



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 81 OF 2010 (JR)

**IN THE MATTER OF APPLICATION BY SYLPHANS ODHIAMBO OWITI FOR AN ORDER
FOR JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)**

BETWEEN

SYLPHANS ODHIAMBO OWITI.....EX PARTE APPLICANT

VERSUS

URIRIDIVISION LAND DISPUTES TRIBUNAL1ST RESPONDENT

MIGORI SENIOR PRINCIPAL MAGISTRATE'S COURT.....2ND RESPONDENT

AND

AGNES MBEDA..... INTERESTED PARTY

JUDGMENT

1. At all material times, the applicant was the registered proprietor of all that parcel of land known as **LR No. Kanyamkago/Katiemo/2928** (hereinafter referred to as “**the suit property**”). The suit property is a sub-division of the original parcel of land known as **LR No. Kanyamkago/Katiemo/11** (hereinafter referred to as “**Plot No.11**”). It is not clear from the record in whose name Plot No.11 was registered before it was sub-divided and a portion thereof (the suit property) registered in the name of the applicant. Sometimes in the year, 2010 or thereabouts, the interested party lodged a claim against the applicant with the 1st respondent concerning Plot No. 11. The interested party claimed that her deceased husband, one, Sumba Sewe had purchased a portion of Plot No.11 measuring 3 ha. from the applicant at a consideration of Ksh.6000/= . The interested party contended that her deceased husband died before the said portion of Plot No. 11 was transferred to him. The interested party’s claim against the applicant was that despite the fact that her deceased husband had paid the purchase price in full, the applicant had declined to apply for and obtain consent of the Land Control Board so that the portion of Plot No. 11 that the interested party’s deceased husband had purchased could be transferred to the interested party.

2. The interested party urged the 1st respondent to compel the applicant to co-operate with the interested party in applying for the consent of the Land Control Board so that the portion of Plot No. 11 that the interested party’s deceased husband had purchased can be transferred to her. The applicant denied before the 1st respondent that he had entered into an agreement for sale of a portion of Plot No.11 with the interested party’s deceased husband. He admitted however that he received a sum of Ksh. 12,000/= from

the interested party's deceased husband on account of purchase price. The applicant contended however that the interested party's deceased husband did not pay the necessary charges for the Land Control Board and that explains why he had not made the necessary application for consent. The 1st respondent heard the interested party and the applicant and made a decision on the interested party's claim on 15th July, 2010.

3. In its decision, the 1st respondent held that the applicant having entered into an agreement for sale with the interested party's deceased husband had an obligation to co-operate with the interested party in applying for the consent of the Land Control Board so that the property that was sold to the interested party's deceased husband could be transferred to the interested party. The 1st respondent ordered the applicant to accompany the interested party to the nearest Land Control Board for the necessary consent and subsequent issuance of the title deed for the portion of Plot No. 11 that was purchased by her deceased husband. It seems that while the interested party's complaint was pending before the 1st respondent, the applicant caused Plot No. 11 to be sub-divided and a portion thereof namely, the suit property registered in his name on 15th June, 2010. The 1st respondent's decision was lodged before the 2nd respondent which adopted the same as a judgment of the court on 12th October, 2010.

4. The applicant was dissatisfied with the said decision of the 1st respondent and its adoption by the 2nd respondent as a judgment of the court as aforesaid. The applicant moved to this court on 8th November, 2010 and obtained leave of the court on 9th October, 2010 to apply for an order of certiorari to remove to this court and quash the proceedings and order that was made by the 1st respondent and subsequently adopted as a judgment of the court by the 2nd respondent. The applicant also sought and obtained leave to apply for an order of Prohibition to prohibit the 2nd respondent from adopting and/or executing the said order by the 1st respondent. Pursuant to the said leave, the applicant brought the application herein for judicial review on 26th November, 2010. In the application, the applicant sought the following orders, namely, that;

a)The Honourable court be pleased to make an order of certiorari to remove to this court and quash the proceedings and the ruling/award of the 1strespondent dated 15th July, 2010 in Uriri Division Land Dispute Case No. 012/2010 AGNES MBEDA –vs- SYLPHANS ODHIAMBO OWITI. NO. MIGORI SPM MISCELLANEOUS APPLICATION NO. 40 OF 2020(sic).

b)This Honourable court be pleased to make an order of Prohibition to prohibit the 2nd respondent from adopting/executing the decree or the award of the 1st respondent dated 15th July, 2010 in Migori SPM's Miscellaneous Application No. 40/2010 and/or issuing a decree or enforcing or executing any such decree.

5. The application was supported by the affidavit of the applicant sworn on 27th October, 2010 and the statutory statement of the same date that was filed in court with the application for leave. The application was also supported by a further affidavit sworn on 6th March, 2014. The application was premised on grounds among others that the applicant is the registered owner of the suit property that originated from Plot No.11 that was the subject of the proceedings before the respondents and that the proceedings before the 1st respondent were null and void. The applicant contended that the 1st respondent had no jurisdiction to determine the dispute over Plot No. 11 that was taken before it by the interested party as it concerned an alleged breach of contract for the sale of land. The applicant contended that if the decision of the 1st respondent aforesaid is allowed to stand, the applicant would suffer irreparable loss as the title of the suit property is bound to be cancelled.

