



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**MISC. CIVIL APPLICATION NO. 41 OF 2011**  
**IN THE MATTER OF AN APPLICATION BY MAKOKHA KATILA MAKUMBA FOR**  
**ORDERS OF JUDICIAL REVIEW**

**AND**

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

**BETWEEN**

REPUBLIC..... APPLICANT

VERSUS

THE CHAIRMAN KANDUYI DIVISIONAL LAND DISPUTES  
TRIBUNAL..... RESPONDENT

EXPARTE

MAKOKHA KATILA MAKUMBA..... APPLICANT

AND

AURELLA NAKHANU KATILA

ROSEMARY NABWILE KATILA..... INTERESTED PARTIES

**JUDGMENT**

This is an application seeking Judicial review orders of certiorari. The exparte applicant seeks the honourable court to remove and quash the order of the Bungoma Chief Magistrate's court which adopted the findings of Kanduyi Land disputes Tribunal in land case No. 7 of 2011. The application is supported by grounds on the face of it, affidavit of the exparte applicant and the statement.

The application is opposed. The Respondent filed grounds of opposition. The interested party filed a replying affidavit.

**Exparte applicants case:**

The applicant submits the Tribunal exceeded jurisdiction when it ordered his land to be sub-divided, resurveyed and the title deed cancelled. Secondly the tribunal lacked jurisdiction to entertain the matter

which is over registered land. Finally, that the Tribunal breached his rights of proprietorship conferred to him by Sec. 27 & 28 of Cap 300 of the Laws of Kenya.

It was their further submission that at the time the dispute was lodged, title for L.R. No. E. Bukusu/W.Sangalo/1545 was already closed on sub division and therefore did not exist. He urged the court to find the decision of the Tribunal was null and void and should be removed. The applicant cited case law of **Kipkoske A. Yetge Vs. Chuchure Mogeno, Civ. Appeal No. 90 of 1988 at Nakuru**. The court herein made a finding that a panel of elders cannot confer jurisdiction unto themselves to determine the issue of title to land unless the matter is referred to them by a Magistrate's court.

### **Interested parties' case**

In her affidavit, the interested party contends this application is misconceived. She is a step mother and sister respectively to the exparte applicant. The 1st interested party's husband and who is father to the applicant and 2nd interested party, owned the suit land **L.R. E. Bukusu/W. Sangalo/264**. The exparte applicant upon becoming administrator of their father's estate, sub divided the land No. 264 into three portions. He transferred two of these into 3rd parties names and got himself registered as owner of **L.R. No. E.Bukusu/W. Sangalo/1545**. He has sub divided this parcel and gave his children only. He gave the 1st interested party and her children 2 ½ acres only.

The interested parties aver the exparte applicant was holding the land in trust for all the family members of their deceased husband and father. According to them, their claim before the Tribunal was to work or occupy land hence the Tribunal had jurisdiction to hear the matter.

### **Respondents' case**

The Respondent listed 3 grounds in their opposition to the application. First, the Respondent heard and determined a claim to occupy land in accordance with relevant laws. Secondly, Sec. 159 and 28 of RLA empowered the Tribunal to apply customary law. Finally this application is an abuse of the court process and ought to be dismissed. On this limb, they submitted that non-joinder of the Chief Magistrate's court as a party to the proceedings resulted into abuse of the court process.

In explaining the relevance of section 28 & 159 of RLA (repealed), they relied on case law of **Nyeri HC Misc. Civ. Application NO. 129 of 2004 – R. Vs. Chairman LDT Kirinyaga exparte Kariuki**.

### **Determination**

The interested parties filed a claim over Land parcel **L.R. No. E.Bukusu/W. Sangalo/1545** against the exparte applicant. The Tribunal made a finding in their favour by awarding them 13 acres to be carved out of the suit land and left the exparte applicant 16 acres. The award was on basis of their share as 2nd widow of Katila – deceased and expate applicant as son of the first house. The exparte applicant submission that the tribunal adjudicated over parcel no 264 which already ceased to exist therefore had no basis.

The effect of the finding of the Tribunal was therefore distributing the asset (land) of a deceased person amongst the beneficiaries. It is not true as put by the interested party and the Respondent that this was a claim to occupy and/or work land. It was not a case of application of customary land as brought out under Sec 28 and 159 of RLA. It was clearly a matter that involved the sharing of the suit land between the two houses of the Ainea Katila-deceased.

The interested party rightly put it in her affidavit that the exparte applicant was holding the land in trust for all the family of the late Katila. To enforce/establish that trust, the Tribunal had no jurisdiction to handle the case. The interested parties ought to go to a court of competent jurisdiction to claim this right. The award of the Tribunal would also amount to cancellation of title of **L.R. No. E.Bukusu/W. Sangalo/1545** were it to be enforced. Issuance of orders for cancellation of title is a preserve of the high court only. To this extent, the tribunal exceeded jurisdiction in making such an order.

The powers of the Tribunal is vested on it under sec 3 (1) of Land Disputes Tribunal Act (*repealed*). None of the above issues they determined is listed under section 3 (1). Unlike the case of **Kipkoske A. Yetge**, *supra*, where panel of elders waited for matters to be referred to it from the magistrate's court, The Land Disputes Tribunal is given original jurisdiction by Law. I find the case *supra* as not applicable in this instance. However the same law limited those powers.

On the last submission by the respondent that failure to join the magistrate court was fatal, that is more of semantics. The trial court merely adopted a finding of the Respondents. In any event, that is a matter curable by invoking the provisions of article 159 of the Constitution. I make a finding that that failure was not fatal and the application is properly before the court. The result is, I find the Tribunal exceeded powers bestowed on it by Sec. 3 (1) in attempting to re-distribute the estate of a deceased person. It also exceeded its powers in making orders that would result in canceling of title **L.R. No. E.Bukusu/W. Sangalo/1545**. The interested parties may have a genuine claim but they went to the wrong forum to realize that claim. Given the circumstances of this case that parties are family members, i order that each party shall bear their costs of these proceedings.

**JUDGMENT DATED, SIGNED and DELIVERED** in open court this 5th day of November 2013.

**A.OMOLLO**

**JUDGE.**