



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L JUDICIAL REVIEW APPLICATION NO. 110 OF 2011

**IN THE MATTER OF AN APPLICATION BY YUVENALIS MOGAKA ONKWARE FOR
JUDICIAL REVIEW IN THE NATURE OF CERTIORARI**

AND

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO.18 OF 1990 (NOW
REPEALED)**

AND

IN THE MATTER OF KEUMBU LAND DISPUTES TRIBUNAL CASE NO.23 OF 2011

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KEUMBU LAND DISPUTES TRIBUNAL.....RESPONDENT

AND

MOGUTE MOCHACHE.....INTERESTED PARTY

EXPARTE

YUVINALIS MOGAKA ONKWARE

JUDGMENT

1. The application herein which is dated 6th January, 2012 was brought by the ex parte applicant, **Yuvinalis Mogaka Onkware** (hereinafter referred to only as “**the applicant**”) pursuant to leave that was granted by this court on 19th December, 2011. The application was brought on the grounds set out in the verifying affidavit and supporting affidavit of the applicant sworn on 16th December, 2011 and 6th January, 2012 respectively and the Statement of facts dated 16th December, 2011. In the application, the applicant sought the following main reliefs;
 - i. **An order of certiorari to remove into this court and quash the decision of the respondent dated 8th July, 2011 ;**
 - ii. **The costs of the application;**

2. According to the affidavits filed by the applicant in support of the application referred to hereinabove, the applicant is the eldest son of the interested party by his deceased first wife. At all material times the interested party was the registered proprietor of all that parcel of land known as **LR. NO. Nyaribari Chache/ Keumbu/723** (“hereinafter referred to as **Plot No. 723**”). Sometimes in the year 1994, the interested party decided to divide Plot No. 723 between his two wives, Milka Obonyo Mogute (deceased) who was the mother of the applicant and Mary Moraa Mogute who is alive. In this regard, the interested party sub-divided Plot No. 723 into two portions namely, LR. No. Nyaribari Chache/Keumbu/1574 (“hereinafter referred to as “**the suit property**”) and LR. No. Nyaribari Chache/Keumbu/1575 (hereinafter referred to as “**Plot No. 1575**”). Sometimes in the month of February, 2011 or thereabouts, the interested party lodged a claim against the applicant with the respondent over the suit property. The interested party claimed that the applicant held title to the suit property illegally. It is not clear from the proceedings of the respondent as to what relief the interested party sought from the respondent. The respondent heard the interested party and the applicant together with their witnesses and delivered its decision on the interested party’s claim against the applicant on 8th July, 2011. In its decision, the respondent made a finding that the interested party had sub-divided Plot No. 723 into two portions and transferred the suit property to the applicant. The interested party then sold part of the land that he had remained with after the transfer of the suit property to the applicant. The respondent concluded that the dispute between the interested party and the applicant was over the boundary of Plot No. 1575 and the suit property and directed that the Kisii District Land Surveyor should visit the site of the two parcels of land and fix the boundaries of the same. The respondent’s said decision was lodged before the Chief Magistrate’s Court at Kisii, in Misc. Application No. 71 of 2011 under 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 and the same was adopted on 29th July, 2011. It is the said decision of the respondent and its adoption that has prompted these proceedings.

3. **The grounds on which the application was brought;**

In summary, the applicant has challenged the said decision of the respondent and its adoption by the Kisii Chief Magistrate’s Court as a judgment on the following main grounds;

- i. **that the 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 the suit property;**
- ii. **that the decision of the respondent was illegal, null and void ; and**
- iii. **that the Chief Magistrate had no jurisdiction to adopt the said decision of the respondent as a judgment of the court.**

The application was not opposed by the respondent. The same was however opposed by the interested party. When the application came up for hearing on 14th May, 2013, I directed that the application be argued by way of written submissions. The applicant filed his submissions on 25th October, 2013 while the interested party filed his submissions on 2nd December, 2013. I have considered the applicants’ application, the statutory statement and the affidavits filed in support thereof. I have also considered the written submissions filed by the advocates for the applicant and the interested party. I am of the opinion that the main issues that present themselves for determination in this application are as follows;

- i. **Whether the 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 the respondent’s decision aforesaid was valid;**
- iii. **Whether the Chief Magistrate’s Court had jurisdiction to adopt the respondent’s decision aforesaid as a judgment of the court.**
- iv. **Whether the applicant is entitled to the reliefs sought against the respondent.**

4. The 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 respondent were clearly

spelt out in the said Act. The respondent 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.”**

As I have mentioned hereinabove, although the interested party had claimed that the title held by the applicant over the suit property was illegal, the respondent found as a fact that the interested party had voluntarily transferred the suit property to the applicant. The respondent found that the dispute between the parties was not over the title or ownership of the suit property but over the boundary of the suit property and Plot No. 1575. The decision made by the respondent and which is being challenged herein was that, the Kisii District Land Surveyor should visit the site of the suit properties and determine their boundaries. The respondent did not make any order affecting the title or ownership of the suit property.

5. It is clear from the provisions of the Act that I have set out above that the respondent had jurisdiction to determine disputes over land boundaries. The respondent having considered the interested party’s complaint and having reached the conclusion that it concerned boundary between the suit property and Plot No. 1575, the respondent had the power to direct the District Land Surveyor to visit the site of the two parcels of land and fix their boundary which was being disputed. It is therefore my finding that the respondent acted within its jurisdiction in arriving at the decision that it made on 8th July, 2011. It has been said that jurisdiction is everything and without it a court or tribunal must lay down its tools. Jurisdiction cannot be assumed neither can it be conferred by agreement.
6. Having come to the conclusion that the respondent had jurisdiction to entertain the claim that was brought before it by the interested party, it is my further finding that the proceedings before the respondent and its decision made on 8th July, 2011 were valid and not nullities as claimed by the applicant. Since the decision of the respondent was valid as aforesaid, it was lawful for the Chief Magistrate’s Court at Kisii to adopt the same as a judgment of the court pursuant to the provisions of Section 7 of the Act. The disposal of this issue brings me to the last issue namely, whether this is an appropriate case to grant the orders 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.
7. As I have already concluded herein above, the respondent acted within the jurisdiction that was conferred upon it by law in making the decision complained of herein. The decision of the respondent was therefore valid the same having been arrived at within the powers that had been conferred upon the respondent by law and after due observance of the rules of natural justice. No good reason has therefore been put forward by the applicant to warrant the review of the said decision by the respondent. Furthermore, I have noted that the applicant did not seek to quash the decision of the Chief Magistrate’s Court that was made on 29th July, 2011. Once the decision of the respondent was adopted by the Chief Magistrate’s Court, it became a judgment of that court and the same could not be challenged independently.
8. I am in agreement therefore with the submission by the interested party’s advocates that failure to join the Chief Magistrate’s Court in these proceedings for the purposes of quashing its proceedings and decree issued on 18th August, 2011 was fatal to the applicant’s application. In conclusion, I am not satisfied that this is an appropriate case to grant the orders sought by the applicant. The applicants’ Notice of Motion application dated 6th January, 2012 has no merit and the same is dismissed accordingly. Due to the relationship between the applicant and the interested party, each party shall bear its own costs of the application.

Delivered, dated and signed and at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Applicant

N/A for the Respondent

Mr. Soire for the Interested party

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE