



No. 280

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. APPL. NO. 77 OF 2011

**IN THE MATTER OF AN APPLICATION BY KENNEDY GEKONGE MAKWAYE FOR AN
ORDER OF CERTIORARI**

AND

IN THE MATTER OF THE DECREE OF THE CHIEF MAGISTRATE'S COURT AT KISII

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990

BETWEEN

REPUBLIC APPLICANT

VERSUS

MOSOCHO LAND DISPUTES TRIBUNAL 1ST RESPONDENT

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

THE ATTORNEY GENERAL..... 3RD RESPONDENT

AND

BENEDICTO OGATO AMENYA INTERESTED PARTY

EX PARTE

KENNEDY GEKONGE MAKWAYE

RULING

1. At all material times, the ex parte applicant **Kennedy Gekonge Makwaye** (hereinafter referred only to as “**the applicant**”) was the registered proprietor of all that parcel of land known as **LR No. West Kitutu/Bogeka/1544** (hereinafter referred to only as “**the suit property**”). Prior to the transfer and registration of the suit property in the name of the applicant, the same was registered in the name of one, **Amenya**. Amenya is the father of the interested party and the maternal

- grandfather of the applicant. Sometimes in the year 2011, the interested party lodged a claim against the applicant with the 1st respondent with regard to the suit property. In his claim before the 1st respondent, the interested party contended that the applicant had acquired the suit property unlawfully. The interested party claimed that Amenya had only given the applicant a portion of the suit property and not the entire parcel of land. The interested party claimed that the applicant was only entitled to half (½) portion of the suit property and that the remaining half of the suit property belongs to him.
2. In response to the interested party's claim, the applicant contended that Amenya had transferred to him the entire parcel of land comprised in the suit property and not a half portion thereof as had been claimed by the interested party. The interested party maintained that he acquired the suit property lawfully and as such there was no reason whatsoever as to why he had to share the same with the interested party. After hearing the applicant, the interested party and their witnesses, the 1st respondent in a decision delivered on 4th May 2011 ordered the suit property to be subdivided into two parts by the District Land Surveyor so that the interested party may have the lower part thereof and the applicant the upper part.
 3. The 1st respondent's decision was filed before the 2nd respondent 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 (now repealed) and the same was duly adopted by the 2nd respondent on 27th May, 2011. It is the said decision by the 1st respondent and its adoption by the 2nd respondent that is the subject of the present application. The applicant was aggrieved by the 1st respondent's decision aforesaid and moved this court on 28th July 2011 seeking leave to apply for an order of certiorari to remove into this court the decision of the 1st respondent aforesaid that was subsequently adopted by the 2nd respondent on 27th May 2011 for the purposes of being quashed. The leave sought was granted on 29th July 2011 after which the applicant brought the present application by way of Notice of Motion dated 16th August, 2011 on 18th August 2011.
 4. In the application, the applicant sought an order of certiorari to quash the decision of the 1st respondent made on 4th May 2011 and the adoption thereof by the 2nd respondent on 27th May 2011. The applicant's application was supported by affidavit sworn by the applicant on 16th August 2011 and the statutory statement dated 28th July 2011. The applicant had sworn two other affidavits on 27th July, 2011 and 28th July, 2011 in support of the application for leave. The affidavit sworn on 27th July, 2011 was referred to as the verifying affidavit while the one sworn on 28th July, 2011 was referred to as supporting affidavit. The verifying affidavit that was sworn on 27th July, 2011 consisted of only five (5) paragraphs and through it, the applicant produced as exhibits a copy of the proceedings and decision of the 1st respondent and a copy of the decree that was issued by the 2nd respondent upon adoption of the 1st respondent's said decision. I will come back to these affidavits later in this ruling.
 5. In his supporting affidavit sworn on 28th July, 2011 which is the only affidavit that I will consider out of the three that were filed by the applicant, the applicant stated that the interested party had lodged a claim against the applicant with the 1st respondent in Tribunal Case No. 16 of 2011 over the suit property in which claim the interested party alleged that the applicant had obtained the title to the suit property unlawfully. The applicant stated further that the 1st respondent determined the claim in favour of the interested party and ordered for the subdivision of the suit property into two (2) portions so that one of the portions is registered in the name of the applicant and the other in the name of the interested party. The applicant stated further that the 1st respondent's decision aforesaid was filed before the 2nd respondent for adoption as a judgment of the court and the 2nd respondent proceeded to adopt the same on 27th May 2011.
 6. The applicant stated that following the adoption of the said decision of the 1st respondent by the 2nd respondent, the District Land Surveyor was in the process of subdividing the suit property in accordance with the said decision of the 1st respondent. The applicant stated that the suit property was transferred to the applicant voluntarily by Amenya who also granted the applicant vacant possession of the same in the year 2008. The applicant stated further that the interested party's

- claim before the 1st respondent was time barred and that the 1st respondent had no jurisdiction to determine the claim and to order the cancellation of the applicant's title to the suit property. The applicant stated further that the 1st respondent failed to give him an opportunity to be heard and to put questions to the interested party and his witnesses contrary to the rules of natural justice. The applicant stated further that the 1st respondent's decision aforesaid was null and void. The applicant annexed to the affidavit among others, the proceedings and decision of the 1st respondent, a copy of a certificate of official search dated 7th March 2011 in respect of the suit property, a copy of the decree issued by the 2nd respondent upon the adoption of the 1st respondent's decision, a copy of a letter dated 27th July 2011 addressed to the applicant and the interested party by the District Surveyor Kisii/Gucha Districts notifying them that the said surveyor was to visit the said property on 17th August 2011 to implement the orders issued by the 1st and the 2nd respondents and a copy of the title deed for the suit property dated 4th August 2009.
7. The applicant's application was opposed by the interested party. The respondents although served did not file any response to the application. The interested party opposed the applicant's application through a replying affidavit sworn on 9th September 2011. In response to the applicant's application, the interested party contended that the decision of the 1st respondent was made on 4th May 2011 and was adopted by the 2nd respondent on 27th May 2011 and as such as at the time when the applicant herein sought leave to institute the present application, the decision of the 1st respondent was non-existent. The interested party contended further that the applicant's application is at variance with the Statement of facts that was filed by the applicant at the leave stage contrary to the provisions of Order 53 of the Civil Procedure Rules. The interested party contended further that the dispute before the 1st respondent concerned subdivision of the suit property and as such the 1st respondent had jurisdiction to hear and determine the same. The interested party contended further that the applicant did not file a proper affidavit in verification of the Statement of facts aforesaid contrary to the provisions of Order 53 of the Civil Procedure rules and as such the entire proceedings herein are a nullity and an abuse of the court process. The interested party contended further that in the event that the court finds that the 1st respondent had exceeded its jurisdiction as claimed by the applicant, the interested party should not be condemned in costs because the interested party had no control over the 1st respondent.
8. On 11th November 2013 the parties agreed to argue the application herein by way of written submissions. The applicant filed his submissions on 30th December 2013 and the interested party did so on 24th February 2014. I have considered the applicant's application, the affidavits filed in support thereof and the Statement of facts. I have also considered the applicant's advocates written submissions and the cases cited in support thereof. Equally, I have considered the interested party's replying affidavit and his advocates written submissions in opposition to the application. In my view, the following are the issues that present themselves for determination in the application before me;
- i. Whether the 1st respondent had jurisdiction to entertain the interested party's claim and to make the decision complained of herein.
 - ii. Whether in arriving at the decision complained of herein the 1st respondent violated the rules of natural justice.
 - iii. Whether the 2nd respondent had jurisdiction to adopt the decision of the 1st respondent as a judgment of the court.
 - iv. Whether the applicant's application is properly before the court.

9. Issue No. I;

It is not in dispute that, at all material times the suit property was registered in the name of the applicant as the absolute proprietor thereof under the provisions of the Registered Land Act Cap. 300 Laws of Kenya (now repealed). It is also not in dispute that the interested party's complaint against the applicant before the 1st respondent concerned the manner in which the applicant had acquired the suit property and

the validity of the applicant's title to the suit property. The 1st respondent was established under the Land Disputes Tribunals Act No. 18 of 1990 (now repealed) (hereinafter referred to only as the "Act"). As a creature of the Act, the powers of the 1st respondent were clearly spelt out in the Act. The 1st respondent could not exercise any power that was not conferred upon the 1st respondent by the Act. According to section 3(1) of the Act, the 1st respondent's jurisdiction was limited to the determination of all cases of a civil nature involving a dispute as to; the division of, or the determination of boundaries to land, a claim to use or occupy land, or trespass to land. The Act did not give the 1st respondent jurisdiction to determine title to or ownership of land.

10. Due to the foregoing, I am in agreement with the submissions by the advocates for the applicant that the 1st respondent did not have jurisdiction to determine the claim that was lodged before it by the interested party which concerned the determination of ownership of or title to the suit property. The 1st respondent did not also have the jurisdiction to make an order for subdivision of the suit property and the transfer of a portion thereof to the interested party. It follows from the foregoing that the proceedings and decision of the 1st respondent made on 4th May, 2011 were *ultra vires* the powers conferred upon the 1st respondent under the Act. In the case of **Desai-vs-Warsama (1967) E.A.351**, it was stated that, no court can confer jurisdiction upon itself. Where a court assumes jurisdiction and proceeds to hear and determine a matter not within its jurisdiction, its decision is a nullity and amounts to nothing. The same fate must befall the 1st respondent's decision herein.

11. Issue No. II;

I have perused the proceedings of the 1st respondent. I have noted that the interested party gave evidence and called one witness while the applicant gave evidence but did not call any witness. From the summary of the proceedings of the 1st respondent before me, there is no indication that the parties had cross-examined each other during the hearing before the 1st respondent. The same applies to the interested party's witness. It is not clear whether she was cross-examined by the applicant or not. There is also no indication in the proceedings that the applicant had sought to cross-examine the interested party and his witness and was not afforded the opportunity. I am unable to accept the applicant's submission that he was denied an opportunity to be heard. The applicant was served with the interested party's claim form, he appeared before the 1st respondent and was heard on his defence. He was also present when the interested party gave evidence and had an opportunity to cross-examine him and his witness if he so wished. I therefore find no merit in the applicant's contention that the decision of the 1st respondent dated 4th May 2011 was arrived at in breach of the rules of natural justice. I am satisfied that each party was given adequate opportunity to be heard which opportunity they both utilized.

12. Issue No. III;

I have held hereinabove that the decision of the 1st respondent was arrived at without jurisdiction and that a decision reached without jurisdiction is null and void. The question that I need to answer here is whether the 2nd respondent could adopt as a judgment of the court a decision which is null and void. 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”.

The decision of the 1st respondent being null and void amounted to nothing to use Lord Denning's words. The 2nd respondent did not therefore have before it a competent decision that it could adopt as a judgment of the court. As I have said before, I am of the opinion that section 7 of the Act presupposed a proper and

lawful decision of the Land Disputes Tribunal. In cases where the tribunals arrogated to themselves powers that they did not have and proceeded to make decisions which were *ultra vires*, the Resident Magistrate's Courts did not have jurisdiction under section 7 of the Act to adopt such decisions as judgment of the court. Due to the foregoing it is my finding that the 2nd respondent acted in excess of its jurisdiction when it purported to adopt the decision of the 1st respondent which was *ultra vires*, null and void.

13. Issue No. IV;

As I have stated at the beginning of this ruling the applicant's application was supported by an affidavit and statement of facts. The application for leave to institute the present application was supported by two (2) affidavits. There was as I have already stated above a verifying affidavit that was sworn on 27th July 2011 and, a supporting affidavit that was sworn on 28th July 2011. When the applicant filed the Notice of Motion application before the court upon obtaining leave, the applicant filed yet another affidavit that was referred to as a supporting affidavit. The same was sworn on 16th August 2011. Under Order 53 of the Civil Procedure Rules, an applicant for judicial review is not required to file any other affidavit in support of the application. The application is supposed to be based solely on the affidavit and statement of facts that accompanied the application for leave. However, an applicant can file a further affidavit with leave of the court under Order 53 rule 4 (2) of the Civil Procedure Rules. In the case before me, the applicant filed two (2) affidavits in support of the application for leave and a further affidavit in support of the judicial review application. I am in agreement with the interested party that the procedure adopted by the applicant was irregular. In fact, I have ignored and have not considered the supporting affidavit sworn on 16th August, 2011 that was filed by the applicant together with the present application. The same was filed irregularly. Of the two affidavits that were filed in support of the application for leave, I have once again ignored the one referred to as "verifying affidavit". What I have considered is the detailed affidavit sworn on 28th July, 2011 that was attached to the application for leave. It was not necessary at all to swear two affidavits in support of the application for leave. This was another irregularity. The applicant's application as I have demonstrated was marred with several procedural irregularities. I am not satisfied however that the said irregularities went to the substance of the application so as to render it incompetent. The interested party has not shown that he suffered any prejudice or miscarriage of justice as a result of the irregular manner in which the applicant's application was brought. I am of the view that the issues raised by the interested party as concerns the manner in which the present application was brought are mere procedural technicalities which this court is constitutionally mandated to overlook for the sake of substantive justice pursuant to the provisions of Article 159 (2) (d) of the Constitution of Kenya. A court of law when faced with an obvious wrong which it has been called upon to right must rise above procedural technicalities and discharge its core duty of dispensing justice. In the case of, **Mawji –vs- Arusha General Store [1970] E. A 137** it was held that irregularity in relation to the rules of procedure does not vitiate proceedings if no injustice has been done to the parties. Sir Charles Newbold P. expressed himself on the issue as follows at page 138;

“We have repeatedly said that the rules of procedure are designed to give effect to the rights of the parties and that once the parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in the vitiation of proceedings.”

Due to the foregoing, the interested party's objection to the application herein on account of the irregular affidavits which were filed by the applicant is overruled.

14. In conclusion, I am satisfied that the application herein has merit. The 1st and 2nd respondents acted without jurisdiction in reaching the decisions which are the subject of these proceedings. The said decisions are therefore nullities and are subject to review by this court. I therefore allow the Notice of Motion application dated 16th August 2011 in terms of prayer (1) thereof. Each party

shall bear its own costs of the application.

Delivered, signed and dated at KISII this 11th day of July, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Nyatundo h/b for Mose for the applicant

N/A for the 1st respondent

N/A for the 2nd respondent

N/A for the 3rd respondent

N/A for the interested party

Mr. Ombasa Court Clerk.

S. OKONG'O

JUDGE