 8 of 2005 referring the said case for determination by the Homa Bay Land Disputes Tribunal to adjudicate on title deed No. Kanyanda/Kalanya/978.**

**2. An order of prohibition prohibiting Homa Bay Land Disputes Tribunal and the Principal**

**Magistrate s Court at Homa Bay from proceeding to hear and declare null and void any order which may have been issued in respect of title No. Kanyanda/Kalanya/978 involving Patrick Amala and Ezekiel O. Ongonga.**

**3. An order in respect of the costs of the application.**

3. The application is grounded on the following grounds set out on the face of the application:

**a. That the Principal Magistrate Homa Bay did not have jurisdiction to entertain Miscellaneous application No. 9 of 2006 in respect of Title No. Kanyanda/Kalanya/978 measuring approximately 3.27Ha.**

**b. That the Homa Bay Land Dispute Tribunal was not properly seized with jurisdiction to hear and determine the dispute or case since the land was registered.**

**c. That the interested party has sued the applicant in the land tribunal case and wants to do away with the applicant's name yet they were joint owners with the father of the interested party and the applicant has been staying in the said plot since 1969 and that if the said orders are not quashed the applicant will be rendered landless.**

4. The ex parte applicant filed a supporting affidavit in support of the application for leave sworn on 21<sup>st</sup> November 2006. The applicant deponed that the suit land **Kanyada/Kanyango Kalanya/978** was ancestral land which was registered in common in equal shares in his name and one Jacob Luore (now deceased) who is the father of the interested party, Patrick Amala Lwore. The copy of search certificate was annexed as **"E001"**. The ex parte applicant averred that after the death of Jacob Luore, the son instituted a case before the Land Disputes Tribunal at Homa Bay who decided the dispute in his favour whereafter he filed Misc. Civil Application No. 9 of 2006 at Homa Bay SRM's court for the adoption of the Land Disputes award as judgment of the court. The copy of the proceedings before the Magistrate's Court is annexed as **"E002"**. The ex parte applicant states he has resided on the suit land since 1969 and the decision by the tribunal would have the effect of disentitling him to the half share he owns of the suit property and thereby render him landless.

5. The ex parte applicant contends the Land Disputes Tribunal did not have jurisdiction to deal with a dispute relating to title to the suit land and by doing so, the Tribunal overstepped its legal mandate rendering its decision null and void. In the premises the ex parte applicant seeks orders of judicial review to quash the proceedings before the Tribunal and proceedings commenced before the Senior Resident Magistrate's Court seeking to have the Tribunal's decision endorsed as judgment of the court.

6. Patrick Amala Lwore, the interested party filed a replying affidavit dated 29<sup>th</sup> January 2014 in opposition to the ex parte applicant's notice of motion. The interested party averred that the complaint for trespass lodged against the ex parte applicant before the Land Disputes Tribunal was determined and the Tribunal rendered its determination after analyzing the evidence. The interested party stated that the ex parte applicant participated in the hearing before the Tribunal and that the applicant did not appeal against the decision of the Tribunal as provided. The Interested Party further contended that the time within which the applicant could lodge an appeal had lapsed and that the instant judicial review application amounts to abuse of the court process and lacks any merit and ought to be dismissed with costs.

7. On 23<sup>rd</sup> October 2014 the court gave directions to the parties to argue the Notice of Motion dated 19<sup>th</sup> December 2006 by way of written submissions. The ex parte applicant's submissions dated 30<sup>th</sup> June 2016 filed on 14<sup>th</sup> July 2016. The interested party on 18<sup>th</sup> November 2016 notified the court he would rely on his filed replying affidavit.

8. The ex parte applicant in his filed submissions reiterated that the Homa Bay Land Disputes Tribunal lacked the jurisdiction to handle the matter relating to land parcel **Kanyada/Kanyango Kalanya/978** as

the dispute related to a registered title. Further the applicant argues the Homa Bay Senior Magistrate's Court equally could not have jurisdiction to deal with the subject matter. The applicant further submitted that the magistrate's court had not adopted the tribunal's decision as a judgment of the court and hence an order of prohibition was available to forestall the court from adopting as a judgment decision of the tribunal which was null and void.

9. There is no dispute that land parcel **Kanyanda/Kanyango Kalanya/978** was registered in the joint names of Ezekiel Ochieng Oganga (the ex parte applicant) and Jacob Luore (deceased father of the interested party) as tenants in common in equal shares as per the copy of certificate of official search dated 14<sup>th</sup> June 2005 ("**E001**"). It is equally not disputed that Jacob Luore is deceased and the interested party is his son. There is no evidence that the interested party had taken out any letters of administration in respect of his late father's estate to be able to initiate legal proceedings on behalf of his late father's estate before the Land Disputes Tribunal. Under Section 82 (a) of the Law of Succession Act, Cap 160 of the Laws of Kenya only a personal representative of deceased person.

**82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:-**

**(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;**

10. The interested party could not properly initiate tribunal proceedings without first obtaining grant of letters of administration authorizing him to represent his late father's estate. Such proceedings if initiated without letters of administration are void abinitio and are of no legal effect. The interested party was under an obligation to obtain a grant of letters of administration to his father's estate and to the extent that he has not demonstrated he had obtained any he lacked the capacity and locus standi to go before the Homa Bay Land Disputes Tribunal purporting to represent the estate of his late father. The proceedings were a nullity.

11. Even if the interested party had obtained grant of letters of administration of his late father's estate the Homa Bay Land Disputes Tribunal would not have had the jurisdiction to deal with the dispute as it touched on and affected title to registered land. This was outside the scope of matters that the tribunal had jurisdiction to handle under the provisions of Section 3 (1) of the Land Disputes Tribunals Act, Cap 303A of the Laws of Kenya which provides thus:-

**3(1) 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; or**

**c. Trespass to land, shall be heard and determined by a Tribunal established under Section 4.**

12. In the instant matter the tribunal inter alia in its findings and verdict held that land parcel number **Kanyada/Kanyango Kalanya/978** belongs to Jacob Luore Olima as the sole proprietor and further went on to declare and/or order that the names of Ezekiel Ochieng Onganga to be deleted from the register. Quite evidently the Tribunal went on to determine the issue of ownership of the suit land which under Section 3(1) of the Act they had no jurisdiction to do. The jurisdiction to determine ownership and/or direct the cancellation of a registered title was a jurisdiction that then lay exclusively with the High Court. There are myriad of court decisions that clearly are to the effect that Tribunals established under the Land Disputes Tribunal Act had no jurisdiction to determine disputes relating to registered land where the question of ownership arises. The jurisdiction of the Tribunals was as set out under Section 3 (1) of the Act.

13. It follows therefore the decision that the Homa Bay Disputes Tribunal made was a nullity and accordingly the Senior Resident Magistrate's Court could not validate and give effect to a decision that was otherwise null and void. Nothing can come out of nothing. This court exercises supervision over all tribunals and the subordinate courts whose decisions relate to matters which this court has jurisdiction over and will not permit or allow the cause of justice to be perverted. Administration of justice demands that due process be followed and adhered to by all and sundry. If this court were to relax its supervisory roles and allow parties to flout due process with abandon there is a risk that we could witness a degeneration of the rule of law which would be a recipe for the law of the jungle where anything and everything goes. This court is not about to fall into that trap and will uphold the rule of law.

14. As I have held that the Homa Bay Land Disputes Tribunal acted without jurisdiction, I find the ex parte applicant's judicial review application dated 19<sup>th</sup> December 2006 to have merit and I grant prayers 1 and 2 of the Notice of Motion. The costs of the application are awarded to the ex parte applicant as against the interested party.

**Judgment dated, signed and delivered at Kisii this 17<sup>th</sup> day of March, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the applicant

..... for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

..... for the interested party

..... Court assistant

**J. M. MUTUNGI**

**JUDGE**