



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 40 OF 2010(JR)**

**IN THE MATTER OF APPLICATION BY DANIEL CHACHA NG'ERA AND MARWA  
DICKSON CHACHA FOR JUDICIAL REVIEW (CERTIORARI AND PROHIBITION**

**AND**

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

**AND**

**IN THE MATTER OF KURIA DISTRICT LAND DISPUTES TRIBUNAL**

**(KEHANCHA DIVISION)**

**AND**

**IN THE MATTER OF SENIOR RESIDENT MAGISTRATE COURT AT KEHANCHA**

**AND**

**IN THE MATTER OF KEHANCHA SRM LDT NO. 04 OF 2010**

**AND**

**IN THE MATTER OF KURIA WEST DISTRICT KEHANCHA DIVISION LAND DISPUTES  
TRIBUNAL CASE NO. 4 OF 2010**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**KURIA DISTRICT LAND DISPUTES TRIBUNAL**

**KEHANCHA DIVISION ..... 1<sup>ST</sup> RESPONDENT**

**THE SENIOR RESIDENT MAGISTRATE'S**

**COURT AT KEHANCHA ..... 2<sup>ND</sup> RESPONDENT**

AND

JOHNES MARWA ROGORO ..... INTERESTED PARTY

EX PARTE

DANIEL CHACHA NG'ERA

MARWA DICKSON CHACHA

RULING

1. What I have before me is the ex parte applicants' Notice of Motion application dated 27<sup>th</sup> April, 2010 brought under Order LIII rules 3, 4 and 5 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act in which the ex parte applicants (hereinafter referred to only as "the applicants") are seeking the following orders:
  - a. **That this honourable court be pleased to grant an order of Judicial Review in the nature of certiorari to remove to the High Court for the purpose of quashing the proceedings, decision and/or award of the (sic) Kuria District Land Disputes Tribunal Case No. 4 of 2010 dated the 26<sup>th</sup> February 2010 and the decree of the Senior Resident Magistrate's Court at Kehancha vide Kehancha Resident Magistrate's Court Land Disputes Tribunal No. 4 of 2010(sic) dated 23<sup>rd</sup> March 2010 adopting the proceedings and decision of the said tribunal(sic) concerning land parcel numbers Bukira/Bwisaboka/3649 and 3651 (hereinafter the suit properties)**
  - b. **That this honourable court be pleased to grant an order of Judicial Review in the nature of prohibition to issue (sic) prohibiting the Kuria Land Disputes Tribunal (Kehancha Division) or such other tribunal from hearing deliberating and/or dealing with issues pertaining to the ownership of the suit properties and order of prohibition to issue(sic) prohibiting the Kehancha Resident magistrate's court at Kehancha (sic)vide Kehancha Senior Resident Magistrate's Land Disputes Tribunal Case No. 4 of 2010 (sic) from hearing, deliberating and enforcing and/or executing decree dated the 23<sup>rd</sup> March 2010 in respect of the suit properties.**
  - c. **That the costs of this application be provided for by the interested party(sic).**
  - d. **Any other further orders as the court may deem fit to grant.**
2. The applicants' application was supported by affidavit sworn jointly by applicants on 27<sup>th</sup> April, 2010. In the said affidavit, the applicants averred that; at all material times, the 2<sup>nd</sup> applicant was and still is the registered owner of the suit properties. On or about 12<sup>th</sup> February 2010, the interested party herein lodged a claim with the 1<sup>st</sup> respondent against the applicants in relation to the suit properties. The 1<sup>st</sup> respondent deliberated on the said claim and thereafter made an award in which the 1<sup>st</sup> respondent ordered that a portion of land measuring 1.5arces be excised from the suit properties and registered in the name of the interested party.
3. The applicants averred further that in entertaining the interested party's claim, the 1<sup>st</sup> respondent delved on issues of ownership and /or title to land and agreement for sale of land which the 1<sup>st</sup> respondent had no jurisdiction to determine. The applicants averred further that since the 1<sup>st</sup> respondent's decision was arrived at without jurisdiction, the 2<sup>nd</sup> respondent had no jurisdiction to adopt the same as a judgment of the court. The applicants averred that in the circumstances, the 2<sup>nd</sup> respondent's decision to adopt the 1<sup>st</sup> respondent's award aforesaid as a judgment of the court was illegal and/or irregular. The applicants annexed to their affidavit certified copies of the registers for the suit properties, a copy of the decision of the 1<sup>st</sup> respondent dated 26<sup>th</sup> February, 2010 and a copy of the decree that was issued by the 2<sup>nd</sup> respondent on 23<sup>rd</sup> March, 2010.
4. The applicants' application was opposed by the interested party. The respondents did not oppose the application. The interested party filed grounds of opposition dated 29<sup>th</sup> January 2013 in opposition to the application. The interested party opposed the application on the following

grounds:

- a. **The application is premature, misconceived, incompetent and otherwise legally untenable.**
- b. **The applicants are not the registered proprietors and/or owners of LR Nos Bukira/Bwisaboka/3649 and 3651 respectively. Consequently, the applicants are devoid of the requisite locus standi to mount and/or maintain the instant proceedings.**
- c. **The decision and/or award of the 1<sup>st</sup> respondent had been adopted and/or ratified by the 2<sup>nd</sup> respondent in exercise of the 2<sup>nd</sup> respondent's statutory mandate vide section 7 of the Land Dispute Tribunal Act No. 18 of 1990 (now repealed). Consequently, the order for prohibition is ineffective, misconceived and overtaken by events.**
- d. **The applicants have not laid out and/or established any sufficient cause and/or basis to warrant granting of the orders of judicial review either in the manner sought or at all.**
- e. **The instant proceedings are contrary to and/or in contravention of the mandatory provisions of order 53 of the Civil Procedure Rules, 2010 as read together with sections 8 and 9 of the Law Reform Act chapter 26 Laws of Kenya.**
- f. **The application constitutes and/or amounts to an abuse of the due process of the court.**
- g. **The applicants are non-suited.**
- h. **The application is devoid of merits, whatsoever and/or howsoever.**

5. When the application came before me on 31<sup>st</sup> January 2013, I directed that the same be argued by way of written submissions. Whereas the applicants filed their written submissions on 14<sup>th</sup> March, 2014, the interested party did not comply with the directions on the filing of submissions and had not put in his submissions as at the date of writing this judgment. I have considered the applicants' application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the interested party in opposition to the application. Finally, I have considered the written submissions filed by the applicants' advocates and the case law cited. The following in my view are the issues that arise for determination in the application before me, namely;

- a. **Whether the 1<sup>st</sup> respondent had jurisdiction to entertain the interested party's claim and to make the decision dated 26<sup>th</sup> February, 2010 complained of herein?**
- b. **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 and to issue the decree dated 23<sup>rd</sup> March, 2010?**
- c. **Whether the application herein was brought contrary to the provisions of Order 53 of the Civil Procedure Rules, 2010 and sections 8 and 9 of the Law Reform Act, Chapter 26 Laws of Kenya?**
- d. **Whether the applicants have established sufficient cause to warrant the granting of the orders sought?**

6. The material part of the decision of the 1<sup>st</sup> respondent dated 26<sup>th</sup> February 2010 that gave rise to these proceedings was in the following terms:-

**“Due to the above observations, the claimant is hereby awarded the 1.5Acres of land which he bought and has been occupying since the year 1990 to date. Therefore after the honourable court at Kehancha will have adopted this document. The claimant will get the land registrar and the surveyor to go and survey his portion of land and get him the title deed which the executive officer in the same court will sign the transfer forms.”**

On the other hand, the decree of the 2<sup>nd</sup> respondent issued on 23<sup>rd</sup> March, 2010 following the adoption of the said decision of the 1<sup>st</sup> respondent was on the following terms:

**“a) THAT the claimant is entitled to 1.5 acres from original land parcel No. Bukira/Bwisaboka/94 now Bukira/Bwisaboka/3649 and 3651.**

**(b) THAT District Land Registrar and the District Surveyor to move in and survey the disputed portion of land and thereafter issue the claimant with a title deed.”**

7. I have perused the proceedings of the 1<sup>st</sup> respondent. It is very clear from the said proceedings that the dispute between the applicants and the interested party that was referred to the 1<sup>st</sup> respondent by the interested party for determination revolved around an alleged breach of an agreement for sale of land. The interested party had contended that he had purchased from the 1<sup>st</sup> applicant a portion measuring 1.5 acres of all that parcel of land then known as LR No. Bukira/Bwisaboka/94(“Plot No.94”) in the year 1990 and that in breach of the said agreement, the 1<sup>st</sup> respondent failed and/or refused to transfer the said portion of land to the interested party. Instead, the 1<sup>st</sup> respondent caused Plot No. 94 to be subdivided and caused portions thereof namely, LR No. Bukira/Bwisaboka/3649 and LR No. Bukira/ Bwisaboka/3651 (the suit properties) which lie in the area that the interested party had purchased from the 1<sup>st</sup> applicant to be transferred to the 2<sup>nd</sup> respondent who is the son of the 1<sup>st</sup> respondent.
8. The interested party contended that his attempts to have the applicants transfer the portion of Plot No.94 which, had now been subdivided as aforesaid did not yield any positive result. The interested party therefore sought the assistance of the 1<sup>st</sup> respondent to compel the applicants to transfer to him 1.5 acres that he had purchased from the 1<sup>st</sup> applicant from the suit properties that had now been registered in the name of the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent found merit in the interested party’s claim and granted his request in the manner that I have stated above. The 1<sup>st</sup> respondent’s award was adopted by the 2<sup>nd</sup> respondent as a judgment of the court and a decree issued for execution. The award by the 1<sup>st</sup> respondent and the decree by the 2<sup>nd</sup> respondent leave no doubt that the effect of the decision of the 1<sup>st</sup> respondent was to rectify the register of the suit properties by causing the same to be consolidated and excising there from a portion measuring 1.5 acres and transferring the same to the interested party. The 1<sup>st</sup> respondent was established under the Land Disputes Tribunals Act No. 18 of 1990 (now repealed)(hereinafter referred to as “the Act”). The powers of the 1<sup>st</sup> respondent were spelt out in the said Act. The 1<sup>st</sup> respondent could not therefore exercise or assume powers outside those conferred by the Act. Section 3 (1) of the Act sets out the disputes over which the 1<sup>st</sup> respondent had jurisdiction as follows:

