



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Miscellaneous Civil Application 83 of 2010

**IN THE MATTER OF AN APPLICATION BY CONSOLATA ANYANGO OJUOK FOR
JUDICIAL REVIEW (CERTIORARI)**

AND

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

AND

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

AND

IN THE MATTER OF RIANA MAGINA LAND DISPUTES TRIBUNAL

BETWEEN

REPUBLIC APPLICANT

VERSUS

RIANA MAGINA LAND DISPUTES TRIBUNAL RESPONDENT

AND

GEORGE OPIYO INTERESTED PARTY

AND

EX-PARTE

CONSOLATA ANYANGO OJUOK

RULING

1. On the 11th November 2010, the Ex parte Applicant obtained the leave of this court to commence proceedings for an order of judicial review in the nature of certiorari, to issue to remove into the High Court and quash the proceedings and decision dated 20th August 2010 by the Respondent herein vide Tribunal Land case No.308 of 2010 touching and/or concerning the ownership of and/or title to the applicant's land known as LR NO. KABUOCH/K.K.KOGUTA/34 (hereinafter referred to as the suit

land). The leave so granted was also to operate as an order of stay, staying the judgment, presentation, adoption, enforcement and/or implementation of the decision dated 20th August 2010 by the respondent touching on the suit land.

2. Pursuant to the said leave, the ex parte applicant brought the Notice of Motion dated 11th November 2010 and filed in court on 15th November 2010 seeking the orders as prayed in the chamber summons for leave. The Notice of Motion was premised on grounds that are set out on the face thereof, the Supporting Affidavit of the ex parte applicant dated 11th November 2010, the Statement of Facts filed pursuant to **Order 53 Rules 1 and 2** of the **CPR**, the Affidavit in Verification of Statement of Facts and the annexures attached to the affidavits. In essence, the ex parte applicant contends that the Respondent had no jurisdiction to deal with land registered under the **Registered Land Act (the RLA) Cap 300 Laws of Kenya** except as provided by **section 3 (1)** of the **Land Disputes Tribunals Act, No.18 of 1990** (the Act). Secondly, the ex parte applicant contends that the issue that was before the Respondent herein was the subject of a final adjudication by the Kamenya/Koguta Kaguria Adjudication section case Number 8/76/76 way back in 1976 between Oguta Alando and Patrick Ojuok so that the purported decision by the respondent was a nullity and amounted to a travesty of justice.

3. The application together with the order granting leave, was duly served upon the respondent and the Interested Party, George Opiyo. The Interested Party opposed the Notice of Motion vide his Replying Affidavit dated 11th October 2011. His main contention is that since the decision by the Respondent made on 20th August 2010 is yet to be adopted as a judgment of the court in accordance with **section 7** of the **Act**, an order of certiorari against the said decision cannot stand. The Interested Party avers that the only jurisdiction of the High Court in the instant case is appellate jurisdiction as envisaged under **section 8 (a)** of the **Act**. Finally, the Interested Party says that all that the Respondent did in its decision of 20th August 2010 was to recognize the award made by the Land Adjudication Committee in which it was said that Ogola Alando, who is father (but now deceased) of the Interested Party was the rightful owner of land parcel number 34 which Patrick Ojuok was ordered to render vacant possession thereof and which vacant possession Patrick Ojuok did not render. The Interested Party urged this court to dismiss the application.

4. The parties appeared before this court on 4th October 2011 and entered into a consent to canvass the application by way of written submissions to be filed and exchanged within 21 days from the date of filing a Replying Affidavit. The Interested Party was also given 14 days within which to file a Replying Affidavit which he did on 18th October 2011. The case was slated for mention on 24th November 2011 to confirm compliance. On that date, Mr. Odhiambo, appearing for the Interested Party told the court that the Interested Party was yet to file his written submissions and further that the Interested Party needed leave to file a Supplementary Affidavit. By that date, the ex parte applicant had filed his written submissions together with authorities. The application for extension of time was opposed.

5. The matter was eventually placed before me on 16th January 2012 but since the parties were absent without explanation, they were ordered to take fresh dates at the registry for directions. The matter came up again on 13th February 2012 when counsel for the Interested Party sought more time for filing of a Further Affidavit and written submissions. The application for more time was opposed. The court upheld the ex parte applicant's objection to the application for more time by Interested Party to file Further Affidavit and written submissions, noting that the said Interested Party had had enough time but chosen to sleep on it instead of applying it for what it was intended. The submissions on record are therefore those of the ex parte applicant. The Replying Affidavit of the Interested Party is also on the record.

6. I have now carefully read the pleadings, the supporting affidavit and the Statement of Facts plus annexures. I have also read the Replying Affidavit. For convenience, I shall adopt the 7 issues framed by the ex parte applicant in her counsel's submissions dated 22nd October and filed in court on 25th October 2011. The 6 issues as framed are:-

(i) Whether the Respondent is seized of jurisdiction to entertain and determine a claim touching [on] ownership and/or title to land;

(ii) Whether the Respondent can adjudicate and/or arbitrate on issues touching on rectification of Register of land registered under the Registered Land Act, Chapter 300, Laws of Kenya;

(iii) Whether the Respondent can impeach and/or invalidate a first registration;

(iv) Whether the Respondent was properly and/or legally constituted;

(v) Whether the orders made by the Respondent were ultra vires or otherwise and

(vi) What are the consequences of the decision made by the Respondent.

An additional issue in my view is whether the instant application is properly before this court.

7. Before determining the said issues, a brief history giving rise to these proceedings will do. The ex parte applicant is the registered proprietor and/or owner of the suit land as can be seen from annexure marked “**CAO 2**” to the Affidavit Verifying Statement of Facts. The same was issued to her on 3rd August 2009. The suit land devolved to the ex parte applicant upon succession of the estate of her late husband, Patrick Ojuok sometime in 2008. The suit land was originally registered in the name of Patrick Ojuok as a first registration. During the demarcation process, the Interested Party’s father Ogola Alando took out objection proceedings against the late Patrick Ojuok, but those proceedings were dismissed in 1976.

8. On or about 3rd August 2010, the Interested Party filed proceedings before the Respondent herein in which he claimed that the suit land belonged to his grandfather, one Okech and later to the Interested Party’s father, Ogola Alando. The Interested Party claimed that after his father Ogola Alando gave him a share of the suit land, he erected his homestead next to the ex parte applicant’s home.

9. After deliberating on the case, the Respondent reached the following conclusion:-

“The land under dispute is awarded to claimant, George Opiyo the son of Ogola Alando unanimously. The Tribunal members have respected the decision of Land Adjudication Committee members No.3/75/76 dated 28th April 1976.”

The Respondent also made the following “**order**”:-

“The Land Registrar to delete the name of Consolata Anyango Ojuok out of parcel No. 34 of K/K/Koguta because it was fraudulently registered on the records by tempered with the Land Adjudication Committee Members’ decision on Land Case No.3/75/76 of 28th April 1976 and insert the name of George Opiyo Ogola the claimant who is also the son of Ogola Alando. The sale of part of the land under dispute between Consolata Anyango Ojuok, the objector be stopped forthwith. The family of Consolata Anyango Ojuok the objector are ordered to vacate the land under dispute within three months from today.” (sic)

10. It was the above order that brought the ex parte applicant before this court. Although the ex parte applicant had 30 days within which to apply to Provincial Land Disputes Appeals Committee in accordance with **section 8 (1)** of the **Act**, there is no evidence that the ex parte applicant did so. This is the reason why the Interested Party is saying that the ex parte applicant has not exhausted the whole dispute resolution mechanism under the Act and therefore that she should not be granted the orders sought.

11. With regard to issues 1, 2, 3 and 5 counsel for the ex parte applicant submitted that by dint of the provisions of **section 3 (1)** of the **Act**, the Respondent had no iota of authority to entertain and/or determine issues pertaining to ownership of land, rectification of Register and/or nullification of title for land registered under the RLA. Further, that the Respondent did not have jurisdiction to sit on appeal over the decision of the objection court. It was submitted that the decision of the Respondent dated 20th August

2010 flew in the face of the provisions of **sections 143 and 159** of the **RLA** which provide as follows:-

“143 (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the high Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate’s Court, or, where the dispute comes within the provisions of section 3(1) of the Land Disputes Tribunals Act in accordance with that Act.”

12. Reliance was placed on the following authorities to support the ex parte applicant’s contention that the respondent had no jurisdiction whatsoever to deal with the matters that were before it and to make the orders that it purported to make:-

- *Asman Maloba Wepukhulu & others –vs- Francis Wakwabubi Biketi, Court of Appeal at Kisumu, Civil Appeal No.157 of 2001 (unreported).*
- *Francis Weta Opwoko & 2 others –vs- Alfred Kweyu & another, Court of Appeal at Kisumu, Civil Appeal No.221 of 2002 (unreported).*
- *Republic –vs- Kajiado Land Disputes Tribunal & another – Nairobi HCCC Misc. Application No.689 of 2001 (unreported).*
- *Wamwea –vs- Catholic Diocese of Muranga, Registered Trustees [2003] KLR 389.*

13. Reliance was also placed on **Section 3(1)** of the **Act** states as follows:-

Subject to this Act, all cases of a civil nature involving a dispute as to:-

- (a) the division of, or the determination of boundaries of land, including land held in common;*
- (b) a claim to occupy or work land;*
- (c) trespass to land shall be heard and determined by a Tribunal established under section 4*

14. It is clear from the above provisions that the jurisdiction of the Tribunal is clearly cut out and does not go beyond those provisions. The Tribunals established under **section 4** of the **Act** do not have jurisdiction to determine issues of legal ownership of registered land. There is no doubt that the Tribunal in this case went outside its jurisdiction when it purported to award the suit land to the Interested Party and, to order deletion of the ex parte applicant’s name from the register concerning the suit land on grounds that the registration of the suit land into the ex parte applicant’s name was done fraudulently. The decision of the Tribunal was thus a nullity.

15. The courts have held that the rights over land of a registered proprietor are guaranteed and protected by the provisions of **sections 27 and 28** of the **RLA**. Those rights are absolute and indefeasible. In the instant case, the Tribunal had no basis for making the decision that it did, alleging that it was respecting

the decision of the Adjudication Committee. The RLA through the provisions quoted above creates absolute and indefeasible ownership over land to the person in whose name the land is registered; whether or not such registration was done fraudulently. See the case of **Obiero –vs- Opiyo & others [1972] EA 227** and **section 143** of the RLA.

16. Concerning issue number 4, the ex parte applicant complains that the composition of the Tribunal as stipulated under **section 4** of the **Act** was either 3 or 5. In the instant case, the ex parte applicant argues that there was no evidence to show that the 5 members were properly gazetted. The applicant wants this court to find that the Tribunal was not properly constituted. Reliance was placed on the case of **Republic –vs- Kasipul Land Disputes Tribunal & another, Nairobi HCC Misc. Application NO.717 of 2007** (unreported) in which the court held that where the Tribunal was not properly constituted its deliberations and decisions were null and void. In the instant case however, the ex parte applicant who alleged that the Tribunal was not properly constituted was under a duty to prove her allegations. She did not do so, and accordingly her complaint fails.

17. On issue number 6, it is contended that though the ex parte applicant attended and gave evidence at the Tribunal hearing, the fact that the tribunal had no jurisdiction to deal with the matters before it, means that whether or not the ex parte applicant participated in those proceedings does not confer jurisdiction on the tribunal. That argument is valid and I agree with it. Jurisdiction is everything and without it no court or tribunal can move one inch more. See generally **Assanand & Sons –vs- East African Records [1959] EA 360** and **Carmella Wathugu Karigaca –vs- Mary Nyokabi Karigaca – Court of Appeal Civil Appeal No.30 of 1995.**

18. Taking all the above into account, clearly the decision of the Tribunal in this case was *ultra vires* and the ex parte applicant was entitled to move this court for appropriate orders of judicial review.

19. Accordingly, and being satisfied that the applicant is entitled to the order of certiorari, I allow the Notice of Motion dated 11th November 2011 and filed in court on 15th November 2011 as prayed. Costs of this application shall be borne by the Interested Party.

20. Lastly, the delay in delivering this ruling/judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

21. It is so ordered.

Dated and delivered at Kisii this 7th day of September, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Nyamurongi for O. Mboya (present) for Ex parte Applicant

Mr. Okongo, Wandago (absent) for Respondent

----- for Interested Party

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.