



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 32 OF 2012**

**IN THE MATTER OF AN APPLICATION BY GEHEMBA KEREU AND BOSIBORI KEREU  
FOR ORDERS OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**1. ETAGO LAND DISPUTES TRIBUNAL**

**2. THE MAGISTRATE OGEMBO LAW COURTS**

**3. FREDRICK OMENGE OGWOKA**

**4. RUTH OMENGE..... RESPONDENTS**

**AND**

**GEHEMBA KEREU**

**BOSIBORI KEREU ..... EX PARTE APPLICANTS**

**JUDGMENT**

1. The ex parte applicants herein Gachemba Kereu and Bosibori Kereu brought an ex parte Chamber Summons application dated 12<sup>th</sup> June, 2012 under Order 53 Rules 1, 2 and 3 of the Civil Procedure rules, section 3A of Civil Procedure Act and section 8 and 9 of the Law Reform Act on 28<sup>th</sup> June 2012 seeking the following orders:-

- a. That this honourable court be pleased to certify this application as urgent and same to be heard on priority basis.
- b. That this honourable court be pleased to grant the applicants leave to apply for an order of certiorari and prohibition to move into this court and quash the proceedings and decision by Etago Land Disputes Tribunal in case number 38 of 2011 dated 5<sup>th</sup> day of May 2012 and prohibit the 3<sup>rd</sup> and 4<sup>th</sup> respondents from implementing and/or carrying out the executions of the said Senior Principal Magistrate’s order dated 8<sup>th</sup> day of May 2012.
- c. That the aforesaid leave do operate as stay of implementation/ execution of the Senior Principal Magistrate’s order.
- d. That costs of this application be in the cause.

The applicant's application for leave was heard by Justice R. Lagat-Korir on the same day and was allowed in terms of prayer a, b and c above.

2. Consequently, the applicants proceeded to file the substantive judicial review application by way of Notice of motion dated 16<sup>th</sup> July 2012 for the following reliefs;

- a. **That this honourable court be pleased to issue an order of judicial review in the nature of certiorari to move into this honourable court and quash the proceedings and award of Etago Land Disputes Tribunal in Case No. 38 of 2011 and the decision of the Principal Magistrate Ogembo Law Court in Misc. Civil Application Number 40 of 2012, adopting the award of the aforesaid tribunal as judgment of the court without complying with the provisions of Land Disputes Tribunal Act No. 18 of 1990.**
- b. **That this honourable court be pleased to issue an order of prohibition, prohibiting the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents from implementing the courts order issued in the 5<sup>th</sup> day of May 2012 and/or in any manner whatsoever or however interfering with parcel title No. South Mugirango/Nyataro/898.**
- c. **That this honourable court be pleased to issue such further and/or other orders as the court may deem expedient in the circumstances.**
- d. **That the costs of this application be borne by the respondents and interested party.**

3. The facts or circumstances that gave rise to the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents which are the subject of the present application are not clear from the material on record. This is because, the applicants have not placed before the court the decisions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents which this court has been called upon to quash. This is contrary to order 53 rule 7 of the Civil Procedure Rules. That order bars an applicant from questioning any decision or order in an application for certiorari unless a copy of the order or decision duly verified by an affidavit has been placed before the court prior to the hearing of the application or the applicant has satisfied the court as to the reasons for the failure to lodge the said order or decision with the court. In the present application, it is not clear to me why the applicants failed to annex copies of the proceedings and decisions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to their verifying affidavit that was filed in support of the application for leave.

4. The applicants have therefore not only failed to lodge the decisions being challenged with the court but have also failed to give sufficient or any reason for that failure. As I will explain herein later, it would be difficult if not impossible to determine the issues raised herein by both parties in the absence of the said proceedings and decisions. In their verifying affidavit, the applicants have contended that; they are the registered proprietors of all that parcel of land known as LR No. South Mugirango/Nyataro/898 (hereinafter referred to only as "the suit property"). The applicants have averred further that the claim that the 3<sup>rd</sup> and 4<sup>th</sup> respondents had brought against them before the 1<sup>st</sup> respondent arose in the year 1981 and as such was time barred and unmaintainable under the Limitation of Actions Act, Cap.22 Laws of Kenya and section 13(3) of the Land Disputes Tribunals Act, No.18 of 1990.

5. The applicants have averred further that the 1<sup>st</sup> respondent had no jurisdiction to arbitrate on the dispute between the applicants and the 3<sup>rd</sup> and 4<sup>th</sup> respondents in that the dispute was over an agreement for sale of land registered under the Registered Land Act, Cap.300Laws of Kenya. The applicants have contended that in any event, the 3<sup>rd</sup> and 4<sup>th</sup> respondents claim was lodged with the 1<sup>st</sup> respondent after the repeal of the Land Disputes Tribunals Act No. 18 of 1990 and as such the 1<sup>st</sup> respondent was not clothed with the jurisdiction to entertain the claim. The applicants have also averred that the decision of the 1<sup>st</sup> respondent was a nullity on account of the fact that the same was not signed by the chairman who presided over the proceedings of the 1<sup>st</sup> respondent the said chairman having died prior to the signing of the said decision. The applicants have contended that the 2<sup>nd</sup> respondent while adopting the said decision of the 1<sup>st</sup> respondent failed to take into account the said anomalies in the decision of the 1<sup>st</sup> respondent.

6. The applicants have therefore challenged the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the following main grounds:

- a. That both the 1<sup>st</sup> and 2<sup>nd</sup> respondents lacked the necessary jurisdiction to entertain the 3<sup>rd</sup> and 4<sup>th</sup> respondents' claim.
- b. That the 3<sup>rd</sup> and 4<sup>th</sup> respondents claim was not properly and legally instituted as provided for under the relevant provisions of section 3 (2) to (4) of the Land Disputes Tribunal Act No. 18 of 1990 and Rules 3 and 7 of the Land Disputes Tribunal (forms and procedure rules 1993) ( Legal Notice No. 13 of 1993).
- c. That the applicants are the sole registered owners of the suit property that was registered in their names on first registration.
- d. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents ignored the fact that there was no privity of contract between the applicants and the 3<sup>rd</sup> and 4<sup>th</sup> respondents.
- e. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents failed to appreciate the fact that the dispute between the applicants and the 3<sup>rd</sup> and 4<sup>th</sup> respondents concerned ownership of land.
- f. That the adoption of the 1<sup>st</sup> respondents decision by the 2<sup>nd</sup> respondent as a judgment of the court was not only irregular but unlawful.

7. The applicants' application was opposed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents who filed a replying affidavit sworn on 25<sup>th</sup> April 2013 by the 4<sup>th</sup> respondent. In the replying affidavit, the respondents averred as follows;

- a. That they lodged a claim against the applicants with the 1<sup>st</sup> respondent who heard the same and delivered a ruling in their favour on 5<sup>th</sup> October 2011.
- b. In the said ruling the 1<sup>st</sup> respondent awarded them a portion measuring 2.5 acres of the suit property.
- c. The said ruling was signed by the then chairman of the 1<sup>st</sup> respondent.
- d. The applicants did not challenge the decision of the 1<sup>st</sup> respondent through appeal as provided for under the Land Disputes Tribunals Act, No.18 of 1990.
- e. The present application has been filed out of time in that it should have been brought within six (6) months from 5<sup>th</sup> October 2011 when the decision of the 1<sup>st</sup> respondent was made.
- f. That the applicants' application is time bared and has no merit.

The 3<sup>rd</sup> and 4<sup>th</sup> respondents also did not annex copies of the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents which are being contested herein to their replying affidavit that I have referred to above.

8. When the matter came up before me on 17<sup>th</sup> June 2013, the advocates for the parties agreed to argue the application by way of written submissions. The applicants and the 3<sup>rd</sup> and 4<sup>th</sup> respondents filed their respective submissions on 11<sup>th</sup> March, 2014 and 19<sup>th</sup> March, 2014 respectively. I have carefully considered the applicants application and the replying affidavit filed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents in opposition thereto. I have also considered the submissions by the advocates for both parties. The issues that arise for determination in this application are the following;

- a. Whether the application is time barred.
- b. Whether the 1<sup>st</sup> respondent had jurisdiction to entertain the 3<sup>rd</sup> and 4<sup>th</sup> respondent's claim.
- c. Whether the 3<sup>rd</sup> and 4<sup>th</sup> respondents claim before the 1<sup>st</sup> respondent was time barred.
- d. Whether the 1<sup>st</sup> respondent's decision was legal.
- e. Whether the 2<sup>nd</sup> respondent had jurisdiction to adopt the decision of the 1<sup>st</sup> respondent as a judgment of the court.
- f. Whether the existence of a right of appeal bars the applicants from instituting these proceedings.
- g. Whether the applicants are entitled to the orders sought.

9. I am unable to determine any of the issues set out above in the absence of the proceedings and decisions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents which are at the centre of this application. Without the proceedings and decisions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, I would not be able to determine when the said

decisions were made. In the order granting leave to the applicants to institute this application, leave was granted to them to apply for an order of certiorari to bring to court and quash the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents that were made on **5<sup>th</sup> May, 2012** and **8<sup>th</sup> May, 2012** respectively. The 3<sup>rd</sup> and 4<sup>th</sup> respondents have now contended that the 1<sup>st</sup> respondent's decision was made on 5<sup>th</sup> May, 2011 and not 5<sup>th</sup> May, 2012 as had been claimed by the applicants.

10. In the absence of the decision of the 1<sup>st</sup> respondent, I am unable to decipher where the truth lies. I am also not in a position to determine whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted within their respective jurisdictions in making the decisions challenged herein. This is because I have no information as to what the dispute before the 1<sup>st</sup> respondent was all about. I do not know therefore the issues that arose for determination and the manner in which they were determined. The same will apply to the decision of the 2<sup>nd</sup> respondent. Without perusing the decision of the 1<sup>st</sup> respondent, I am unable to say whether the 2<sup>nd</sup> respondent had jurisdiction to adopt the same or not. I am of the view that it is because of these practical difficulties that necessitated the requirement under order 53 rule 7 that an applicant for an order of certiorari must lodge with the court before the hearing of the application a verified copy of the decision or order sought to be quashed.

11. For the foregoing reasons, the applicants' application herein must fail. The applicants have as a result of their failure to lodge with the court copies of the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents being challenged herein failed to establish valid grounds upon which the orders sought can issue. It is therefore my finding that the Notice of Motion application dated 16<sup>th</sup> July, 2012 has no basis. The same is accordingly dismissed. Each party shall bear its own costs of the application.

**Delivered, signed and dated at KISII this 14<sup>th</sup> of November, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

N/A for the Applicant

Mr. Ochwang'i h/b for Omwega for the respondents

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**