NO. 212

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L JUDICIAL REVIEW APPLICATION NO. 49 OF 2011

IN THE MATTER OF AN APPLICATION BY MAGEBO SABURE FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI

AND

IN THE MATTER OF KURIA WEST DISTRICT (MASABA DIVISION) LAND DISPUTES TRIBUNAL CASE NO. 16 OF 2010

AND

IN THE MATTER OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KEHANCHA, LDT CASE NO. 18 OF 2010

BETWEEN

REPUBLIC……APPLICANT

VERSUS

THE KURIA WEST DISTRICT (MASABA DIVISION)

LAND DISPUTES TRIBUNAL……..……..1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE, KEHANCHA...…..….2ND RESPONDENT

THE DISTRICT LAND REGISTRAR,

KURIA WEST DISTRICT…….3RD RESPONDENT

THE DISTRICT SURVEYOR

KURIA WEST DISTRICT…….4TH RESPONDENT

AND

NZATO MAROA…….…..…….. INTERESTED PARTY

EXPARTE

MAGEBO SABURE

JUDGMENT

1. The ex parte applicant, **Magebo Sabure** (hereinafter referred to only as **"the applicant"**) obtained leave of this court on 12th May, 2011 to bring the application herein which was filed on 27th May, 2011. The application was brought on the grounds set out in the supporting affidavit and verifying affidavit of the applicant both sworn on 11th May, 2011 and the statutory Statement of the same date which were filed pursuant to the provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules together with the application for leave. The applicant sought the following reliefs;

i. **An order of certiorari to remove into this court and quash the decision and/or award of the 1st respondent dated 16th November, 2010;**
ii. **The costs of the application.**

2. The circumstances that gave rise to the application herein can be summarized from the contents of the said affidavits and the statement filed herein by the applicant as follows; the applicant was at all material times the proprietor of all that parcel of land known as **LR. No. Bugumbe/Masaba/ 304** ("hereinafter referred to only as "**the suit property**"). The applicant purchased the suit property from the interested party's mother one, **Kihingo Marwa** at a consideration of Kshs. 2,800.00 on 30th April, 1973. The suit property was thereafter transferred and registered in the name of the applicant on 29th October, 1974. Sometimes in the month of April, 2010, the interested party lodged a claim against the applicant with the 1st respondent over the suit property. The interested party claimed that the applicant had acquired the suit property irregularly and sought the assistance of the 1st respondent to recover the suit property from the applicant. The applicant brought the claim on his own behalf and on behalf of his deceased brothers, namely, **Chacha Maroa** and **Magaigwa Maroa**. The 1st respondent after hearing the interested party and the applicant together with their witnesses delivered its decision on the matter on 16th November, 2010. The 1st respondent held that the interested party's mother had only sold to the applicant a portion of the suit property and that the rest of the suit property she had reserved for her three sons namely, the interested party and his brothers mentioned above who are deceased. The 1st respondent held further that the applicant caused the entire parcel of land comprised in the suit property to be transferred into his name through acts of fraud. The 1st respondent ordered that the suit property be sub-divided into four portions amongst the applicant, the interested party and the interested party's two deceased brothers whereby the interested party and his deceased brothers aforesaid were to get 5 hectares each while the applicant was to get 3.5 hectares of the said property. The 1st respondent's said decision was lodged with the 2nd respondent pursuant to the provisions of section 7 of the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) for adoption as a judgment of the court. The same was adopted by the 2nd respondent as a judgment of the court on 13th January, 2011 and a decree issued on the same day for execution. The applicant was aggrieved by the said decision of the 1st respondent and its adoption by the 2nd respondent and decided to bring these proceedings to challenge the same. For reasons which are not clear, the applicant's application is only challenging the decision of the 1st respondent although these proceedings were filed after the 1st decision had been adopted by the 2nd respondent as aforesaid. I will revisit this issue later in this judgment.
3. **The grounds on which the application was brought**;

In summary, the applicants' application was brought on the following main grounds;

i. **that the 1st respondent had no jurisdiction to entertain the dispute that existed between the interested party and the applicant as it concerned title and/or ownership of land;**

ii. **that the decision of the 1st respondent was illegal,null and void; and**

iii. **that the 2nd respondent had no jurisdiction to adopt the said decision of the 1st respondent as a judgment of the court.**

4. The application was not opposed by the respondents. The same was however opposed by the interested party who filed a replying affidavit sworn on 24th June, 2011. The interested party opposed the application on several grounds. The interested party contended that the applicant had sought leave to take out judicial review proceedings in the nature of certiorari to quash the decision of the 1st respondent that was purportedly made on **6th November, 2010** which decision is non-existent. The interested party argued that although leave was sought to challenge the said decision of **6th November, 2010**, the application herein was instituted to challenge the decision made on **16th November, 2010** for which no leave was sought. The interested party contended therefore that the applicant's application is not properly before the court as it was brought without leave of the court. On the merit of the application, the interested party contended that the 1st respondent's decision was within its jurisdiction. In the alternative, the interested party contended that if the court holds that the 1st respondent had no jurisdiction, the costs of this application should not be visited upon the interested party as the interested party was not the author of the decision complained of.
5. When the application came up for hearing on 24th April, 2013, the parties agreed to argue the application by way of written submissions. The applicant filed his submissions on 4th June, 2013 while the interested party filed his submissions in reply on 23rd September, 2013. I have considered the applicant's application, the statutory statement and the affidavits filed in support thereof. I have also considered the grounds of opposition filed by the interested party in opposition to the application and the written submissions filed by the advocates for the applicant and advocates for the interested party. The issues that present themselves for determination in this application arising from the said pleadings and submissions are as follows;

i. **Whether the 1st respondent had jurisdiction to determine the dispute that was referred to it by the interested party and to make the decision complained of;**
ii. **Whether the1st respondent's decision aforesaid was valid;**
iii. **Whether the 2ndrespondent had jurisdiction to adopt the 1st respondent's said decision as a judgment of the court.**
iv. **Whether the applicant's application is competent**.
v. **Whether the applicant is entitled to the reliefs sought against the respondents.**

I accept the applicant's contention that the 1st respondent acted outside its jurisdiction when it entertained the interested party's claim against the applicant. The 1st respondent was established under the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) (hereinafter referred to only as "**the Act**"). The powers of the 1st respondent were spelt out in the said Act. The 1strespondent could not exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act sets out the disputes over which the 1st respondent had jurisdiction as follows; **"……..all cases of 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."**

6. From the foregoing, it is clear that the 1strespondent did not have jurisdiction to determine disputes over ownership and/or title to land. The 1st respondent did not therefore have the power to make a finding that the applicant had acquired the title of the suit property fraudulently and to order that the suit property be divided into four portions among the applicant, the interested party and his two deceased brothers. It is now well established in our law that jurisdiction is everything

and without it a court or a tribunal must lay down its tools. Jurisdiction cannot be assumed neither can it be conferred by agreement. In the case of **Desai- vs- Warsama (1967) E.A.351**, it was held that, no court can confer jurisdiction upon itself and where a court assumes jurisdiction and proceeds to hear and determine a matter not within its jurisdiction, the proceedings and the determination are a nullity. Having come to the conclusion that the 1st respondent had no jurisdiction to entertain the claim that was brought before it by the interested party, it is also my finding that the proceedings before the 1st respondent and the 1st respondent's decision made on 16th November, 2010 were all nullities. In the case of **Macfoy -vs- United Africa Co. Ltd. (1961) 3 All E.R 1169,** Lord Denning stated as follows concerning an act which is a nullity at page 1172;

> **"if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"**.

7. It follows that if the decision of the 1st respondent was a nullity as I have already held; there was nothing in law that could be filed before the 2nd respondent for adoption as a judgment of the court. Such judgment would equally be a nullity. Since the decision of the 1st respondent was a nullity for want of jurisdiction, the 2nd respondent could not adopt the same as a judgment of the court as out of nothing comes nothing. The interested party has challenged the application herein mainly on technical grounds. There is only one substantive ground of opposition that has been raised by the interested party. The interested party had contended that the applicant did not obtain leave of the court to institute these proceedings in that the leave that was sought and obtained was to institute judicial review proceedings in the nature of certiorari to quash the decision of the 1st respondent dated 6th November, 2010 which is non-existent. The interested party argued that the applicant having sought and obtained leave to challenge the decision of 6th November, 2010, the applicant could not use that leave to mount these proceedings that are challenging the 1st respondent's decision of 16th November, 2010. I have noted that the applicant's application for leave, sought leave of the court to commence judicial review proceedings in the nature of certiorari to bring before the court and quash the decision of the 1st respondent purportedly made on **6th November, 2010**. Reference to 6th November, 2010 in the application in my view was a typing error. There was no doubt in the applicant's application looked at in totality that the leave sought was intended to challenge the 1st respondent's decision of **16th November, 2010** and not **6th November, 2010**. Although there existed an error in the application, the order that was extracted on 3rd June, 2011 after the application for leave was allowed referred to the 1st respondent's decision of 16th November, 2010. I agree with the interested party that the said order was not properly extracted as it was not in accord with the order of the court. This is not however the proper forum for contesting the said order. The interested party should have moved the court to set aside the said order on account of the irregularity that I have mentioned above if he felt that the said irregularity which originated from a mere typing error was prejudicial to him. The interested party having failed to do so, it is now not open to him to attack the present application which in itself is properly before the court.
8. The substantive ground that was put forward by the interested party in opposition to the application herein is that by the time this application was being filed, the decision of the 1st respondent which is sought to be quashed had already been adopted as a judgment of the court and a decree issued. The interested party's argument was that upon adoption, the decision of the 1st respondent ceased to exist alone but became subsumed in the decision of the 2nd respondent that has adopted it as a judgment. It was therefore the interested party's contention that after the 1st respondent's decision dated 16th November, 2010 was adopted by the 2nd respondent, it ceased to exist independently and as such the same cannot be quashed unless the decision of the 2nd respondent in which it has been subsumed as aforesaid is also quashed. As I have mentioned

earlier in this judgment, it is not clear to me why the applicant failed to seek the quashing of the decision of the 2nd respondent. It is even more puzzling as to why the applicant decided to join the 2nd, 3rd and 4th respondents in these proceedings but failed and/or omitted to seek any relief against them. I am in agreement with the submission by the interested party that it would not be possible to quash the decision of the 1st respondent which has already been adopted as a judgment of the court without quashing the judgment itself. See the persuasive holding by Khamoni J. in the case of, **R Vs. Chairman Land Disputes Tribunal, Kirinyaga District & Another Exparte Kariuki [2005] 2 KLR 10**, in which he stated that, **"When a decision of the Land Disputes Tribunal has been adopted by a Magistrates Court in accordance with the provisions of The Land Disputes Act, the adoption makes the decision of the Tribunal or the decision of the Appeals Committee be a decision of the Magistrates Court, consequently, the decision of the Tribunal or Appeals Committee, in law ceases to exist as an independent decision challengeable separately in an appeal or judicial review."** The proper procedure that should have been followed by the applicant in challenging the decision herein by the 1st respondent after its adoption would have been to make an application to quash both the decision of the 1st respondent and its adoption by the 2nd respondent. Anything short of that would be ineffective to quash the decision of the 1st respondent which ceased to exist independently after it was adopted by the 2nd respondent. Due to the foregoing, I find merit in this ground of opposition to the applicant's application herein.

9. Having disposed of all the grounds that were raised in opposition to the application herein, the issue that is now left for consideration is whether this is an appropriate case to grant the order of certiorari sought by the applicant. This court has power under section 13(7) (b) of the Environment and Land court Act, 2011 to grant the prerogative order sought. Although I have concluded herein above that the 1st and 2ndrespondents acted in excess of the jurisdiction conferred upon them by law and that their decisions were null and void, I am unable for the reasons that I have set out above to grant the prayer sought by the applicant. I am of the opinion that failure by the applicant to seek the quashing of the decision of the 2nd respondent is fatal to the application herein. The order sought by the applicant was overtaken by events when the 1strespondent's decision which is sought to be quashed was adopted as a judgment of the court. Even if this court was to purport to quash the decision of the 1st respondent, there would be nothing stopping the 2nd respondent from executing its judgment and decree issued on 13th January, 2010 arising from the said decision of the 1st respondent. It is worth noting that the applicant did not even seek an order to prohibit the 2nd, 3rd and 4th respondents from carrying out such execution. I am of the opinion that the court would be acting in vain if it grants the order sought herein by the applicant.
10. The upshot of the foregoing is that I find no merit in the applicant's application by way of Notice of Motion dated 26th May, 2011. The same is hereby dismissed. Due to the peculiar nature of this application, each party shall bear its own costs.

Delivered, dated, and **signed** at **Kisii** this 7th **day** of **February 2014.**

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Applicant

N/A for the Respondents

Mr. Kaburi h/b for Nyambati for the Interested party

Mobisa Court Clerk

S. OKONG'O

JUDGE