



No. 269

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 13 OF 2011**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI BY HEZRON  
OMBAE AND JOSEPH MATIBE**

REPUBLIC ..... APPLICANT

VERSUS

HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT

ROSE ATIENO OLUOCH ..... 2<sup>ND</sup> RESPONDENT

**EX PARTE**

HEZRON OMBAE

JOSEPH MATIBE

**JUDGMENT**

1. What is before me is the Notice of Motion application dated 14<sup>th</sup> February 2011 that was brought by Hezron Ombae and Joseph Matibe (hereinafter referred to as “**the applicants**”) seeking the following reliefs:
  - a. **An order of certiorari to remove into this court and quash the award of the Mosochi Land Disputes Tribunal in Case No. 27 of 2009 that was adopted as a judgment of Kisii Resident Magistrate’s Court in Misc. Civil Suit No. 159 of 2010 together with all consequential orders.**
  - b. **A declaration that all that parcel of land known as LR No. West Kitutu/Bogusero/1932 is owned by the 2<sup>nd</sup> applicant Joseph Matibe;**
  - c. **The cost of the application.**

The applicant’s application was supported by statement of facts dated 2<sup>nd</sup> February 2011, supporting affidavit and verifying affidavit both sworn on 2<sup>nd</sup> February 2011 and on the grounds that were set out in the body of the application. The facts giving rise to this application as set out in said statement and the two affidavits filed in support of the application are as follows. At all material times, all that parcel of land known as LR No. West Kitutu/Bogusero/1932 (hereinafter referred to as “**the suit property**”) was registered in the name of one, **Rosalina Anyango Nyambuche**, deceased (hereinafter referred to as only as “**Rosalina**”). Rosalina had three daughters but had no son. The 2<sup>nd</sup> respondent and her husband one, Julius Oluoch Abeka

(deceased) came to live with Rosalina on the suit property for the purposes of looking after her as she was aged, poor and ailing.

2. The 2<sup>nd</sup> respondent and her said husband set up their home on the suit property. During her lifetime, Rosalina made attempts to transfer the suit property to the 2<sup>nd</sup> respondent's said husband during which process she executed a transfer in favour of the 2<sup>nd</sup> respondent's said husband and obtained consent of the land control board to have the suit property transferred to the 2<sup>nd</sup> respondent's said husband. The transfer of the suit property in favour of the 2<sup>nd</sup> respondent's husband aforesaid was not registered due to the 2<sup>nd</sup> respondent and her said deceased husband's inability to raise the stamp duty and registration fees in the sum of Kshs. 16,000.00. The 2<sup>nd</sup> respondent's said husband fell sick and died sometimes in the year 2005 before the transfer that had been executed by Rosalina was registered and the suit property transferred to his name.
3. After the death of the 2<sup>nd</sup> respondent's husband, Rosalina also fell ill and died thereafter. After the death of Rosalina, the 2<sup>nd</sup> respondent got information that the 1<sup>st</sup> applicant and the 2<sup>nd</sup> applicant were making arrangements to have the suit property transferred to the name of the 2<sup>nd</sup> applicant. When the 2<sup>nd</sup> respondent visited the land's registry at Kisii, she discovered that the suit property had indeed been transferred to the 2<sup>nd</sup> respondent on 17<sup>th</sup> August 2009. Sometimes in the year 2010 the 1<sup>st</sup> applicant and his son came to the suit property and demanded that the 2<sup>nd</sup> respondent do vacate her house on the property and move out as the suit property belonged to the 1<sup>st</sup> applicant. The 2<sup>nd</sup> respondent reported the matter to the area chief who advised her to lodge a complaint against the applicants herein with the Mosochi Land Disputes Tribunal.
4. The 2<sup>nd</sup> respondent lodged land disputes claim No. 27 of 2010 with Mosochi Land Disputes Tribunal (hereinafter referred to only as "**the Tribunal**") against the applicants herein in which case the 2<sup>nd</sup> respondent was the claimant and the applicants were the objectors. The 2<sup>nd</sup> respondent's claim against the applicant before the Tribunal was that it was the 2<sup>nd</sup> respondent who was entitled to inherit the suit property and that the 1<sup>st</sup> applicant had no relationship with Rosalina and as such had no interest whatsoever on the suit property. The 2<sup>nd</sup> respondent contended before the Tribunal that Rosalina had before her death transferred the suit property to the 2<sup>nd</sup> respondent's deceased husband, Julius Oluoch Abeka and that what remained was only for the 2<sup>nd</sup> respondent and her said deceased husband to look for a sum of Kshs. 16,000.00 that was being demanded by the land's office to have the property registered in the name of the 2<sup>nd</sup> respondent's deceased husband. The 2<sup>nd</sup> respondent contended before the tribunal that the 1<sup>st</sup> applicant who had no relationship with Rosalina was not entitled to inherit Rosalina's property namely, the suit property.
5. The 2<sup>nd</sup> respondent's contention was that the 1<sup>st</sup> applicant had no right to acquire the suit property and to have the same transferred to the 2<sup>nd</sup> applicant. The applicants were served with the 2<sup>nd</sup> respondent's complaint and they appeared before the tribunal and put up their defences. The tribunal after hearing the 2<sup>nd</sup> respondent in her complaint and the applicants made a decision sometimes in the month of November 2010 in which it declared the 2<sup>nd</sup> respondent to be the rightful successor of Rosalina and ordered the suit property to be registered in her name. The tribunal further ordered the 2<sup>nd</sup> applicant to seek a refund of the money that he had paid as purchase price from the 1<sup>st</sup> applicant. The Tribunal's decision was lodged at the Chief Magistrate's court at Kisii in Misc. App. No. 159 of 2010 on 11<sup>th</sup> November 2010 for adoption as a judgment of the court pursuant to the provisions of section 7 of the Land Disputes Tribunals Act No. 18 of 1990 (hereinafter referred to only as "**LDA**"). The Tribunal decision was ultimately adopted as a judgment of the court on 17<sup>th</sup> January 2011 and was followed by a decree that was issued on the same date. The applicants were aggrieved by the said decision by the Tribunal and its adoption by the Chief Magistrate's court at Kisii as a judgment of the court and that is what prompted the present application before the court.
6. The applicant's application has been brought on the grounds that the tribunal had no jurisdiction to determine the complaint that had been lodged with the Tribunal by the 2<sup>nd</sup> respondent as it

