



**REPUBLIC OF KENYA**

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

**E & L JUDICIAL REVIEW APPLICATION NO. 56 OF 2011**

**IN THE MATTER OF AN APPLICATION BY NCHAMA CHACHA NYARUNGU FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI**

**AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 (NOW REPEALED)**

**AND**

**IN THE MATTER OF KURIA WEST DISTRICT (MASABA DIVISION) LAND DISPUTES TRIBUNAL**

**AND**

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

**BETWEEN**

REPUBLIC.....APPLICANT

**VERSUS**

KURIA WEST DISTRICT (MASABA DIVISION)

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

THE SENIOR RESIDENT MAGISTRATE'S COURT

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

**AND**

1. ZACHARIA MWIKWABE MAGIGE

2. THOMAS MURIMI MAGIGE..... INTERESTED PARTIES

**EX PARTE**

NCHAMA CHACHA NYARUNGU

## JUDGMENT

1. The ex parte applicant, **Nchama Chacha Nyarungu** (hereinafter referred to only as “**the applicant**”) brought the present application dated 30<sup>th</sup> May, 2011 pursuant to leave that was granted by this court on 25<sup>th</sup> May, 2011. The application was brought on the grounds set out in the verifying affidavit and supporting affidavit of the applicant sworn on 25<sup>th</sup> May, 2011, and 30<sup>th</sup> May, 2011 respectively and the Statement of facts dated 25<sup>th</sup> May, 2011. The application sought the following reliefs;

**i. An order of certiorari to remove into this court and quash the proceedings and award of the 1<sup>st</sup> respondent dated 8<sup>th</sup> March, 2011 made in Land Disputes Tribunal Case No. 19 of 4/10/2010 and the judgment and/or the decision of the 2<sup>nd</sup> respondent made in Kehancha SRM LDT. No. 2 of 2011 on 5<sup>th</sup> April, 2011 adopting the said proceedings of the 1<sup>st</sup> respondent that concerned LR No. Bugumbe/Mabera/518 (hereinafter referred to as “the suit property”);**

**ii. The costs of the application to be paid by the interested parties;**

**iii. Any other or further orders as the court may deem fit to grant.**

2. According to the affidavits filed by the applicant in support of the application referred to hereinabove, the applicant was at all material times occupying a portion of the suit property measuring 8 acres. The said portion of the suit property was purchased by the applicant from the 2<sup>nd</sup> interested party sometimes in the year 1986. The suit property was at all material times registered in the names of the 2<sup>nd</sup> interested party and one, Mangare Magige (deceased). Sometimes in the month of October, 2010, the 1<sup>st</sup> interested party lodged a claim against the 2<sup>nd</sup> interested party with the 1<sup>st</sup> respondent over the suit property. The 1<sup>st</sup> interested party claimed that he was entitled to a portion of the suit property and that the 1<sup>st</sup> respondent should assist him and the 2<sup>nd</sup> interested party who is his brother in sub-dividing the suit property between them. The 2<sup>nd</sup> interested party did not object to the 1<sup>st</sup> interested party’s claim before the tribunal and the relief that he sought. The 1<sup>st</sup> interested party’s claim was however objected to by the applicant herein who contended that he had purchased a portion of the suit property measuring 8 acres and as such his interest in the suit property should be taken care of by the 1<sup>st</sup> respondent while considering the 1<sup>st</sup> interested party’s request for the sub-division of the suit property. The 2<sup>nd</sup> interested party admitted before the 1<sup>st</sup> respondent that he had sold his share of the suit property to the applicant and expressed to the 1<sup>st</sup> respondent his wish to have the applicant remain in occupation of the said portion of the suit property. The 1<sup>st</sup> interested party however did not accept the applicant’s claim to a portion of the suit property.

3. The 1<sup>st</sup> respondent heard the two interested parties and the applicant together with their witnesses and delivered its decision and/or award on the 1<sup>st</sup> interested party’s claim against the 2<sup>nd</sup> interested party on 8<sup>th</sup> March, 2011. In its decision, the 1<sup>st</sup> respondent held that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were the beneficiaries of the suit property and that they should have the suit property divided between the two of them before the applicant who claimed to be a purchaser of a portion of the suit property can be allowed to put forward his claim. The 1<sup>st</sup> respondent ordered that the suit property be sub-divided into two equal portions between the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. The 1<sup>st</sup> respondent made a further order that the applicant had not purchased a portion of the suit property from the 2<sup>nd</sup> interested party and as such he should vacate and move out of the portion of the suit property that was under his occupation. 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 5<sup>th</sup> April, 2011 and a decree issued on 6<sup>th</sup> April, 2011 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.

