



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APPL. NO. 87 OF 2011(JR)

**IN THE MATTER OF: AN APPLICATION BY MARY KERUBO OGOTI FOR ORDERS OF
JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)**

AND

IN THE MATTER OF: LAND DISPUTES TRIBUNALS ACT, NO 18 OF 1990

AND

IN THE MATTER OF TH LAND DISPUTE TRIBUNAL (FORMS AND PROCEDURE)

RULES, 1993, LEGAL NOTICE NO 13 OF 1993

AND

IN THE MATTER OF KIOGORO LAND DISPUTES TRIBUNAL LAND CASE NO 4 OF 2010

AND

**IN THE MATTER OF REGISTERED LAND PARCEL NO. NYARIBARI
CHACHE/B/B/BOBURIA/6939**

AND

IN THE MATTER OF: KISII CMCC MISC.APPLICATION NO 77 OF 2011

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KIOGORO LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

CHIEF MAGISTRATE’S COURT AT KISII.....2ND RESPONDENT

AND

STEPHEN KINARA OGORI

MARISERA MORAA OGORI.....INTERESTED PARTIES

JUDGMENT

1. The applicant herein, **Mary Kerubo Ogori**, (hereinafter referred to only as “**the applicant**”) brought an application by way of Notice of Motion dated 26th September 2011 under Order 53 Rules 3, 4, 5 and 7 of the Civil Procedure Rules, 2010 seeking the following orders;

a. The application be heard on priority basis owing to the obtaining special and/or peculiar circumstances.

b. The Court be pleased to grant an Order of Judicial Review in the nature of Certiorari to remove to the High Court and quash the proceedings and decision of the 1st Respondent dated 20th July 2011 and the adoption proceedings through Kisii CMCC Misc. Application No. 77 OF 2011 and the decision made thereon on 5th August 2011, adopting the said decision of the 1st respondent which touched on and concerned the applicant’s LR. No. Nyaribari Chache/B/B/Boburia/6939, whereby the 1st Respondent ordered that the interested parties be registered as the proprietors of the said parcel of land.

c. The Court be pleased to grant an Order of Judicial Review in the nature of Prohibition to prohibit the 1st Respondent from hearing, further hearing, deliberating on and/or in any other way whatsoever and/or howsoever dealing with issues pertaining to ownership in respect of LR. No. Nyaribari Chache/B/B/Boburia/6939, registered in the name of the applicant, Mary Kerubo Ogori.

d. The Court be pleased to grant an Order of Judicial Review in the nature of Prohibition, to prohibit the 2nd Respondent from further hearing, deliberating on, adopting and/or in any way whatsoever and/or howsoever, dealing with any determination and/or decision and in particular, the decision dated 5th August 2011, emanating from the 1st Respondent concerning and/or in respect of LR. NO. Nyaribari Chache/B/B/Boburia/6939, registered in the names of, the applicant Mary Kerubo Ogori.

e. Costs of this application be borne by the respondents and the interested parties jointly and severally.

f. Such further and/or other orders be made as the court may deem fit and expedient.

2. The applicant’s application was supported by a supporting affidavit and a verifying affidavit both sworn on 26th September, 2011 and a statement of facts of the same date. In her said affidavits, the applicant has stated that she was at all material times the registered proprietor of **LR. No. Nyaribari Chache/B/B/Boburia/6939** (hereinafter known as “**the suit land or the suit property**”) and that sometimes in the year 2010, the interested parties lodged a claim against her with the 1st respondent over the suit land in which claim, the interested parties contended that the suit land belongs to the interested parties. The 1st respondent entertained the interested parties claim against the applicant and in a decision that was delivered on 20th July, 2011, the 1st respondent ordered that the applicant’s title over the suit property be cancelled and that the suit property be registered in the name of the interested parties.

3. The applicant has stated that the 1st respondent had no jurisdiction to entertain the interested parties’ claim against the applicant and to order the cancellation of the applicant’s title over the suit property. The applicant has stated further that the said decision by the 1st respondent was lodged with the 2nd

respondent who proceeded to adopt the same as a judgment of the court similarly without jurisdiction to do so. The applicant has stated that the 1st respondent's decision having been made without jurisdiction, the 2nd respondent had no jurisdiction to adopt the same as a judgment of the court. The applicant has stated that the decisions of the 1st and 2nd respondents were null and void for all intents and purposes for want of jurisdiction. The applicant has annexed to her verifying affidavit, a copy of the certificate of official search dated 5th October, 2010 in respect of the suit land showing that the suit land was registered in her name on 6th March, 2007, a copy of title deed dated 13th March, 2007 in her name, a copy of the proceedings and decision of the 1st respondent dated 20th July, 2011 and a copy of the decree of the 2nd respondent issued on 8th August, 2011.