concerned title and/or ownership of the suit property. The applicants have contended further that the Tribunal had no jurisdiction to determine a dispute relating to succession as the 2<sup>nd</sup> respondent's claim was based on her status as a beneficiary of the estate of Rosalina. The applicants have contended further that the 2<sup>nd</sup> respondent's claim before the tribunal was statute barred under the provisions of section 13 of the LDA. It is also the contention of the applicants that the Chief Magistrate's Court at Kisii had no jurisdiction to adopt the decision of the Tribunal aforesaid as a judgment of the court. It is on account of the foregoing that the applicants have sought an order to bring before this court for the purposes of being quashed the said decisions of the Tribunal and the adoption thereof by the Chief Magistrate's Court at Kisii.

7. The applicant's application was opposed by the respondents. Whereas the 2<sup>nd</sup> respondent filed grounds of opposition dated 28<sup>th</sup> September 2012, the 1<sup>st</sup> respondent neither filed grounds of opposition nor replying affidavit to the application. Through a consent letter dated 5<sup>th</sup> June 2012 that was signed by the advocates for all the parties herein, the parties agreed to argue the applicant's application by way of written submissions. The 1<sup>st</sup> respondent filed its submissions on 22<sup>nd</sup> May 2013. The same was followed by the submission by the 2<sup>nd</sup> respondent that was filed on 3<sup>rd</sup> June 2013 and finally with the submissions by the applicant that was filed on 22<sup>nd</sup> January 2014. In her grounds of opposition filed in response to the application herein, the 2<sup>nd</sup> respondent contended that the applicant's application is misconceived, incompetent and legally untenable. The 2<sup>nd</sup> respondent contended that the Hon. Attorney General and the 2<sup>nd</sup> respondent who have been sued herein as respondents did not make the decisions complained of by the applicants in these proceedings and as such the orders sought herein have been sought in vacuum.
8. The 2<sup>nd</sup> respondent contended further that orders of judicial review do not lie against her as she is a private citizen and not a judicial or quasi-judicial body capable of making orders which can be amenable to review by this court. The 2<sup>nd</sup> respondent also took issue with the applicants verifying affidavit filed in support of the application which she termed inadequate to support the present application. The 2<sup>nd</sup> respondent contended further that the application before the court is at complete variance with the chamber summons that had been filed for leave to commence the application and as such the application does not lie. Finally, the 2<sup>nd</sup> respondent contended that the applicants' application is muddled up, wrought with illegalities, irredeemably bad and discloses no cause of action whatsoever as against the respondents who according to the 2<sup>nd</sup> respondent are non-suited. The 2<sup>nd</sup> respondent termed the application herein as devoid of any merit and an abuse of the process of the court.
9. I have considered the applicant's application together with the statements and the two affidavits filed in support thereof. I have also considered the 2<sup>nd</sup> respondent's grounds of opposition filed in opposition to the application. Finally, I have considered the written submissions filed by the respondents and the applicant and the case law cited. In my view the issues that arise for determination in the present application are as follows:
  - a. **Whether the orders sought by the applicants can lie as against the respondents herein and,**
  - b. **Whether the applicants are entitled to the reliefs sought as against the respondents.**

It is not in dispute that the applicants' complaints are directed against the decision that was made by Mosoch Land Disputes Tribunal and its adoption as a judgment of the court by the Chief Magistrate's Court at Kisii. Decisions complained of by the applicants were therefore neither made by the 1<sup>st</sup> respondent herein namely, the Hon. Attorney General nor the 2<sup>nd</sup> respondent, Rose Atieno Oluoch. Neither Mosoch Land Disputes Tribunal nor the Chief Magistrate's Court at Kisii are parties to these proceedings.

10. I am in agreement with the submissions by the respondents that the applicants have not brought the right parties before the court. This court cannot be called upon to quash the decisions made by the parties which are not before it. Failure by the applicants to join Mosoch Lands Disputes Tribunal and the Chief Magistrate's Court at Kisii in these proceedings as respondents is fatal to the application before the court. I am in agreement with the submissions by the respondents that

the application before me is misconceived, incompetent and legally untenable. I am also in agreement with the submission by the 2<sup>nd</sup> respondent that in any event the orders of judicial review do not lie against her, as she is neither a judicial nor quasi-judicial body clothed with the power to make decisions which are amenable to review by this court. The upshot of the foregoing is that the orders sought do not lie as against the respondents before the court. The applicants' application dated 14<sup>th</sup> February 2011 is therefore not for granting. The same is hereby dismissed with costs to the respondents.

**Delivered, dated and signed at Kisii this 6<sup>th</sup> day of June 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Okenye h/b for Z. Mokuu for the applicants

N/A for the 1<sup>st</sup> respondent

Mr. Oguttu for the 2<sup>nd</sup> respondent

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**