



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
E & L JUDICIAL REVIEW NO. 8 OF 2012

**IN THE MATTER OF AN APPLICATION BY LAWRENCE MIRONGA BICHAGE
FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI**

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP. 26 LAWS OF KENYA OF KENYA

AND

**IN THE MATTER OF PROCEEDINGS AND AWARD OF LAND DISPUTES TRIBUNAL
BOARD MARANI DISTRICT CASE NO. 53 of 2011**

AND

IN THE MATTER OF LR.NOS. WEST KITUTU/MWAGICHANA/1510 & 3206

BETWEEN

REPUBLIC.....APPLICANT

AND

**1. LAND DISPUTES TRIBUNAL BOARD MARANI DISTRICT
2. THE CHIEF MAGISTRATE’S COURT AT KISII.....RESPONDENTS**

AND

JOSEPH OINDI GETONTO.....INTERESTED PARTY

EXPARTE

LAWRENCE MIRONGA BICHANGE

JUDGMENT

1. The exparte applicant, **Lawrence Mironga Bichage** (hereinafter referred to only as “the

applicant”) moved this court on 13th March, 2012 by way of a Notice of Motion application for judicial review dated 12th March, 2012. The application was made pursuant to leave that was granted to the applicant on 27th February, 2012. In the Notice of Motion application, the applicant sought an order of certiorari to remove into this court and quash the proceedings and award of the 1st Respondent made in land case No. 53 of 2011 on 25th August, 2011 and the consequential proceedings instituted before the 2nd Respondent in Kisii Chief Magistrate Miscellaneous Application No. 9 of 2012 for the adoption of the said award as a judgment of the court. The application was supported by the verifying affidavit of the applicant sworn on 23rd February, 2012 and on the statutory statement of facts of the same date. In his affidavit in support of the application, the applicant stated as follows; at all material times, the applicant was the registered proprietor of all those parcels of land known as **LR. Nos. West Kitutu/ Mwangichana/ 1510 and West Kitutu/ Mwangichana/3206** (“hereinafter known as “**the suit properties**”). On 28th August, 2011, the 1st respondent made a decision in Tribunal Case No. 53 of 2011 between the applicant and the interested party in which decision, the 1st respondent cancelled the applicant’s titles over the suit properties and ordered the sub-division of the same and registration of the sub-divided portions into the names of the interested party and other third parties who were not parties to the said proceedings. The said decision was filed at the Chief Magistrate’s court at Kisii on 13th January, 2012 in Kisii CMC. Misc. Application No. 9 of 2012 for adoption as a judgment of the court. The applicant contended that the 1st respondent had no jurisdiction to cancel his titles over the suit properties. The applicant contended that this court has power to call for the said proceedings and decision of the 1st and 2nd respondents for the purposes of quashing the same.

2. The Applicant’s application was opposed by the interested party. The respondents did not oppose the same. In his replying affidavit sworn on 3rd May, 2012, the interested party contended that the 1st respondent acted within its jurisdiction and as such its decision cannot be faulted. The interested party contended further that the 1st respondent’s decision was made before the repeal of the Land Disputes Tribunals Act, No. 18 of 1990 and as such the same was properly made and adopted as a judgment of the court. The interested party contended further that the applicant’s application herein was irregularly and un-procedurally commenced and as such the same is a non-starter. The interested party contended further that the application herein is fundamentally and fatally defective and as such the same cannot be granted.
3. On 7th March, 2013 the advocates for the parties agreed to argue the application herein by way of written submissions. The applicant filed his submissions on 14th May, 2013 while the interested party filed his submissions on 28th May, 2013. In their submissions, the applicant’s advocates argued that the 1st respondent had no jurisdiction to determine a dispute relating to ownership and/or title to land registered under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed). The applicant submitted further that the 1st respondent had no jurisdiction to order the cancellation of the applicant’s titles to the suit properties. The applicant submitted further that, since the 1st respondent’s decision was made without jurisdiction and as such was a nullity, the 2nd respondent likewise had no jurisdiction to adopt such a decision as a judgment of the court. In conclusion the applicant submitted that the applicant’s titles could only be impeached under the provisions of section 143 of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) and as such all that the respondents had engaged in was nothing but an abuse of the due process.
4. In their submission in reply, the interested party’s advocates raised several technical objections touching on the competency of the applicant’s application. First, the interested party submitted that the application is incompetent on the ground that the chamber summons application for leave to institute the same was wrongly titled in that instead of the application being brought in the name of the applicant, the same was brought in the name of the republic. Secondly, the interested party contended that the application is defective in that the applicant in his statement of facts only sought leave to seek orders of certiorari. The interested party contended that since the said relief was spent after leave was granted to the applicant, there is no basis upon which the substantive

relief of certiorari sought in the application herein can be granted. The interested party contended that the applicant ought to have indicated in the statement of facts the substantive relief sought herein and not the leave that he had sought in the chamber summons application. The interested party cited several authorities in support of the foregoing submissions. On the merit of the application, the interested party submitted that the interested party's complaint before the 1st respondent concerned a claim to occupy land and as such the same was within the jurisdiction of the 1st respondent. The interested party contended that there is no basis for quashing the decision of the 1st respondent as it was proper. In conclusion, the interested party submitted that the applicant's application lacks merit and should be dismissed with costs.

6. I have considered the applicant's application together with the affidavit and the statement of facts filed in support thereof. I have also considered the affidavit filed by the interested party in response thereto and the submissions of the advocates for both parties. In my view the issues for determination in this application are as follows:-

I. Whether the application is competent?

II. Whether the 1st respondent had jurisdiction to determine the claim that was brought before it by the interested party and to make the orders complained of ?

III. Whether the 1st respondent's decision was null and void?

IV. Whether the 2nd respondent had jurisdiction to adopt the decision of the 1st respondent as a judgment of the court.

7. Issue No. I

I see no merit at all in the interested party's objections to the application herein on account of form and procedural errors. The interested party has contended that the applicant should have brought the application for leave to institute this application in his name as the applicant instead of bringing the same in the name of the republic. The applicant's application for leave was heard by Sitati J. on 27th February, 2012 who allowed the same. The applicant proceeded to file the present application pursuant to that leave. The interested party did not move the court to set aside the said order that granted leave to the applicant on account of the said error in the title of the application. I accept as correct the interested party's contention that the application for leave should have been brought in the name of the applicant and not in the name of the republic. The interested party has not demonstrated to this court however that failure by the applicant to bring the application for leave in his own name has caused prejudice to the interested party in these proceedings or that the same has led to a miscarriage of justice. Article 159 (2) (d) of the Constitution of Kenya enjoins this court to administer justice without undue regard to procedural technicalities. The court would be going against the said provision of the constitution if it was to dismiss this application on account of this procedural lapse. The interested party's other objection which was also based on procedural error concerned the contents of the statement of facts that was filed with the chamber summons application for leave. Again, the interested party contended that failure by the applicant to set out in the statement of facts the reliefs it intended to seek in the present application is fatal to the application. Once again, I am not convinced that this error has caused any prejudice or injustice to the interested party. The reliefs sought in the present application are clear. The interested party has responded to the same. The interested party has not cited any element of confusion or misunderstanding that has been occasioned by the difference in the reliefs set out in the statement of facts and those in notice of motion application before the court. The interested party's objections herein although well taken do not go to the substance of the applicant's application. The same are procedural in nature and this court is inclined to overlook the same for the sake of substantive justice. The cases that were cited by the interested party in support of the foregoing objections in my view represented judicial thinking and the state of the law prior to the promulgation of the Constitution of Kenya, 2010.

8. Issue No.II

There is no doubt from the material before me that the claim that was brought by the interested party against the applicant before the 1st respondent concerned ownership of and/or title to the suit properties. There was also an element of succession dispute. The interested party's complaint against the applicant before the 1st respondent was that, the applicant was registered as the proprietor of the suit properties in his capacity as the legal representative of the estate of his deceased father and that the applicant had refused and/or declined to sub-divide the suit properties and distribute portions thereof to the beneficiaries of the estate of his deceased father and other persons such as the interested party who had purchased portions thereof from the said beneficiaries. I am unable to accept the contention by the interested party that the dispute between the applicant and the interested party concerned a claim to occupy land. The 1st respondent's jurisdiction was set out in section 3(1) of the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) ("the Act"). Under that section, the 1st respondent's jurisdiction did not extend to the determination of disputes over title and/or ownership of land. The 1st respondent also lacked jurisdiction to determine disputes relating to distribution of estates of deceased persons. That jurisdiction is reserved for the High Court and resident magistrate's court under section 47 of the Law of Succession Act, Cap. 160 Laws of Kenya.

The suit properties were registered under the Registered Land Act, Cap. 300 Laws of Kenya (RLA) (now repealed). Under section 159 of the RLA, only the high court and in limited cases, the resident magistrate's court has jurisdiction to determine disputes relating to title to land registered thereunder. Under section 143 of the RLA, only the high court has jurisdiction to cancel or rectify a title issued thereunder. It follows that, the 1st respondent had no jurisdiction to determine issues relating to title to land registered under the RLA or to cancel a title issued thereunder.

I am in agreement with the decision of Makhandia J. (as he then was) in the case of, **R vs. Kisii Municipality Land Disputes Tribunal & 2 others, exparte Yuvenalis Mosioma Miroro, Judicial Review No. 88 of 2010** (unreported) and the decision of, Sitati J. in the case of, **R vs. Kenyena District Land Disputes Tribunal & 2 others, exparte Nyakwama Nyamosi, Judicial Review No. 24 "B" of 2010** (unreported) that were cited by the applicant's advocates on the issue of the jurisdiction of the Land Disputes Tribunals. Due to the foregoing, it is my finding that the 1st respondent's decision dated 25th August, 2011 was made without jurisdiction.

9. Issue No.III.

A decision made without jurisdiction is null and void. Having reached the conclusion that the decision of the 1st respondent complained of herein was arrived at without jurisdiction I have no hesitation in declaring the same as null and void.

11. Issue No.I V

I am in agreement with the submission by the applicant that the 2nd respondent has no jurisdiction to adopt as a judgment of the court a decision that is null and void. The interested party's application before the 2nd respondent seeking the adoption of the 1st respondent's said decision is therefore misconceived and this court would not have hesitated to issue an order of prohibition to prohibit the intended adoption of the said decision by the 2nd respondent if the applicant had sought such an order.

12. Conclusion:-

I am satisfied that the applicant's application is well merited. The applicants' Notice of Motion application dated 12th March, 2012 is allowed in terms of prayer (a) thereof. The interested party and the beneficiaries of the estate the applicant's deceased father, Bichage Mibiria are at liberty to

pursue their claim over the suit properties if any in a court of competent jurisdiction. Each party shall bear its own cost of this application.

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

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Ochoki for the applicant

No appearance for the respondents

No appearance for the interested party

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.