4. The applicant's application was opposed by the interested parties. The interested parties filed a Notice of Preliminary Objection dated 8th February, 2012 and a replying affidavit sworn by the 1st interested party on 5th December, 2011 in opposition to the application. In their preliminary objection the interested parties averred that;

I. The applicant's application is fatally defective and incompetent.

II. The application is in clear breach and/or disregard of the mandatory provisions of the Civil Procedure Rules.

5. In their replying affidavit the interested parties have admitted that the applicant was at all material times the registered proprietor of the suit land. The interested parties have contended however that in the Notice of Motion application for judicial review before the court, the applicant has not been mentioned as a party to the proceedings more particularly as the ex parte applicant. The interested parties have contended that in the circumstances this court lacks jurisdiction to make any order in the applicant's favour since the applicant has not sought any relief. The interested parties have contended further that although the suit land was registered in the name of the applicant, the applicant was not entitled to the same as the suit land belonged to the interested parties in their capacity as the rightful heirs of one, **Alexina Bosibori Kinara** who is their deceased grandmother. The interested parties contended that the applicant had her own parcel of land that she was entitled to. The interested parties have contended further that the 1st respondent had jurisdiction to determine the interested parties' claim against the applicant as the claim concerned a dispute over the sub-division of and a right to use and occupy land. The interested parties have reiterated the fact that the applicant's application is defective and ought to be dismissed with costs.

6. When the matter came up before me on 19th February 2013 the advocates for the parties agreed to argue the application by way of written submissions. The parties filed their respective submissions save for the respondents and the same are on record. I have considered the applicant's application together with the affidavits filed in support thereof. I have also considered the interested parties' Notice of Preliminary Objection and replying affidavit filed in opposition to the application. Finally, I have considered the submissions filed by the parties and the case law cited. In my view, there are only two issues for determination in the present application. The first issue is whether the applicant's application is competent and secondly, whether the applicant has given good grounds to warrant the grant of the orders sought.

7. The interested parties have contended in their notice of preliminary objection and have submitted at length in their written submissions that the application herein is incurably defective. The interested parties' contention is that the application herein was filed without leave of the court contrary to the express provisions of Order 53 Rule 1 of the Civil Procedure Rules and as such the same is not maintainable. According to the court record, the applicant sought leave of this court to file the present application through Chamber Summons application dated 26th September, 2011 that was filed on the same date. The applicant's application for leave was heard on 5th October, 2011 and allowed by Sitati J.

8. For some strange reason, the applicant had filed the present Notice of Motion application for judicial

review on the same date that shelodged her application for leave on 26th September 2011 may be on the assumption that the application for leave would be heard and granted on the same day that it was lodged. There is therefore no dispute that the applicant's application herein was filed without leave of the court. The explanation given by the applicant in her submissions that the registry staff erroneously stamped the application when she presented the Chamber Summons application for filing is not convincing. The Notice of Motion application was dated 26th September, 2011, the affidavit in support thereof was sworn on 26th September, 2011, the same was presented to court and stamped on 26th September, 2011 and the same was paid for according to the court receipt No. 4057337 on 26th September, 2011. There is no doubt therefore that the applicant intended to file the Notice of Motion application on 26th September, 2011 and did file the same on that date before leave was granted for that purpose. Order 53 rule 1(1) of the Civil Procedure Rules provides that:

“No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.”

9. I am in agreement with the submission by the interested parties' advocates that the applicant's application herein which was filed without leave of the court is incurably defective and incompetent. I therefore uphold the interested parties' preliminary objection. Having found that the applicant's application is improperly before the court, I am not obliged to consider the merit of the application. For the completeness of this judgment however, I would wish to state that the 1st respondent acted without jurisdiction in entertaining the interested parties' complaint against the applicant. Section 3 (1) of the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) sets out the disputes over which the tribunal like 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”

The interested party's complaint against the applicant concerned ownership and/or title to the suit land. The 1st respondent made a declaration that the suit land belongs to the interested parties and ordered the applicant's title to be cancelled and the suit property transferred to the interested parties. The 1st respondent lacked jurisdiction to determine the dispute between the parties and to make an order cancelling the applicant's title. The suit property was registered under the Registered Land Act, Cap. 300, Laws of Kenya(RLA)(now repealed). Under the RLA, only the High Court has jurisdiction under Section 143(1) thereof to cancel a title issued under the Act. The proceedings of the 1st respondent were therefore conducted without jurisdiction. The 1st respondents decision was similarly rendered without jurisdiction and as rightly submitted by the applicant's advocate was null and void for all intents and purposes.

10. I am also in agreement with the applicant's submission that the 2nd respondent had no jurisdiction to adopt a null and void decision by the 1st respondent as a judgment of the court. The 2nd respondent's decree that was issued on 8th August, 2011 was therefore issued without jurisdiction and as such was like the 1st respondent's decision, a nullity. A nullity can only beget a nullity. From the foregoing, it is clear that if I had a competent application before me, I would have granted all the prayers sought by the applicant. As things stand now however, even with much sympathy which I have for the applicant who has fallen a victim of an illegal process, my hands are tied. The applicant's application cannot be saved even under Article 159 (2) (d)of the Constition of Kenya. The requirement for leave to be obtained prior to the filing of an application for judicial review is not a technical procedural issuse but a substantive issue of law.

11. I hope that there are still some other legal avenues left through which the applicant can challenge the illegal proceedings and decisions that were rendered by the 1st and 2nd respondents herein. The upshot of the foregoing is that the interested parties' preliminary objection succeeds. The applicant's Notice of Motion application dated 26th September, 2011 is hereby struck out. Each party shall bear its' on costs of the application.

Delivered, dated and signed at Kisii this 6th day of June 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Applicant

N/A for the Respondent

Mr. Okenye h/b for Sagwe for the Interested Parties

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE