



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Judicial Review 24 of 2010

**IN THE MATTER OF APPLICATION BY NYAKWAMA NYAMOSI FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)**

AND

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

AND

**IN THE MATTER OF KENYENYA DISTRICT LAND DISPUTES TRIBUNAL (KENYENYA
DISTRICT)**

AND

IN THE MATTER OF CHIEF MAGISTRATE'S COURT AT KISII

AND

IN THE MATTER OF KISII CMC MISC. CIVIL APPLIC. NO.78 OF 2010

AND

IN THE MATTER OF KENYENYA DISTRICT LAND DISPUTES TRIBUNAL NO.3 OF 2010

BETWEEN

REPUBLIC APPLICANT

VERSUS

KENYENYA DISTRICT LAND DISPUTES TRIBUNAL 1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT KISII 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

JOSEPH OMBOGO MONACHI INTERESTED PARTY

VERSUS

NYAKWAMA NYAMOSI EX PARTE APPLICANT

RULING

1. On the 16th September 2010, the ex parte applicant obtained leave of this court to apply for orders of certiorari, and prohibition to remove and bring to the High Court for purposes of quashing the decision of Kenya District Land Disputes Tribunal dated 27th July 2010 in Tribunal Case No.3 of 2010 and to prohibit the 1st and 2nd Respondents and the Interested Party from adopting and/or implementing the orders made by the 1st Respondent on 27th July 2010 respectively. The leave so granted was to operate as a stay of implementation of the decision dated 27th July 2010. The ex parte applicant was thereafter to file the substantive application within 21 days of the date of the leave. The substantive motion was filed on 23rd September 2010 in accordance with the orders of the court dated 16th September 2010.
2. The substantive application was supported by the following 8 grounds:-
 - *That the 1st Respondent acted in excess of her jurisdiction by adjudicating/deliberating on the proprietary interest of land No. MAJOGE/MAGENCHE/1120 and 1122 notwithstanding the express mandate as provided for in Section 3(1) of the Land Disputes Tribunal Act.*
 - *That the 1st Respondent acted in excess of her jurisdiction by deliberating a claim which was null and void and without taking into account the provisions of Section 27 and 28 of the Registered Land Act Cap 300 Laws of Kenya.*
 - *That the 1st Respondent acted in excess of her jurisdiction by arbitrating on a claim over land under Cap 300 Laws of Kenya.*
 - *That the 1st Respondent acted in excess of her jurisdiction by ordering for removal of restriction imposed on land parcel No. MAJOGE/ MAGENCHE/1120.*
 - *That the 1st Respondent had no jurisdiction to deal with a first registration.*
 - *That the 1st Respondent had no jurisdiction to issue restraining Orders.*
 - *That the said Orders of the 1st Respondent are wrong in Law.*
 - *That there was no evidence to support or justify the decision of the 1st Respondent dated 27th July 2010 shall not be stayed. (sic)*
3. It was also premised on the grounds in the Supporting Affidavit dated 23rd September 2010; the Verifying Affidavit dated 13th September 2010 and the Statutory Statement of Facts made pursuant to **Order LIII** of the **now repealed CPR**. In the main the ex parte applicant contends that the 1st Respondent acted beyond its powers and jurisdiction as set out in **section 3 (1)** of the **Land Disputes Tribunals Act, No.18 of 1990** by adjudicating/deliberating on the proprietary interests in Land Parcel No. Majoge/Magenche/1120 and 1122 (the suit lands) which interests are protected and preserved by the provisions of the now repealed Registered Land Act, Cap 300 of the Laws of Kenya.
4. The application was duly served upon the respondents herein. The Interested Party Joseph Omboga Monachi swore a Replying Affidavit dated 7th April 2011 and averred therein that the suit lands were demarcated and title deeds issued in 1970 to Monachi Nyamosi and Nyakwama Nyamosi who are brothers respectively. That for the whole time since 1970, there have been disputes between the 2 brothers over the suit land until April 2010 when the ex parte applicant started trespassing onto the portion owned

by the Interested Party namely Majoge/Magenche/1120. According to the respondent, when the disputes arose, he referred the matter to the elders who in turn consulted the District Land Registrar Kisii/Gucha Districts on 22nd April 2010 who in turn referred the matter to the Kenyena Land Disputes Tribunal for arbitration on the ground that the dispute between the parties herein concerned the boundary and allegations of trespass. Eventually therefore Land Disputes Tribunal case No. 3 of 2010 was filed before the Tribunal. The case was heard by the Tribunal and in their decision dated 27th July 2012, the Tribunal ruled as follows:-

“That now the restriction imposed on parcel No.1120 belonging to

Monachi Nyamosi to be removed and allow Monachi Nyamosi to go ahead with his development. That Nyakwama should stop interfering with parcel No.1120.”

5. From the proceedings, the respondent’s complaint to the Tribunal was that the Interested Party had trespassed onto the respondent’s land and demarcated it with a new boundary on 27th March 2010 with the help of the area assistant chief. The former assistant chief told the Tribunal during the hearing that during his 20 years as assistant chief, such a dispute had never arisen between the parties herein.

6. I have now carefully analyzed the facts and the affidavit evidence adduced by both parties. The applicant’s case is that in entertaining the Interested Party’s case, and by making the decision that it did, the 1st respondent went way above its jurisdiction as stipulated under **section 3(1) of the Land Disputes Tribunals Act, No.18 of 1990** (the Act). **Section 3 (1) of the Act** provides as follows:-

“3 (1) Subject to this Act, all cases of a 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 shall be heard and determined by a Tribunal established under section 4.”

7. To support their respective positions, parties filed their written submissions. The applicant argued that the Tribunal erred by ordering the removal of a restriction imposed on the suit land as such orders did not fall within the Tribunal’s mandate and ran counter to the provisions of **sections 133 and 136 of the now repealed Registered Land Act, Cap 300 Laws of Kenya**. The two sections provide as follows:-

“133. (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.

(2) (a) The Registrar may, on the application of any person interested, serve notice on the cautioner warning him that his caution will be removed at the expiration of the time stated in the notice.

(b) If at the expiration of the time stated the cautioner has not objected, the Registrar may remove the caution.

(d) If the cautioner objects to the removal of the caution, he shall notify the Registrar in writing of his objection within the time specified in the notice, and the Registrar, after giving the parties an opportunity of being heard, shall make such order as he thinks fit, and may in the order make provision for the payment of costs.

(3) On registration of a transfer by a charges in exercise of his power of sale under section 77, the Registrar shall remove any caution which purports to prohibit any dealing by the chargor and which was registered after the charge by virtue of which the transfer has been effected.

(4) On the withdrawal or removal of a caution, its registration shall be cancelled, but any liability of the cautioner previously incurred under section 135 shall not be affected by the cancellation.

136. (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.

(2) A restriction may be expressed to endure –

(a) for a particular period; or

(b) until the occurrence of a particular event; or

(c) until the making of a further order, and may prohibit or restrict all dealings or only such dealings as do not comply with specified conditions, and the restriction shall be registered in the appropriate register.

(3) The Registrar shall make a restriction in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted.

(4) The Registrar shall make a restriction expressed to endure until the making of a further order when the Registrar is informed by the National Museums of Kenya that a declaration of heritage by the Minister under the National Museums and Heritage Act has been applied for, or is about to be gazette or has been gazette affecting the property in question and upon gazette the restriction shall take effect as a charge over the land.”

8. The applicant also averred that the Tribunal had no jurisdiction and/or power to issue restraining orders in terms of **Order 40** of the **CPR**. The applicant wants this court to find that the Tribunal’s actions were *ultra vires* and therefore ex-facie, a nullity. Consequently, the applicant argues that since the Tribunal’s decision was a nullity, a nothing, the same could not have been made a judgment of the court as the 2nd Respondent purported to do.

9. On his part, the Interested Party concedes that the complaint that was taken to the Tribunal was one of trespass and boundary dispute, but says that before determining the issue of the boundary, the Tribunal had to decide on the issue of the restriction which was placed on the suit land by the applicant in 1998.

10. Applying the law to the facts of this case, I am of the considered view that the Tribunal had no basis ruling on the matter of the restriction. That issue was outside the mandate of the tribunal. The tribunal had no jurisdiction to do so, and since jurisdiction is everything, whatever is done without jurisdiction is null and void *abinitio*.

11. The question that now follows for determination is: what is the consequence of the tribunal’s nullity on what the 2nd Respondent did? Although **section 7** of the **Act** requires the 2nd Respondent to adopt as a judgment of the court the decision of the tribunal once an application is made to that effect, in the instant case, there was no decision that could have been adopted by the court since the decision of the Tribunal was a nullity. As rightly observed by counsel for the ex parte applicant, out of nothing comes nothing. The issue of nullities was succinctly put by Lord Denning MR in the case of **Macfoy –vs– United Africa Co. Ltd. [1961] 3 All ER 1169** where his Lordship said that “**you cannot put something on nothing and expect it to stand. It will collapse.**” In the instance case, a decision of the court cannot stand because it had nothing to stand on.

12. In the premises and for the reasons above given, I allow the Notice of Motion dated 22nd September 2010 and do make the following orders:-

- 1) *An order of CERTIORARI be and is hereby issued quashing the decision delivered by the 1st Respondent on the 27th July 2010 in Kenyena District Land Disputes Tribunal Case No.3 of 2010.*
- 2) *An Order of PROHIBITION be and is hereby issued prohibiting the 1st and 2nd Respondent's and the Interested Party from adopting and/or implementing the said orders made on 27th July 2010.*
- 3) *Costs of this application shall be borne by the Interested Party.*

13. 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.

14. It is so ordered.

Dated and delivered in open court at Kisii this 7th day of September, 2012.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

M/s G.M. Nyambati (absent) for Ex parte Applicant

N/A for 1st Respondent

N/A for 2nd Respondent

N/A for 3rd Respondent

N/A for Interested Party

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.