**“.....all cases of civil nature involving the 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.”**

9. It is clear from the foregoing that the 1<sup>st</sup> respondent had no jurisdiction to determine a dispute over the ownership of the suit properties that was referred to it by the interested party. It did not also have the jurisdiction to order that a portion of the suit properties be excised and transferred to the interested party. In the case of **Jotham Amunavi vs. The Chairman Sabatia Division Land Disputes Tribunal & Anor C. A No. 256 of 2002**, the Court of Appeal expressed itself as follows:-

**“It is clear that the proceedings before the tribunal related to both title to land and to beneficial interest in the suit land. Such a dispute is not in our view within the provisions of section 3 (1) of the Land Disputes Tribunal Act. By section 159 of the Registered Land Act such a dispute can be tried by the High Court or by the Resident Magistrate court in case where the latter has jurisdiction.”**

The law as stated in the Amunavi case (Supra) and in many other subsequent cases is that where the dispute involved title and/or ownership of land, a tribunal established under the Act had no jurisdiction to entertain the same and whatever decision such a tribunal rendered was a nullity and liable to be quashed by an order of certiorari. A decision arrived at in the absence of jurisdiction

cannot be allowed to stand. In the case of **Desai vs. Warsama (1967) E. A 351** it was stated that:

**“No court can confer jurisdiction upon itself and where a court assumes jurisdiction and proceeds to hear and determine a matter not within its jurisdiction, the proceedings and the determination are a nullity.”**

10. The decision of the 1<sup>st</sup> respondent dated 26<sup>th</sup> February, 2010 was therefore a nullity as it was arrived at without jurisdiction. I am of the opinion that that the 2<sup>nd</sup> respondent had no jurisdiction to adopt a nullity as a judgment of the court. When something is a nullity, it amounts to nothing. A judgment of a court of law cannot be derived from nothing. It is my finding therefore that both the respondents acted in excess of their jurisdictions conferred upon them by law. I am not in agreement with the contention by the interested party that section 7 of the Act imposed an obligation upon the 2<sup>nd</sup> respondent to adopt the decision of the 1<sup>st</sup> respondent as its judgment. In my view, section 7 of the Act, presupposed a valid judgment from the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent had no obligation of any nature to adopt an invalid decision by the 1<sup>st</sup> respondent as its judgment. The interested party had also contended that the application herein was brought contrary to the provisions of Order 53 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act, Cap. 26 Laws of Kenya. As I have stated above, the interested party did not make any submission. I am unable therefore to appreciate the basis of this line of objection to the application herein. The interested party was expected to elaborate on the nature of breaches of Order 53 of the Civil Procedure Rules and The Law Reform Act, Cap. 26 that the applicants have committed. In the absence of any elaboration, the objections based on the said breaches to me amounts to mere allegations with no basis and I so hold.
11. Due to the foregoing, I am satisfied that the applicants have established sufficient grounds to warrant the grant of the orders of certiorari sought. The applicants are however not entitled to an order of prohibition. This is because the applicants neither sought nor obtained leave to apply for such order. It would therefore be contrary to the provisions of Order 53 rule 1(1) of the Civil Procedure Rules, 2010 to grant the said order. The applicants' application dated 27<sup>th</sup> April, 2010 is therefore allowed in terms of prayer 1 thereof. Each party shall bear its own costs.

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

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Abisai	for the applicant
N/A	for the respondents
Mr. Ochwang'i	for the interested party
Mr. Mobisa	Court Clerk

**S. OKONG'O**

**JUDGE**