



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L MISC. CIVIL APPLICATION NO. 105 OF 2011

JUDICIAL REVIEW

**IN THE MATTER OF AN APPLICATION BY DOMINIC MAANGU NYABWENGI FOR JUDICIAL
REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION**

AND

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

AND

IN THE MATTER OF LAND PARCEL NO. KISII/BOMARIBA/746

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. THE CHAIRMAN SUNEKA LAND DISPUTES TRIBUNAL

2. THE LAND REGISTRAR, KISII

3. THE CHIEF MAGISTRATE, KISII

4. THE ATTORNEY GENERAL..... RESPONDENTS

AND

CHARLES MAUTA MAANGI.....INTERESTED PARTY

EXPARTE

DOMINIC MAANGU NYABWENGI

JUDGMENT

1. Introduction:

The exparte applicant, **Dominic Maangu Nyabwengi** (hereinafter referred to only as “**the applicant**”)

obtained leave of this court on 7th September, 2011 to bring the present application which was filed on 20th September, 2011. The application was brought on the grounds set out in the statutory Statement dated 6th September, 2011 and a Verifying Affidavit sworn by the applicant on the same date which were filed pursuant to the provisions of Order 53 Rule 1(2) of the Civil Procedure Rules together with the application for leave. The applicant sought the following reliefs;

- i. **An order of certiorari to quash the order and/or decision of the 1st respondent dated 27th May, 2011 made in Suneka Land Disputes Tribunal Case No. 14 of 2011 and a decree of the 3rd respondent**

made in Kisii CMC Misc. Civil Appl. No. 86 of 2011;

- ii. **An order of prohibition to prohibit the respondents from in any manner transacting in, dealing in or interfering with land parcel No. Kisii/ Bomariba/ 746 .**

2. Brief facts of the case;

The circumstances that gave rise to the application herein can be summarized from the affidavit and the statement filed in court by the applicant as follows; at all material times, all that parcel of land known as **LR. No. Kisii/ Bomariba/ 746 (“the suit property”)** was registered in the name of one, **Peter Nyabwengi**, deceased who died on 17th March, 2011 (hereinafter referred to only as “**Nyabwengi**”). Nyabwengi was the applicant’s father. Nyabwengi’s own father, one **Maangu Nyairiba** (hereinafter referred to as “**Maangu**”) had four (4) sons, Nyabwengi and the interested party inclusive. The interested

party is the applicant’s paternal uncle. It was claimed that after the death of Maangu, Nyabwengi moved and settled on a parcel of land that Maangu had purchased and thereafter renounced his right to inherit Maangu’s ancestral land. It was claimed further that due to Nyabwengi’s renunciation of his right to ancestral land as aforesaid, Maangu’s land was subdivided and shared among Nyabwengi’s three (3) brothers. It was claimed that the suit property is one of the sub-divisions of Maangu’s ancestral land and that the same was allocated to one of Nyabwengi’s brothers named, Samwel Omanwa Maangu whose whereabouts was unknown. It was claimed further that through acts of fraud, Nyabwengi caused the suit property to be registered in his name thereby depriving his said brother of the same.

3. The claim before the 1st respondent;

Sometimes in the month of May, 2011, the 1st interested party who

is Nyabwengi’s brother and the applicant’s uncle lodged a complaint with the 1st respondent against Nyabwengi who was deceased by then and the applicant that Nyabwengi had “stolen” the suit property and should restore it to Samwel Omanwa Maangu who although was away and his whereabouts was still unknown “could return home at any time”. The 1st respondent heard the interested party and the applicant on the complaint and made its decision on the matter on 27th May, 2011. The 1st respondent ordered the cancellation of Nyabwengi’s title to the suit property on the ground that Nyabwengi had fraudulently acquired the same. The 1st respondent’s decision aforesaid was lodged with the 3rd respondent for adoption as a judgment of the court pursuant to the provisions of section 7 of the Land Disputes Tribunals Act, 1990. The 3rd respondent adopted the said decision by the 1st respondent as a judgment of the court on 26th August, 2011. The applicant was

aggrieved by the said decision of the 1st respondent and its adoption

by the 3rd respondent as a judgment of the court on the grounds set out hereunder.

4. The grounds on which the application was brought;

The application herein was brought on the following main grounds;

- i. **That the 1st respondent had no jurisdiction to make the decision dated 27th May, 2011;**
- ii. **That the said decision was illegal, null and void ; and**
- iii. **That the 3rd respondent had no jurisdiction to adopt the said decision by the 1st respondent as its own judgment and/or decree.**

5. The application was not opposed by the respondents and the interested party. They neither filed replying affidavits nor grounds of opposition. On 26th February, 2013, the court directed that the application be argued by way of written submissions. The

applicant's advocates filed their submissions on 1st March, 2013. The interested party's advocates filed their submissions on 29th May, 2013. In their written submissions, the applicant's advocates reiterated the contents of the applicant's verifying affidavit filed in support of the application and submitted that the 1st respondent made an error of fact and consequently arrived at a decision that was not only irrational but also amounted to abuse of power. The applicant submitted that the 1st respondent knew that Nyabwengi who was the registered proprietor of the suit property was deceased and proceeded to make orders against Nyabwengi and the applicant. The applicant submitted further that the 1st respondent acted in excess of its powers in making the decision complained of. The applicant submitted that the 1st respondent derived its jurisdiction from the Land Disputes Tribunals Act, No.18 of 1990 (now repealed). The applicant submitted that the 1st respondent had no jurisdiction under the

said act to determine a dispute over title to land and to cancel a title. The applicant submitted further that the 1st respondent had no jurisdiction over a property registered in the name of a deceased person with respect to whose estate no letters of administration had been taken out. The applicant submitted that the 1st respondent's decision amounted to intermeddling in the estate of a deceased person contrary to the provisions of section 45 of the Law of Succession Act, Cap. 160, Laws of Kenya. The applicant submitted further that a decision arrived at without jurisdiction is null and void and as such, the same could not be lawfully adopted as a judgment of the court by the 3rd respondent. The applicant relied on a number of authorities in support of the foregoing submissions. The interested party in his submissions supported the 1st respondent's decision and its filing with the 3rd respondent for adoption as a judgment of the court. The interested party contended that the 1st respondent's decision

was based on the evidence given by the area residents and community elders and as such cannot be faulted. The 1st interested party contended further that the 1st respondent had jurisdiction to determine the issues that the interested party had presented before it for determination. The interested party urged the court not to close its eyes on Nyabwengi's obvious acts of fraud. He submitted that to do so would be tantamount to aiding the applicant in abusing the judicial process. On the applicant's contention that he had not responded to the application, the interested party submitted that under Order 53 of the Civil Procedure Rules, it was not mandatory that he files a formal response to the application. He submitted that he was entitled to be heard even in the absence of such a response.

6. I have considered the applicants' application, the statutory statement and the affidavit filed in support thereof. I have also perused the applicants' advocates' submissions and the case law

cited in support thereof. Equally, I have considered written submissions filed on behalf of the interested party. The issues that present themselves for determination in this application are as follows;

- i. **Whether the 1st respondent had jurisdiction to determine the issues that were raised before it by the interested party and to make the decision complained of;**

- ii. **Whether the said decision was valid;**
- iii. **Whether the 3rd respondent had jurisdiction to adopt the said decision as a judgment of the court and,**
- iv. **Whether the applicant is entitled to the reliefs sought against the respondents.**

7. Issue No.I:

The 1st 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 1st respondent were spelt out in

the said Act. The 1st 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 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 did not have jurisdiction to determine disputes over ownership of or title to land. The 1st respondent also lacked jurisdiction to determine disputes over the estates of deceased persons. The 1st respondent did not therefore have the power to order the cancellation of Nyabwengi’s title over the suit property. Due to the foregoing, I am

persuaded by the applicant’s submission that, the 1st respondent acted outside its statutory powers when it entertained the interested party’s complaint and proceeded to make the decision complained of herein. The dispute between the interested party, Nyabwengi and the applicant concerned the issue of ownership of the suit property. The suit property was registered under the Registered Land Act, Cap. 300 Laws of Kenya (now repealed) and as at the time when the interested party lodged his claim with the 1st respondent, the jurisdiction to determine disputes concerning title to or possession of land registered under the Registered Land Act, (supra) was conferred exclusively upon the High Court and the Magistrates Court’s in limited cases by section 159 of the said Act. The 1st respondent had no jurisdiction to determine issues to do with the ownership or title to land registered under the said Act. See, the Court of Appeal Cases of **Jotham Amunavi-vs-The Chairman**

Sabatia Division Land Disputes Tribunal & another, Court of Appeal at Kisumu, Civil Appeal No. 256 of 2002 (unreported) and **Dominica Wamuyu Kihu-vs-Johana Ndura Wakaritu, Court of Appeal at Nyeri, Civil Appeal No. 269 of 2007(unreported)**. The High Court cases cited herein by the applicant are to the same effect. I would wish to add that since the applicant had not taken out letters of administration of the estate of Nyabwengi, the applicant could not be sued by the interested party. It follows that the decision by the 1st respondent dated 27th May, 2011 could neither bind Nyabwengi who was deceased nor the applicant. I am in agreement with the submission by the advocates for the applicant that the 1st respondent acted ultra vires its powers in making the decision dated 27th May, 2011 in favour of the interested party.

8. Issue No.II:

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. In the case of **Desai-vs-Warsama (1967) E.A.351**, it was held 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. Having come to the conclusion that the 1st respondent had no jurisdiction to entertain the claim that was brought before it by the interested party, it is my finding that the proceedings before the 1st respondent and its decision

made on 25th May, 2011 were nullities.

9. Issue No.III:

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”.

I am of the view that since the decision of the 1st respondent was a nullity, there was nothing in law that could be filed before the 3rd respondent for adoption. Adoption by the 3rd respondent of the 1st respondent's said decision as a judgment of the court amounted in the words of Lord Denning to, **“putting something on nothing”**. Such judgment was equally a nullity. I am of the view that, Section 7 of the Land Disputes Tribunal Act pursuant to which the decision of the 1st respondent was lodged with the 3rd respondent for adoption envisaged a lawful decision by the 1st respondent. The 3rd

respondent had no jurisdiction under section 7 of the Land Disputes Tribunal Act aforesaid to adopt annul and void decision by the 1st respondent. It is my finding that since the decision of the 1st respondent was a nullity for want of jurisdiction, there was nothing on the basis of which the 3rd respondent could enter judgment and issue a decree.

10.Issue No.IV:

This issue concerns the question whether this is an appropriate case to grant the orders of certiorari and prohibition sought by the applicant. The applicant has sought an order of certiorari to quash the decisions of the 1st and 3rd respondents complained of herein and an order of prohibition to prohibit the respondents from in any manner transacting in, dealing in or interfering with the suit property. As I have already concluded herein above, the 1st respondent had no jurisdiction to entertain the interested party's

complaint. Its decision on the said complaint was therefore made without jurisdiction and as such was a nullity. Likewise, the 3rd respondent had no jurisdiction to adopt a decision that was a nullity as a judgment of the court. From the authorities that I have cited above, I am satisfied that this is an appropriate case to grant the order of certiorari sought by the applicant. Since the suit property is registered in the name of a deceased person, I am not inclined to grant the order of prohibition sought as it may interfere with the rights of other beneficiaries of the estate of the deceased who are not parties to this application. Due to the foregoing, I find the applicants' Notice of Motion application dated 15th September, 2011 well merited. I allow the same and grant orders in terms of prayer 1 thereof. The applicant shall have the costs of the

application to be paid by the interested party.

Dated, signed and delivered at Kisii this 11th day of October, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

No appearance for the Applicant

No appearance for the Respondents

Mr. S. Ondari for the Interested Party

Mobisa Court Clerk

S. OKONG'O,

JUDGE.

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