REPUBLIC OF KENYA

High Court of Kisii

Miscellaneous Civil Application 92 of 2011

IN THE MATTER OF AN APPLICATION BY SAM JOSEPH MOTARI FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

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

AND

IN THE MATTER OF SUNEKA LAND DISPUTES TRIBUNAL CASE NO.15 OF 2011

AND

IN THE MATTER OF KISII CMC MISC.CIVIL.APPL.NO.94 OF 2011

BETWEEN

REPUBLIC…………………………………………… ……………..……..………APPLICANT

VERSUS

SUNEKA LAND DISPUTES TRIBUNAL……..………………………..1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT KISII ……......……..………..2ND RESPODNENT

THE ATTORNEY GENERAL…………………………… …………….3RD RESPONDENT

AND

AGNES MORAA NYANDIKA

MARIA KERUBO NYANDIKA……………………………………………..INTERESTED PARTIES

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EXPARTE

SAM JOSEPH MOTARI

JUDGMENT

1.**Introduction**:

The exparte applicant, **Sam Joseph Motari**(hereinafter referred to only as **"the applicant"**) is the son of one, Obiri Motari(deceased)(hereinafter referred to as **Obiri**) while the interested parties are the widows of one, Nyandika Motari(deceased)(hereinafter referred to only as **Nyandika**). Obiri and Nyandika were brothers, the two being the sons of Motari(deceased). Motari owned a parcel of land at Suneka area within Kisii County. The said parcel of land was divided into two portions by Suneka-Kisii road with one portion being on the upper part and the other on the lower part. From the information on record, after the death of Motari, the two brothers divided the said parcel of land between themselves. Nyandika got a portion that

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was registered as LR.No.W/Bogiakumu/1466(hereinafter referred to as **"the suit property"**). It is not clear from the record as to the particulars of the portion of the original land that was given to Obiri. Sometimes in the year 2011, a dispute arose between the interested parties and the applicant over the suit property that was owned by Nyandika. The interested parties claimed that the applicant had trespassed into the suit property. The interested parties proceeded to file a complaint against the applicant at the Suneka Land Disputes Tribunal, the 1st respondent herein in Case No. 15 of 2011 over the said dispute. The 1st respondent heard the complaint and rendered its award on 27th May, 2011. The 1st respondent ordered that the District Land Surveyor do visit the site of the disputed parcel of land for the purposes of confirming its boundaries on the ground. The said award by the 1st respondent was filed with the 2nd respondent who adopted it as judgment of the Court on 16th September, 2011. The applicant

was aggrieved by the said award of the 1st respondent and its subsequent adoption by the 2nd respondent and decided to bring these proceedings to challenge the same.

2.The applicant sought and obtained leave of this court on 21st November, 2011 to institute the present application for judicial review which seeks orders of certiorari and prohibition. The application was filed on 25th November, 2011. The application was brought on the grounds set out, in the body of the said application, the Statement filed pursuant to the provisions of Order 53 rule 1(2) of the Civil Procedure Rules, 2010 and the Supporting Affidavit of the applicant sworn on 25th November, 2011. The application seeks the following reliefs;

i.an order of certiorari to remove to the high court and quash the proceedings and the decision delivered by the 1st respondent on the 27th May, 2011 in Suneka Division Land Disputes Tribunal Case No. 15 of 2011;

ii.an order of prohibition to prohibit the 1st and 2nd respondents and the interested parties by their

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agents and/or servants from executing the orders made by the 1st respondent and adopted by the court on 16th September, 2011.

3.**The grounds on which the application has been brought;**

The decision of the 1st respondent has been challenged by the applicant on the following main grounds;

i.that the 1st respondent had no jurisdiction to make the award dated 27th May, 2010 and,

ii.**that the said a ward was illegal to the extent that it ordered the re-survey of the suit property which was registered under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) contrary to the provisions of sections 27 and 28 of the said Act.**

In summary, the applicant contends that the 1st respondent had no jurisdiction to entertain the interested parties' complaint because the suit property was registered in the name of a deceased person (Nyandika) and the interested parties who had lodged the complaint with the 1st interested party were not his legal administrators. The applicant contends further that the 1st

respondent illegally ordered that the suit property be given to the interested parties. The applicant contends that the 1st respondent had no jurisdiction to arbitrate on the complaint and to give the orders that it gave. The application was not opposed by the respondents. The State Counsel who appeared on behalf of the respondents informed the court that the respondents did not wish to oppose the application. The application was however opposed by the interested parties. The interested parties filed Statement of grounds of opposition dated 10th April, 2012 in response to the application. The interested parties supported the 1st respondent's decision and it's adoption by the 2nd respondent. The interested parties opposed the application on the following main grounds, namely;

i.that the verifying affidavit that was filed by the applicant in support of the application and which formed the crux of these proceedings was fatally defective and/or incompetent thereby negating the entire proceedings;

ii.that the dispute before the 1st respondent

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concerned trespass to land and the determination of the boundary of the suit property and as such the same was within the jurisdiction of the 1st respondent;

iii.that after the decision of the 1st respondent was adopted by the 2nd respondent as a judgment of the court, it ceased to be an independent decision capable of being quashed in exclusion of the order of the 2nd respondent and since no order was sought to quash the order of the 2nd respondent, the order of certiorari sought against the decision of the 1st respondent is misconceived and legally untenabl

iv. the applicant having failed to seek an order for the quashing of the order of the 2nd respondent adopting the decision of the 1st respondent, the order of prohibition sought to bar the execution of the decision of the 1st respondent is mounted in vacuum;

4.The issues that present themselves for determination in this application are as follows;

i. **Whether the 1st respondent had the jurisdiction to entertain the interested parties' complaint and to make the decision complained of;**

ii. **Whether the said decision was valid;**

iii.**Whether the applicant's application was competent;**

iv.**Whether the applicant is entitled to the reliefs sought against the respondents and the interested party.**

5. **Issue No.1:**

The 1st respondent was a creature of a statute namely, The Land Disputes Tribunals Act, No.18 of 1990 (now repealed)(hereinafter referred to as "the Act"). As a creature of the Act, the composition and powers

of the 1st respondent were spelt out in the Act. The 1st respondent could not exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act sets out the disputes over which the 1st 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.”

It is clear from the foregoing that the 1st respondent had jurisdiction to determine the dispute over the boundary of the suit property and whether or not the applicant had trespassed into the suit property. It follows therefore that, the 1st respondent had jurisdiction to determine the dispute that the interested parties had against the applicant. I don’t think that the 1st respondent was divested of jurisdiction to entertain the said dispute merely because the registered proprietor of the suit property was deceased and the interested parties who presented the complaint before the 1st respondent were not the legal representatives of the said registered proprietor. In my view, if the interested parties had not obtained a grant of letters of administration with respect to the estate of their deceased husband in whose name the suit property was registered, that could only affected their legal standing before the 1st respondent but not the 1st respondent’s jurisdiction to determine the complaint. The issue of *locus standi*

and jurisdiction are separate and distinct. The issue of the interested parties’ legal standing before the 1st respondent ought to have been raised before the 1st respondent and could form a ground of appeal. That is issue cannot form a basis for judicial review. In the circumstances, the cases of **Samwel Chacha Rioba-vs-George Joseph Kiginga & 2 others, Kisii High Court,Civil Case No.174 of 2008(unreported)** and **Republic-vs-Uriri Land Disputes Tribunal & Another,Exparte Japheth Ondiek Ongoya,Kisii High Court,Misc.Civil Appl. No.59 of 2009(unreported)** are distinguishable as the issue in the present case did not concern a dispute over the distribution of the property of a deceased person neither did it concern the ownership of land. Due to the foregoing, I am in full agreement with the submission of the advocates for the interested parties that the 1st respondent acted intra vires its powers in making the decision dated 27th May, 2011.

6. Issue No.2:

The 1st respondent in its decision dated 27th May, 2011 ordered that the District Land Surveyor should visit the suit property and confirm its boundaries on the ground. In a dispute over boundary, this order by the 1st respondent was within its jurisdiction to make. The 1st respondent did not make an order that the suit property be transferred to the interested parties as alleged by the applicant. It is therefore my finding that the order made by the 1st respondent was valid unless overturned on appeal on other grounds. The order did not in any way contravene the provisions of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) as claimed by the applicant. The definition of land in the Act, includes land registered under the Registered Land Act, Cap.300, Laws of Kenya(now repealed). The 1st respondent had jurisdiction therefore to arbitrate on a boundary dispute over land registered under the said act. The 1st respondent's order was in

the circumstances not a nullity. The case of **Macfoy –vs-United Africa Company Limited (1961)3 All ER 1169** cited by the applicantis not relevant.

7.**Issue No.3:**

Having reached the conclusion that the decision of the 1st respondent complained of herein was within its jurisdiction to make, I need not consider this issue. However, for the purposes of making the procedure of instituting judicial review applications certain, I would like to say that I am in agreement with the submission by the advocate for the interested party that the application herein was not brought in a proper manner. The applicant's application for leave was supported by **a statement**, **"a supporting affidavit"** and "**a verifying affidavit"**. The statement that was filed pursuant to the provisions of order 53, rule 1(2) contained the particulars required under the said rule. The supporting affidavit on the other hand contained facts that the

applicant had relied on in support of the application. The verifying affidavit was a short six (6) paragraph affidavit which merely contained the description of the applicant and an averment that the contents of the statement are true. As was stated in the Court of Appeal case of **Commissioner General, Kenya Revenue Authority-vs-Silvano Onema Owaki, Kisumu,Court of Appeal, Civil Appeal No.45 of 2000(unreported)** that has been cited by the advocate for the interested party, in an application for judicial review, all the facts relied on by the applicant should be contained in the verifying affidavit. In this case, the applicant set out the facts in "a supporting affidavit" instead of having the same in the verifying affidavit. There is no provision for "a supporting affidavit" in addition to the verifying affidavit under order 53, rule 1(2) of the Civil Procedure Rules, 2010. That rule allows an applicant to file more than one verifying affidavit. This does not mean however that an applicant can file two affidavits sworn by

himself but titled, “a verifying affidavit” and “a supporting affidavit” respectively as was done in this case. The other procedural lapse in the application that I would wish to point out is that, once leave is granted, the Notice of Motion application for judicial review need not be supported by another affidavit. The same should be based on the verifying affidavit(s) filed at the leave stage. The court can of course allow the applicant under order 53, rule 4(2) to rely on further affidavits. The applicant however need not file another affidavit in support of the Notice of Motion application while filing the same. In this case, the applicant filed the Notice of Motion application and another “supporting affidavit” in support thereof. This was improper. The court while considering an application for judicial review is only supposed to consider the verifying affidavit that was filed at the leave stage unless leave is sought and an applicant is allowed to rely on further affidavits. While I am in agreement with the interested

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party that these were serious procedural flaws on the part of the applicant, this court in light of the provisions of section 159(2)(d) of the Constitution of Kenya, 2010, would not without more dismiss the present application on account of the same.

8. Issue No.4:

I have already reached the conclusion that the 1st interested party had the jurisdiction to make the decision that it made and that the order that flowed therefrom was valid. In the circumstances, the applicant is not entitled to the orders sought. I would wish however to add once again for the purposes of procedural certainty that, the decision of the 1st respondent once it was adopted as a judgment of the court ceased to be a decision of the 1st respondent but assumed the status of a judgment of the court and the same could not be challenged independently as the applicant did in this case. The applicant in this case sought the quashing of the decision of the 1st respondent that had already

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been adopted by the 2nd respondent without seeking similar orders against the decision of the 2nd respondent that adopted the decision of the 1st respondent as a judgment of the court. If the decision of the 1st respondent was to be quashed, it would leave the decision of the 2nd respondent intact and there would be nothing stopping the execution thereof. The applicant should have sought the quashing of both the decision of the 1st respondent and that of the 2nd respondent. In this application, although the applicant did not seek the quashing of the decision of the 2nd respondent, it sought an order prohibiting the 2nd respondent from executing the said decision. It would have been appropriate if there was a prayer seeking the quashing of the said decision so that once it is quashed, the order of prohibition would follow

as a matter of course. The submission by the interested parties that the prayer seeking the prohibition of the 2nd respondent from executing its decision made on 16th September, 2011 has been

sought in vacuum cannot be resisted in the circumstances. I have said enough to show that the applicant has failed to make out a case for orders of certiorari and prohibition sought against the respondents and the interested parties herein. I am of the view that the orders sought cannot issue in any event against the interested parties. The interested parties are neither public bodies nor public officers. Due to the foregoing, the notice of motion application dated 25th November, 2011 is dismissed with costs to the interested parties.

Dated, signed and delivered at Kisii this 12th day of April, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

No appearance for the Applicant

No appearance for the Respondents

No appearance for the Interested Parties

Mobisa Court Clerk

S. OKONG'O,

JUDGE.