



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. 114 OF 2012**

**(BEING AN APPLICATION FOR DECLARATORY ORDERS**

**CONCERNING**

**TITIKI EAST LAND DISPUTES TRIBUNAL IN CLAIMS NUMBERS**

**AND**

**IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT VIHIGA MISC. CIVIL**

**APPLICATIONS NUMBERS 58 OF 2002 AND 93 OF 2002**

**BETWEEN**

**ESTHER SHADUMA .....APPLICANT**

**AND**

**ROSE AMUKWIRI .....1<sup>ST</sup> RESPONDENT**

**ATTORNEY-GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. **Esther Shaduma**, (the applicant), has moved this court by way of Originating Notice of Motion dated 9/10/2012, said to be brought under Articles 23, 40, 50, 159 and 248 of the Constitution of Kenya (2010), Section 19 of the sixth schedule of the Constitution, and part 1 of the Constitution of Kenya High Court Practice and Procedure Rules, 2006. The applicant has sued **Rose Amukwiri** and the Attorney General as 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.

2. The applicant has sought five (5) main prayers in the Originating Motion as follows;

**1. This Honourable court be pleased to call for the record and or proceedings of Tiriki East Land Disputes Tribunal in the claim concerning title known as KAKAMEGA/ SHAMAKHOKHO/676 giving rise to Vihiga Senior Resident Magistrate's court Misc. Application No. 92 of 2002 for purposes of satisfying itself as to the legality of the said proceedings and upon so calling for the said proceedings, do find and declare the same unlawful, null and void.**

**2. The Honourable court be pleased to call for the record and proceedings of Tiriki East Land Disputes Tribunal in the claim concerning title known as**

**KAKAMEGA/SHAMAKHOKHO/676 that gave rise to the proceedings in Vihiga Senior Resident Magistrate's Court Misc. Civil Application No. 58 of 2002 for purposes of satisfying itself as to the legality thereof and upon so calling for the same do find them to have been conducted in violation of the law and declare the same unlawful, null and void.**

**3. The Honourable Court do find all the orders from the Senior Resident Magistrate's Court made in Miscellaneous Civil Application No. 93 of 2002 and 58 of 2002 regarding the title known as KAKAMEGA/SHAMAKHOKHO/676 to have been unlawful and do declare the same null and void.**

**4. This Honourable court calls for the record and proceedings of the Western Province Land Disputes Appeals Committee in claim No. 143 of 2003 for purposes of ascertaining the legality thereof and on so calling the proceedings and record do find and declare them unlawful, null and void.**

**5. The Honourable court do arrive at the conclusion that the title numbers KAKAMEGA/SHAMAKHOKHO/1173 AND 1174 created from the original title known as KAKAMEGA/SHAMAKHOKHO/676 from the order of the Senior Resident Magistrate's Court Vihiga in Misc. Civil Application No. 93 of 2002 were so created without legal authority and do order both be cancelled and original title in the name of Thomas Shaduma be restored.**

3. The applicant also prays that costs of the Originating Motion be borne by the 1<sup>st</sup> respondent.

4. The Originating Motion is supported by some ten (10) grounds a-j, which appear on the face of the Motion. The grounds include lamentations that the Tiriki East Land Disputes Tribunal acted without lawful mandate; that the Tiriki East Land Disputes Tribunal abused the provisions of the parent Act; that Tiriki East Land Disputes Tribunal acted upon a claim that was statutorily time barred; that both the Tiriki East Land Disputes Tribunal and Western Province Land Disputes Appeals Committee were unlawful in their composition and that the decisions of the Tribunals were unlawful.

5. The other grounds are that the Senior Resident Magistrate's Court acted in violation of the Law in purporting to issue and execute decrees of bodies which acted without or in excess of their authorities; that it's a breach of the fundamental rights of the applicant under the Constitution to be deprived of her property on the basis of orders which lack legal authority and that the Senior Resident Magistrate's court acted with impropriety by issuing orders not in conformity with the Tribunal awards and sub-dividing land parcel known as KAKAMEGA/SHAMAKHOKHO/676, and creating and transferring titles KAKAMEGA/SHAMAKHOKHO/ 1173 AND 1174.

6. The applicant has finally attacked the awards saying that those awards and the Court orders cannot be supported and that the orders sought are in the best interest of justice.

7. The application is supported by the affidavit of the applicant sworn on 9/12/2012, with annexures annexed thereto. According to the affidavit, the applicant is sister-in-law to the 1<sup>st</sup> respondent. That is the respondent and the applicant's husband (now deceased) were brother and sister. The suit land namely KAKAMEGA/SHAMAKHOKHO/676, was initially registered in the names of the applicant's husband. The 1<sup>st</sup> respondent later claimed for a portion of the land and filed a dispute before the Tiriki East Land Disputes Tribunal which resulted into awards which were later duly adopted by the Vihiga Senior Resident Magistrate's court in Misc. Application Nos. 58 of 2002 and 93 of 2002 with decrees following therefrom.

8. The applicant states in her affidavit, that all this time, the applicant's husband who was the Respondent in those cases was duly represented by an advocate, but the advocate later vanished/disappeared. The applicant's husband appealed to the Western Province Land Disputes Appeals Committee but he died when these matters were still pending.

9. Those awards were then used to sub-divide land parcel No. Kakamega/Shamakhokho/676 into parcels Nos. 1173 and 1174. Parcel No. 1173 was registered in the applicant's husband's name while parcel No. 1174 was registered in the 1<sup>st</sup> respondent's name.

10. The applicant attempted to have the title Deeds cancelled through Vihiga Court but was not successful. Thereafter, she was unable to pursue the matter further on account of lack of resources. She now says that the sub-division and subsequent transfer of the parcels of land No. KAKAMEGA/SHAMAKHOKHO/1174 to the 1<sup>st</sup> respondent through Vihiga SRM's case No. 93/2002 was fraudulent since the Tribunal's award as adopted by the court, never awarded the 1<sup>st</sup> respondent land. She says that the Tiriki East Land Disputes Tribunal and Western Province Disputes Appeals Committee had no legal mandate over title on the property Kakamega/Shamakhokho/676.

11. The 1<sup>st</sup> respondent has opposed this Originating Motion and filed a replying affidavit of some 21 paragraphs. The respondent's contention is that parcel No. 676 belonged to their mother, and that the land was registered in the name of **Thomas Shaduma Mukwiri** (deceased) to hold it in trust for himself and his siblings, including the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent says that she only sued her late brother in Vihiga Misc. Application No. 58 of 2002, but that it was her late brother who had filed Misc. Application No. 93 of 2002 for purposes of removing the caution the 1<sup>st</sup> respondent had lodged against title No. Kakamega/Shamakhokho/676. According to the 1<sup>st</sup> respondent, the file in Misc. 93 of 2002 disappeared never to be found.

12. The 1<sup>st</sup> respondent has disputed the applicant's contention that the applicant's advocate disappeared. She stated that the applicant's husband was ably represented, and by the time of his demise, he had given up on the litigation; all the cases having been concluded.

13. According to the 1<sup>st</sup> respondent, the deceased had filed a Judicial Review No. 7 of 2003, which was also dismissed on 2/6/2004 and by 15/9/2003, the 1<sup>st</sup> respondent had obtained her title for parcel No. 1174. The 1<sup>st</sup> respondent also says that the deceased had also filed an appeal to this court being HCCA. No. 71 of 2003 but which was not pursued. The 1<sup>st</sup> respondent further says that the applicant was a party to Vihiga SRMCC No. 76 of 2005 where she had raised a counter-claim and upon losing, the matter went on appeal, and that it is currently before the Court of Appeal at Kisumu. It is the 1<sup>st</sup> respondent's position that after the Vihiga ARMCC Misc. No. 93 of 2003, there was an appeal to this court being Civil Appeal No. 74 of 2003 hence the issues raised by the applicant were ably ventilated in court.

14. The 1<sup>st</sup> respondent finally raised the issue of entitlement as a sister to the deceased, saying that the property belonged to their mother and that she was equally entitled to a share of the property. The 1<sup>st</sup> respondent therefore argues, that since the applicant has had her day in court all the way to the Court of Appeal, where the matter is now pending, there should be an end to litigation. It is the 1<sup>st</sup> respondent's position that, the present application is meant to perpetuate endless litigation in the family. She prays that this Originating Motion be dismissed.

15. Counsel for the parties filed written submissions which are on record. Counsel for the applicant argues the suit land belonged to the applicant's husband, and that it was distributed through irregular orders of the Land Disputes Tribunal and Vihiga Court. He contends that Article 40 of the Constitution protects right to property. According to counsel, the court should find that the 1<sup>st</sup> respondent acquired the land unlawfully. He relies on Article 50 (1) of the Constitution which provides for hearing of disputes before independent and impartial Tribunal or body.

16. The applicant's counsel further relied on Article 23 of the Constitution arguing that both the Land Disputes Tribunal and Magistrate's court, are under the supervisory powers of this court. Counsel reiterated the applicant's averments contained in her affidavit, more so that after the Tribunal's decision, the applicant's husband moved the High Court by way of Judicial Review but his application was dismissed. He contends that the Land Disputes Tribunal decision did not give the 1<sup>st</sup> respondent land and

that the 1<sup>st</sup> respondent unprocedurally acquired the land.

17. Counsel further submitted that Western Province Disputes Appeals Committee upheld the decision of the Tiriki East Land Disputes Tribunal which is contained in the Decree of Vihiga Court Misc. application No. 58 of 2002. Counsel submitted that in both decisions, the Tribunals did not have jurisdiction. He therefore urged the court to allow the applicant's application.