6. The application was opposed by the interested party through a replying affidavit sworn on 16th May, 2014. In her affidavit, the interested party contended that the applicant's application herein has been overtaken by events in that the decision of the 1st respondent that is sought to be quashed was adopted as a judgment of the court by the 2nd respondent before the institution of these proceedings and has already

been executed. The interested party has contended that the decision of the 1st respondent was adopted by the 2nd respondent as a judgment of the court on 12th October, 2010 and a decree issued by the 2nd respondent on 26th October, 2010 for execution. The interested party has contended further that the said decree has already been executed in that she has already obtained consent of the Land Control Board in accordance with the terms thereof.

7. The interested party has contended further that the applicant's application has been brought in bad faith with the intention of perpetuating fraud. The interested party has claimed that the applicant caused the suit property to be transferred to his name fraudulently during the pendency of the proceedings before the 1st respondent so as to pre-empt the outcome of the said proceedings and to defeat the cause of justice. The interested party has contended that the 1st respondent's decision having been adopted by the 2nd respondent as a judgment of the court, the same is not capable of being quashed as sought by the applicant. The interested party has contended further that, the 2nd respondent having adopted the decision of the 1st respondent on 12th October, 2010 as aforesaid, the order of prohibition sought by the applicant herein which is directed at the same activity cannot issue as the court cannot prohibit what has already taken place.

8. When the matter came up for hearing before me on 3rd June, 2014, I directed that the application be argued by way of written submissions. The advocates for both parties filed their submissions as directed by the court and the same are on record. I have considered the applicant's application together with the supporting affidavit and the statutory statement. I have also considered the replying affidavit filed by the interested party in opposition thereto. Finally, I have considered the submissions filed by the advocates for both parties and the case law cited in support thereof. The issues that arise for determination are namely, whether the applicant's application is maintainable and, whether the applicant is entitled to the orders sought. The interested party has objected to the applicant's application on two main grounds which do not go to the merit of the application but rather to its competency.

9. The first issue which has been raised by the interested party is that the decision by the 1st respondent that the applicant has sought to quash through prayer 1 of the application dated 25th November, 2010 was adopted by the 2nd respondent as a judgment of the court on 12th October, 2010 and a decree issued before the institution of these proceedings on 8th November, 2010. The interested party has contended that after the 1st respondent's decision made on 15th July, 2010 was adopted by the 2nd respondent as aforesaid, the same ceased to be a decision of the 1st respondent and assumed the status of a judgment of the court and as such the same cannot be quashed. It is not in dispute that by the time the applicant sought leave to institute this application for judicial review; the 1st respondent's decision had already been lodged with the 2nd respondent and adopted as a judgment of the court. I am in agreement with the contention by the interested party that on adoption of the 1st respondent's decision by the 2nd respondent as a judgment of the court, the said decision merged with the decision of the 2nd respondent that adopted it and became a judgment of the court. The 1st respondent's decision ceased therefore to exist independently of the 2nd respondent's decision and as such the same was not capable of being quashed.

10. See, the decision of the High Court (Khamoni J.) in **Wamwea –vs- Catholic Diocese of Muranga Registered Trustees [2003] KLR 389** and the decision of the Court of Appeal in **Johana Nyakwoyo Buti –vs- Walter Rasugu Omariba & 2 Others, Kisumu Court of Appeal, civil Appeal No. 182 of 2006 (unreported)**. The applicant should have sought not only the quashing of the 1st respondent's decision of 15th July, 2010 but also the 2nd respondent's decision of 12th October, 2010 that adopted the same as a judgment of the court. Failure by the applicant to seek the quashing of the decree of the 2nd respondent issued on 26th October, 2010 that adopted the said decision of the 1st respondent as a judgment of the court is fatal to the applicant's application before me for an order of certiorari.

11. I am also in agreement with the interested party that the applicant's prayer for an order of prohibition is misconceived. An order of prohibition looks at the future and not the past. This means that prohibition

cannot undo things which have already been done. As I have stated above, when the applicant instituted these proceedings, the decision of the 1st respondent had already been adopted by the 2nd respondent as a judgment of the court. In the circumstances, the applicant cannot purport to seek an order to prohibit the adoption of the said decision of the 1st respondent by the 2nd respondent. The interested party has also contended that the decree that was issued by the 2nd respondent aforesaid has been executed and the interested party issued with the consent of the Land Control Board in accordance with the terms of the said decree. The applicant did not challenge the interested party's contention in this regard.

12. It follows again that this court cannot prohibit the execution of a decree the execution of which has been completed. For the foregoing reasons, it is my finding that the orders sought in the application before me have been overtaken by events. I would like to mention also that the applicant's application was not properly brought before the court. The application should have been instituted in the name of the Republic and not in the name of the applicant.

13. In conclusion, I find no merit in the Notice of Motion application dated 25th November, 2010. The same is hereby dismissed. Each party shall bear its own costs of the application.

Delivered, Dated and Signed at KISII this 6th of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the applicant

N/A for the respondents

N/A for the interested party

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE