



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 50 OF 2010

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY WAY OF
CERTIORARI AND PROHIBITION**

AND

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

AND

IN THE MATTER OF REGISTERED LAND ACT, CAP 300 OF THE LAWS OF KENYA

AND

REPUBLIC APPLICANT

VERSUS

RESIDENT MAGISTRATE'S COURT KEHANCHA 1ST RESPONDENT

KURIA WEST LAND DISPUTES TRIBUNAL 2ND RESPONDENT

GEORGE ONYANGO OMECHI 3RD RESPONDENT

EX PARTE

GRACE KEMUNTO ROBI INTERESTED PARTY

JUDGMENT

1. The ex parte applicant herein **Grace Kemunto Robi** (hereinafter referred to only as “**the applicant**”) brought the application herein by way of Notice of Motion dated 9th July 2010 under Order 53 rules 3, 5 and 7 of the Civil Procedure Rules seeking the following orders:-

- a. That this honourable court be pleased to issue an order of certiorari to remove into this honourable court and quash the award by Kuria West Land Disputes Tribunal dated 26th February 2010 which was adopted as a judgment of the court vide Kehancha Misc. App. No. 5 of 2010 dated 18th March 2010.
- b. That this honourable court be also pleased to issue an order of prohibition against the respondents herein from jointly and/or severally implementing and/or executing the

decree/judgment of Kehancha R. M Misc. App. No. 5 of 2010 dated 18th March 2010 which adopted the award by Kuria West Land Disputes Tribunal dated 26th February 2010.

c. Costs of this application be provided for.

The facts giving rise to the applicant's application were as follows; the applicant was at all material times the registered proprietor of all that parcel of land known as **LR No. Bukira/Buhirimono/576** (hereinafter referred to as "**Plot No. 576**"). Sometimes in the year 2010, the 3rd respondent herein lodged a claim against the applicant with the 2nd respondent in relation to Plot No. 576. The 3rd respondent claimed that sometimes in the year 1990, the applicant had sold to him a portion of Plot No.576 measuring 228 feet by 58 feet at a consideration of Ksh.200,000/=. The 3rd respondent claimed that the applicant had refused to transfer the said portion of Plot No. 576 to him and had instead sub-divided Plot No. 576 and sold the portion thereof that she had sold to the 3rd respondent to third parties. The 3rd respondent sought the assistance of the 2nd respondent to compel the applicant to transfer to him the portion of Plot No.576 that he had purchased from the applicant.

2. The applicant denied the 3rd respondent's claim before the 2nd respondent. The applicant denied that she had sold any land to the 3rd respondent and that she was liable to transfer any land to him. The 2nd respondent heard the 3rd respondent's and the applicant and their witnesses. During the hearing, it transpired that Plot No. 576 had been sub-divided and a portion thereof that remained in the name of the applicant was **LR. No. Bukira/Buhirimono/2736** (hereinafter referred to as "**Plot No. 2736**"). In its award delivered on 26th February, 2010 after hearing the parties as aforesaid, the 2nd respondent held that the 3rd respondent had indeed purchased a portion of Plot No. 576 measuring 228 feet by 58 feet from the applicant and ordered that Plot No. 2736 which is now registered in the name of the applicant to be surveyed and a portion thereof measuring 228 feet by 58 feet be carved out and transferred to the 3rd respondent.

3. The 2nd respondent's award was lodged with the 1st respondent for adoption as a judgment of the court in Kehancha SRMC Misc. Appl. No.5 of 2010. The 1st respondent adopted the said award as a judgment of the court on 18th March, 2010 pursuant to the provisions of section 7 of the Land Disputes Tribunals Act No. 18 of 1990(hereinafter referred to only as "**the Act**"). The applicant was aggrieved with the said decision by the 2nd respondent and its adoption by the 1st respondent as a judgment of the court and obtained leave of this court on 23rd June, 2010 to bring these proceedings. The applicant has sought an order of certiorari to remove into this court and quash the said decision of the 2nd respondent and its adoption by the 1st respondent as a judgment of the court. The applicant has also sought an order of prohibition to prohibit the respondents from implementing and/or executing the said decisions. The applicant has in her verifying affidavit and statutory statement challenged the 1st and 2nd respondent's decisions aforesaid on various grounds. The applicant has contended that the dispute between the applicant and the 3rd respondent concerned an agreement for sale of land and as such the 2nd respondent had no jurisdiction to determine the same.

4. The applicant contended further that the purported agreement for sale between the applicant and the 3rd respondent was made in the year 1990 and as such the 3rd respondent's claim based thereon that was brought before the 2nd respondent in the year 2010 was time barred and as such the 2nd respondent had no jurisdiction to entertain the same. The applicant contended further that the 2nd respondent's decision aforesaid was irregular and unlawful in that the 2nd respondent made orders with respect to a parcel of land that was not in dispute before it. The applicant's application was served upon all the respondents but none opposed the same. The Attorney General filed a memorandum of appearance dated 20th November 2013 on behalf of the 1st and 2nd respondents but failed take any further steps in the matter.

5. When the matter came up for hearing before me on 26th February 2014, I directed that the applicant's application be heard by way of written submissions. The written submissions were filed by the applicant's

advocates only. The Attorney General who had appeared on behalf of the 1st and 2nd respondents as aforesaid failed to file its submissions within the time that was fixed by the court. I have considered the applicant's application, the verifying affidavit and statutory statement that were filed in support thereof and the written submissions by the applicant's advocates. I am in agreement with the applicant's submission that the 2nd respondent acted outside its jurisdiction when it entertained the 3rd respondent's complaint against the applicant. As submitted by the applicant's advocates, the 1st respondent was established under the Land Disputes Tribunals Act, No.18 of 1990 (now repealed) ("**the Act**"). The powers of the 2nd respondent were clearly spelt out in the said Act. The 2nd 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 2nd 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."

6. It is clear from the foregoing that the 2nd respondent did not have jurisdiction to determine disputes over ownership and/or title to land. The 2nd respondent did not also have jurisdiction to determine disputes arising from agreements for sale of land. The 2nd respondent had no power therefore to entertain the 3rd respondent's claim against the applicant and to proceed to award the 3rd respondent a portion of the applicant's parcel of land namely, Plot No. 2736. The decision of Musinga J.(as he then was) that was cited by the applicant supports this position. It has been said that jurisdiction is everything and without it a court or tribunal must lay down its tools. Jurisdiction cannot be assumed neither can it be conferred by agreement. 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.

7. Having come to the conclusion that the 2nd respondent had no jurisdiction to entertain the claim that was brought before it by the 3rd respondent, it is my further finding that the proceedings of the 2nd respondent and its decision made on 26th February, 2010 were nullities. If the said decision of the 2nd respondent was a nullity as I have held, I am of the opinion that it was not open to the 1st respondent to adopt it as a judgment of the court on 18th March, 2010. In the now famous 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".

8. I am of the opinion that since the decision of the 2nd respondent was a nullity, there was nothing in law that could be lodged before the 1st respondent for adoption as a judgment of the court. Such judgment would equally be a nullity. As I have said before, Section 7 of the Act pursuant to which the decision of the 2nd respondent was lodged with the 1st respondent for adoption envisaged a lawful decision by the 2nd respondent. The 1st respondent had no jurisdiction under section 7 of the Act aforesaid to adopt annul and void decision by the 2nd respondent. Since the decision of the 2nd respondent was a nullity for want of jurisdiction, there was nothing, on the basis of which the 1st respondent could enter judgment and issue a decree that was issued on 18th March, 2010. The disposal of this issue brings me to the last issue namely,

whether this is an appropriate case to grant the orders of certiorari and prohibition 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 1st and 2nd respondents acted in excess of the jurisdiction conferred upon them by law. Their decisions were therefore nullities. The said decisions by 1st and the 2nd respondents are liable to review by this court.

9. I have noted however that the applicant has sought an order of prohibition against the 3rd respondent. The 3rd respondent is not subject to the supervisory jurisdiction of this court through judicial review. The order of prohibition sought against the 3rd respondent is therefore not available to the applicant. Save as aforesaid as concerns the order sought against the 3rd respondent, I am satisfied that this is an appropriate case to grant the orders sought by the applicant. The applicant's Notice of Motion application dated 9th July, 2010 is well merited. I allow the same in terms of prayers (a) and (b) thereof save that the order of prohibition shall only issue as against the 1st and 2nd respondents. The applicant shall have the costs of the application to be paid by the 3rd respondent only.

Delivered, signed and dated at KISII this 5th day of December, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Abisai h/b for Soire for the Applicant

N/A for the 1st and 2nd respondents

N/A for the 3rd respondent

Mr. Mobisa: Court Clerk

S. OKONG'O

JUDGE