18. Counsel for the 1<sup>st</sup> respondent, on his part, submitted that the suit land was family land (originally known as Tiriki/Shamakhokho/676) which was sub-divided giving rise to Title Numbers 1173 and 1174. According to counsel, the dispute between the parties has been litigated in different fora, including Vihiga SRMCC No. 76 of 2005 and Kakamega HCCA No. 74 of 2009, and that the dispute is now pending before the Court of Appeal at Kisumu. It is the learned counsel's submission, that this matter has been litigated long enough and that the applicant has had her day in court and therefore this application will serve no purpose. He asked that the Originating Motion be dismissed with costs and bring this litigation to conclusion.

19. I have considered this matter, the affidavits filed by the parties, materials placed before me and submissions by counsel for both parties.

20. The dispute herein pitted the 1<sup>st</sup> respondent ROSE AMUKWIRI and her brother THOMAS SHADUMA AMUKWIRI (now deceased), involving a family land known as TIRIKI/SHAMAKHOKHO/676. The parties litigated at the Tiriki East Land Disputes Tribunal, where the 1<sup>st</sup> respondent appears to have won and her brother, the late Thomas Shaduma Amukwiri, appealed to Western Province Disputes Appeals Committee, which upheld the Tiriki East Land Disputes Tribunal's decision.

21. The decisions by the Tribunals were adopted by the Vihiga Senior Resident Magistrate's court in Misc. Application No. 58 of 2002, and thereafter implemented. The land was sub-divided into parcel Nos. 1173 and 1174, with parcel No. 1173 registered in the name of Thomas Shaduma Amukwiri, the applicant's husband, and parcel No. 1174 into the 1<sup>st</sup> respondent's name. The 1<sup>st</sup> respondent had the land registered in her name on 15/9/2003.

22. The late Thomas Shaduma Amukwiri tried to set aside the Tribunal's orders through various suits including, I am told, Civil Appeal No. 74 of 2004 to no avail. According to the 1<sup>st</sup> respondent, the dispute is now pending before the Court of Appeal at Kisumu. The applicant has not said anything about this contention that there is an appeal pending before the Court of Appeal at Kisumu, between the parties herein over the same subject matter.

23. The applicant has invoked the Constitution and particularly **Articles 23** and **40**. **Article 23** gives this court jurisdiction to grant reliefs on the infringement of Fundamental rights. The court can also grant judicial review orders. **Article 40** of the Constitution is on the protection of right to property and the applicant has relied on **sub-article 3**, which provides that the State shall not deprive a person of property of any description except as provided for under that Article.

24. The applicant has asked this court to call for and examine the record of proceedings in the Tribunals and the Magistrate's court I have been told, and the applicant has not denied this, that after the proceedings of the Tribunal and Appeals Committee were concluded, and the decisions implemented, the applicant's late husband appealed to the High Court which obviously made some decision. The only decision of this court I have seen on record, is one dated 2.6.2004. In that decision, **Kariuki, J.**, (as he then was) dismissed the applicant's application for Judicial Review which was seeking to overturn the decision of Tiriki East Land Disputes Tribunal and subsequent actions taken to implement that decision.

25. From the documents filed herein and the averment in the Replying affidavit, and submissions by counsel for the 1<sup>st</sup> respondent, the applicant has not been candid before this court. If there is an appeal pending in the Court of Appeal, which the applicant has not denied, that appeal arises from a decision of

this court which must have been made in respect of the dispute between the parties herein. What that decision was and why the applicant kept quiet about it remains a mystery.

26. This court is not convinced that the applicant's Originating Motion under Article 22, 23, 40, 50, 159 and 248 has been made in good faith. The applicant chose to follow a certain route of litigation and having gone upto the Court of Appeal, and while awaiting the decision of that court, has decided to come back to this court but failed to disclose that this court made a decision before the matter went to the Court of Appeal. This would have enabled this court make an informed decision.

27. The applicant chose to come to this court well aware that this court, differently constituted, heard the same dispute between the same parties and made a decision. That decision seems to be the subject of litigation in the Court of Appeal. This court cannot consider the decisions complained of in this matter in isolation of the decision made by this court on the same dispute.

28. It is my considered view that this court cannot review a decision of an inferior court or Tribunal when that inferior court or Tribunal's decision has already been considered by a Judge of this court. This court cannot therefore purport to sit on appeal over a decision of a court of concurrent jurisdiction in the form of an application brought under Articles 22, 23, 40, 50, 159 and 248 of the Constitution. This application will not aid the applicant given the journey this matter has travelled.

29. It is the finding of this court, that the applicant and her late husband were heard in every forum they chose to go to, and should await the Court of Appeal to determine the matter before it and finally lay the dispute between the parties to rest.

30. I find that this application is unnecessary in view of the matter now pending before the Court of Appeal. This application is an abuse of the court process.

31. For the above reasons, the Originating Motion dated 9/10/2012 is hereby dismissed. As the parties are sisters-in-law, the appropriate order for costs this court can make in the circumstances of this case is that each party do bear their own costs.

***Dated and delivered at Kakamega this 5<sup>th</sup> day of November, 2014***

**E. C. MWITA**

**J U D G E**