



**REPUBLIC OF KENYA**

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

**E & L JUDICIAL REVIEW APPLICATION NO. 6 OF 2009**

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

**BETWEEN**

REPUBLIC.....APPLICANT

**VERSUS**

HOMA BAY DISTRICT

LAND DISPUTES TRIBUNAL.....1<sup>ST</sup>RESPONDENT

THE SENIOR RESIDENT MAGISTRATE'S COURT

AT HOMA BAY.....2<sup>ND</sup>RESPONDENT

THE DISTRICT LAND REGISTRAR HOMA BAY.....3<sup>RD</sup> RESPONDENT

ROSE ADOYO OKINDA.....4<sup>TH</sup>RESPONDENT

**EX -PARTE**

SIPRINE ANYANGO ODERA

**JUDGMENT**

1. The ex parte applicant, **SIPRINE ANYANGO ODERA** (hereinafter referred to only as “**the applicant**”) brought the application herein dated 6<sup>th</sup> March, 2009 pursuant to leave that was granted by this court on 27<sup>th</sup> February, 2009. The application was brought on the grounds set out in the verifying affidavit and supplementary affidavit of the applicant both sworn on 17<sup>th</sup> February, 2009 and the Statement of facts dated 20<sup>th</sup> February, 2009. The application sought the following reliefs;

**i. An order of certiorari to remove into this court and quash the decision of the 1<sup>st</sup> respondent dated 27<sup>th</sup> November, 2008 and the adoption thereof as a judgment of the court by the 2<sup>nd</sup> respondent on 28<sup>th</sup> January, 2009 ;**

**ii. An order of prohibition to prohibit the 3<sup>rd</sup> respondent from altering the register for land parcel No. Kanyamwa/ K/K/Kakaeta/312 (hereinafter referred to only as “the suit property”)**

by registering the same in the name of the 4<sup>th</sup> respondent pursuant to the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents aforesaid;

iii. **An order of prohibition to prohibit the 2<sup>nd</sup> respondent from executing the decree that it had issued in Misc. Appl. No. 2 of 2009 upon the adoption of the decision of the 1<sup>st</sup> respondent aforesaid;**

iv. **An order of prohibition to prohibit the 1<sup>st</sup> and 4<sup>th</sup> respondents from entering the suit property save with the applicant's permission or by an order of this court;**

v. **The costs of the application to be paid by to the applicant;**

2. According to the affidavits filed by the applicant in support of the application referred to hereinabove, the applicant was at all material times the widow and legal administrator of the estate of one, **Patrick Wasonga Odera**, deceased (hereinafter referred to only as "**Wasonga**") while the 4<sup>th</sup> respondent was the widow of one, **Joel Okinda Ochieng**, deceased (hereinafter referred to as "**Okinda**"). Wasonga is and was at all material times the registered proprietor of **LR No. Kanyamwa/K/K/Kakaeta/312** ("**the suit property**") which measures 5.2 hectares. Wasonga purchased the suit property from one, John Owino Kungu on 8<sup>th</sup> September, 1992. Okinda is said to have purchased a portion of the suit property measuring 7 acres from John Owino Kungu on 10<sup>th</sup> August, 1987 before the entire parcel of land was sold and transferred by the said John Owino Kungu to Wasonga on 8<sup>th</sup> September, 1992 as aforesaid. At the time when Wasonga purchased the suit property from John Owino Kungu, the portion of the said property that had been sold earlier to Okinda as aforesaid was demarcated and the boundary thereof marked with sisal plants and the same was being used by Okinda for cultivation.

3. It is said that Wasonga was told by John Owino Kungu that Okinda would vacate and hand over the portion of the suit property that was under his occupation shortly. This never happened and Okinda continued in occupation of the said portion of the suit property that is said to have been sold to him by John Owino Kungu. Okinda died thereafter and left his wife the 4<sup>th</sup> respondent in possession of the said portion of the suit property. The 4<sup>th</sup> respondent continued cultivating the suit property after Okinda's death. On 30<sup>th</sup> August, 2008, the applicant through her advocates on record sent to the 4<sup>th</sup> respondent a letter demanding that she desists from carrying out any further activity on the suit property on the ground that the agreement between her husband, Okinda and John Owino Kungu was not consented to by the Land Control Board within 6 months and as such became null and void and could not form a basis for her (the 4<sup>th</sup> respondent's) claim over the portion of the suit property that was the subject of the said agreement.

4. On receipt of the applicant's advocate's demand letter aforesaid, the 4<sup>th</sup> respondent lodged a claim against the applicant with the 1<sup>st</sup> respondent in the month of September, 2008. The 4<sup>th</sup> respondent contended that she was entitled to remain on and to continue cultivating the portion of the suit property that her deceased husband, Okinda purchased in the year 1987 from John Owino Kungu. The 4<sup>th</sup> respondent sought the assistance of the 1<sup>st</sup> respondent to have the portion of the suit property that was purchased by her said husband, transferred to her. The applicant was summoned by the 1<sup>st</sup> respondent and she appeared at the hearing of the plaintiff's claim. The applicant maintained before the 1<sup>st</sup> respondent that the 4<sup>th</sup> respondent had no right to continue cultivating the disputed portion of the suit property because the applicant's deceased husband had been told that the sale transaction between the 4<sup>th</sup> respondent's husband and John Owino Kungu did not materialize because the 4<sup>th</sup> respondent's husband did not complete the payment of the purchase price.

5. The 1<sup>st</sup> respondent heard the 4<sup>th</sup> respondent and the applicant together with their witnesses and delivered its decision and/or award on the 4<sup>th</sup> respondent's claim against the applicant on 27<sup>th</sup> November, 2008. In its decision, the 1<sup>st</sup> respondent held that the 4<sup>th</sup> respondent was entitled to the portion of the suit

property measuring 7 acres that was purchased by her deceased husband, Okinda from John Owino Kungu. The 1<sup>st</sup> respondent ordered that the suit property be sub-divided and a portion thereof measuring 7 acres transferred to the 4<sup>th</sup> respondent. The 1<sup>st</sup> respondent's said decision was lodged with the 2<sup>nd</sup> respondent under the provisions of section 7 of the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) for adoption as a judgment of the court and the same was adopted as such on 28<sup>th</sup> January, 2009 and a decree issued on 6<sup>th</sup> February, 2009 for execution. The applicant was aggrieved with the said decision of the 1<sup>st</sup> respondent and its adoption by the 2<sup>nd</sup> respondent as a judgment of the court and decided to bring these proceedings to challenge the same.

#### **6. The grounds on which the application was brought;**

In summary, the applicant has challenged the said decision of the 1<sup>st</sup> respondent and its adoption by the 2<sup>nd</sup> respondent as a judgment of the court on the following main grounds;

- i. that the 1<sup>st</sup> respondent had no jurisdiction to entertain the dispute between the applicant and the 4<sup>th</sup> respondent as it concerned title and/or ownership of the suit property;**
- ii. that the decision of the 1<sup>st</sup> respondent was null and void ;**

7. The applicant's application was not opposed by any of the respondents. The respondents were served with the application but none of them filed a replying affidavit in response to the same. On 6<sup>th</sup> October, 2011, Ms. Gace Kamau, State Counsel appeared for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and informed the court that the said respondents did not wish to oppose the application. The 4<sup>th</sup> respondent neither appeared in court nor filed any pleading in opposition to the application. On the same date, namely, 6<sup>th</sup> October, 2011, the court directed that the application be heard by way of written submissions. Since the application was not opposed, the submissions were filed only by the applicant. I have considered the applicants' application, the statutory statement and the affidavits filed in support thereof. I have also considered the written submissions filed by the advocates for the applicant and the authorities cited in support thereof. I am of the opinion that the main issues that present themselves for determination in this application are as follows;

- i. Whether the 1<sup>st</sup> respondent had jurisdiction to determine the dispute that was referred to it by the 4<sup>th</sup> respondent and to make the decision complained of?**
- ii. Whether the 1<sup>st</sup> respondent's decision aforesaid was valid?**
- iii. Whether the 2<sup>nd</sup> respondent had jurisdiction to adopt the 2<sup>nd</sup> respondent's decision aforesaid as a judgment of the court?**
- iv. Whether the applicant is entitled to the reliefs sought against the respondents?**

8. I am in agreement with the applicant's submission that the 1<sup>st</sup> respondent acted outside its jurisdiction when it entertained the 4<sup>th</sup> respondent's claim against the applicant. As submitted by the applicant's advocates, the 1<sup>st</sup> respondent was established under the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) (hereinafter referred to only as "**the Act**"). The powers of the 1<sup>st</sup> respondent were clearly spelt out in the said Act. The 1<sup>st</sup> respondent could not exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act that the applicant has referred to sets out the disputes over which the 1<sup>st</sup> 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.”**

9. It is clear from the foregoing that the 1<sup>st</sup> respondent did not have jurisdiction to determine disputes over ownership and/or title to land. The 1<sup>st</sup> respondent did not also have jurisdiction to determine disputes arising from agreements for sale of land. The 4<sup>th</sup> respondent's claim against the applicant should have been filed in the High Court for determination under the provisions of section 159 of the Registered Land Act, Cap.300 Laws of Kenya (now repealed). In the Court of Appeal case of **Jotham Amunavi –vs- The Chairman Sabatia Divisional Land Disputes Tribunal & Another C. A. No. 256 of 2002(unreported)**, the court stated as follows regarding the powers of the Land Disputes Tribunals:-

**“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's court in cases where the latter has jurisdiction.”**

The 1<sup>st</sup> respondent did not have the power to make a declaration that the 4<sup>th</sup> respondent was entitled to a portion of the suit property measuring 7 acres which is said to have been purchased by his deceased husband. The 1<sup>st</sup> respondent did not also have jurisdiction to order that the suit property be sub-divided and the said portion measuring 7 acres transferred to the 4<sup>th</sup> respondent. Jurisdiction of a court or tribunal is of paramount importance. In fact, it has been said to be everything and without it a court or tribunal must lay down its tools. Jurisdiction cannot be assumed neither can it be conferred by agreement.

10. As was stated in the case of **Desai-vs-Warsama (1967)E.A.351**, 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. Having come to the conclusion that the 1<sup>st</sup> respondent had no jurisdiction to entertain the claim that was brought before it by the 4<sup>th</sup> respondent, it is my further finding that the proceedings before the 1<sup>st</sup> respondent and its decision made on 27<sup>th</sup> November, 2008 were all nullities. If the said decision of the 1<sup>st</sup> respondent was a nullity as I have held, I am of the opinion that it was not open to the 2<sup>nd</sup> respondent to adopt it as a judgment of the court on 28<sup>th</sup> January, 2009. 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”.**

11. I am of the opinion that since the decision of the 1<sup>st</sup> respondent was a nullity, there was nothing in law that could be lodged before the 2<sup>nd</sup> respondent for adoption as a judgment of the court. Such judgment would equally be a nullity. I am of the view that, Section 7 of the Act pursuant to which the decision of the 1<sup>st</sup> respondent was lodged with the 2<sup>nd</sup> respondent for adoption envisaged a lawful decision by the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent had no jurisdiction under section 7 of the Act aforesaid to adopt and void decision by the 1<sup>st</sup> respondent. Since the decision of the 1<sup>st</sup> respondent was a nullity for want of jurisdiction, there was nothing, on the basis of which the 2<sup>nd</sup> respondent could enter judgment and issue a decree on 6<sup>th</sup> February, 2009. The disposal of this issue brings me to the last issue namely, whether this is an appropriate case to grant the orders of certiorari sought by the applicant. This court has power under section 13(7) (b) of the Environment and Land Court Act, 2011 to grant the prerogative orders sought. As I have already concluded herein above, the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted in excess of the jurisdiction conferred upon them by law. Their decisions were therefore nullities. The said decisions are liable to

review by this court.

12. I am satisfied that this is an appropriate case to grant the orders sought by the applicant. The orders sought cannot however lie against the 4<sup>th</sup> respondent. The respondent is neither judicial, quasi-judicial or an administrative body. Her decisions or actions are therefore not subject to supervisory jurisdiction of this court. The applicants' Notice of Motion application dated 6<sup>th</sup> March, 2009 is nevertheless well merited as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The same is hereby allowed in terms of prayers 1, 2 and 3 thereof. Since the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not defend the application and the orders sought against the 4<sup>th</sup> respondent have been found by the court to be without merit, each party shall bear its own costs.

**Delivered, Dated and Signed at Kisii this 5<sup>th</sup> day of December, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Gembe h/b for G. S. Okoth      for the Applicant

N/A      for the Respondents

Mr. Mobisa      Court Clerk

**S. OKONG'O**

**JUDGE**