#### **4. 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 that arose between the interested parties one hand and the applicant on the other hand as it concerned title and/or ownership of the suit property;**
- ii. that the decision of the 1<sup>st</sup> respondent was illegal, null and void ; and**
- iii. that the 2<sup>nd</sup> respondent had no jurisdiction to adopt the said decision of the 1<sup>st</sup> respondent as a judgment of the court and as such the purported adoption of the same was similarly illegal, null and void.**

5. The applicant's application was opposed by the interested parties. The respondents were served with the application but did not oppose the same. The interested parties did not file a replying affidavit or grounds of opposition to the application but appointed an advocate who appeared at the hearing of the application. When the application came up for hearing on 5<sup>th</sup> December, 2013, the advocates for the parties agreed to argue the same by way of written submissions. The applicant filed his submissions on 20<sup>th</sup> February, 2014 while the interested parties filed their submissions on 3<sup>rd</sup> March, 2014. 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 interested parties 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 1<sup>st</sup> interested party which involved the 2<sup>nd</sup> interested party and the applicant 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?**

6. I am in agreement with the applicant's submission that the 1<sup>st</sup> respondent acted outside its jurisdiction when it entertained the 1<sup>st</sup> interested party's claim against the 2<sup>nd</sup> interested party and 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."**

7. 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 therefore have the power to make a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> interested parties were the beneficiaries of the suit property and that the same should be divided between them equally. The 1<sup>st</sup> respondent did not also have jurisdiction to order the applicant to vacate the suit property. I have noted from the record that one of the registered owners of the suit property is deceased and that he was not represented in the proceedings before the 1<sup>st</sup> respondent by a legal representative. I don't think that the 1<sup>st</sup> respondent had jurisdiction to make an order for the distribution of a property of a deceased person in respect of whose estate no grant of letters of administration had been obtained. Such move was contrary to the provisions of section 45 of the Law of Succession Act, Cap 160 Laws of Kenya. 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.

8. 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 1<sup>st</sup> interested party, it is my further finding that the proceedings before the 1<sup>st</sup> respondent and its decision made on 8<sup>th</sup> March, 2011 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 5<sup>th</sup> April, 2011. If any authority is required to support that position, I would refer to the case of **Macfoy-vs-United Africa Co. Ltd.(1961) 3 All E.R 1169**, in which 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”.**

9. 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 filed 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 annul 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 that was issued on 6<sup>th</sup> April, 2011. The disposal of this issue brings me to the last issue namely, to 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 order sought.

10. 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 decisions of the 1<sup>st</sup> and the 2<sup>nd</sup> respondents are liable to review by this court. I am in agreement with the submission by the advocates for the interested parties that the order of certiorari sought by the applicant is discretionary and that even where conditions for grant of such order are met the court can still decline to grant the same. As I have stated above, the interested parties did not file a replying affidavit in response to the application herein. The interested parties have not therefore brought any material before me that would have persuaded me not to exercise my discretion in favour of the applicant. The interested parties have also contended that the applicant was not a party to the case before the 1<sup>st</sup> respondent and as such he has no business challenging the decision of the 1<sup>st</sup> respondent in these proceedings. A perusal of the proceedings

of the 1<sup>st</sup> respondent leaves no doubt that the 1<sup>st</sup> interested party's claim was actually directed against the applicant. There was no dispute at all between the 1<sup>st</sup> and 2<sup>nd</sup> interested party that could have been taken before the 1<sup>st</sup> respondent for determination. The 1<sup>st</sup> respondent went to great length to inquire from the 1<sup>st</sup> and 2<sup>nd</sup> respondent as to why they had come before the 1<sup>st</sup> respondent as it appeared that they had no dispute between them.

11. It is not true therefore that the applicant was merely a witness in the dispute before the 1<sup>st</sup> respondent. I wonder whose witness he was and why an order was made against him in the proceedings if he was merely a witness. The applicant was clearly made a party to the proceedings and orders were made against him. The applicant had every right to challenge the said orders by way of an application for judicial review as he has done herein. I am satisfied that this is an appropriate case to grant the orders sought by the applicant. The applicants' Notice of Motion application dated 30<sup>th</sup> May, 2011 is in my view well merited. The same is hereby allowed in terms of prayer 1 thereof. The applicant shall have the costs of the application to be paid by the interested parties.

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

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Abisai	for the Applicant
N/A	for the Respondents
N/A	for the Interested parties
Mr. Mobisa	Court Clerk

**S. OKONG'O**

**JUDGE**