



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**PETITION NO. 9 OF 2014**

**IN THE MATTER OF ARTICLES 20(2), 21(1), 22(1) AND (2), 23(1), 40(2) AND 165 OF THE CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE PROPERTY RIGHTS OF THE PETITIONER**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

**AND**

**IN THE MATTER OF LR NOS NYARIBARI CHACHE/B/B/BOBURIA/9154, 9155 AND 9156**

**AND**

**IN THE MATTER OF KIOGORO LAND DISPUTES TRIBUNAL**

**AND**

**IN THE MATTER OF KISII CMCC LAND DISPUTES TRIBUNAL CASE NOS 63 AND 66 ALL OF 2011**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION**

**OF RIGHTS AND FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**MARY KERUBO OGOTI.....PETITIONER**

**VERSUS**

**THE CHIEF MAGISTRATE'S COURT KISII.....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR, KISII.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**MARY KERUBO ONDIEKI.....4<sup>TH</sup> RESPONDENT**

**EVANS ONCHOMBA NYAIGOTI.....5<sup>TH</sup> RESPONDENT**

**ZADOCK MOREMA MOCHACHE.....6<sup>TH</sup> RESPONDENT**

## J U D G M E N T

1. The Petitioner filed the instant Petition on 20<sup>th</sup> March 2014. The Petitioner's complaint was that the Land Disputes Tribunal, Kiogoro Division had illegally and without jurisdiction adjudicated and awarded the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents, the Petitioner's land parcels **Nyaribari Chache/B/B/Boburia/ 9154, 9155 and 9156**. The Tribunal's award was lodged and adopted by the 1<sup>st</sup> Respondent as judgment and decree of the court and was executed resulting in the cancellation of the Petitioner's titles to the suit properties and the titles being issued in favour of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents. The Petitioner contends the Tribunal acted without jurisdiction in making the award and asserts the adoption of the award by the Magistrate's Court was null and void and of no effect.

2. The Petitioner prays for the following orders in the Petition:-

**a) Declaration be issued to the effect that the petitioner is entitled to protection under the Constitution.**

**b) Declaration that the complaint, proceedings and the attendant award of the Land Disputes Tribunal, Kiogoro Division, which was subsequently adopted and ratified by the 1<sup>st</sup> Respondent vide Kisii CMCC Land Dispute Tribunal Case Nos 63 and 66 all of 2011 and the resultant decree(s) were illegal, null and void for want of jurisdiction.**

**c) Declaration that the process of enforcement, execution and implementation of the decree arising from Kisii CMCC Land Dispute Case Nos 63 and 66 all of 2011, culminating into the revocation of the Petitioner's titles over the suit properties, was void.**

**d) Declaration that the transfer and registration of the titles in respect of LR Nos Nyaribari Chache/B/B/Boburia/9154, 9155 and 9156, in favour of the 4<sup>th</sup> and 5<sup>th</sup> Respondents was anchored on an illegal and void process and hence same ought to be nullified.**

**e) An order for cancellation of the titles in favour of the 4<sup>th</sup> and 5<sup>th</sup> respondent and rectification of the register in respect of LR Nos Nyaribari Chache/B/B/Boburia/9154, 9155 and 9156, to read the name of the Petitioner, as the bona fide and legitimate owner thereof.**

**f) An order of permanent injunction restraining the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents either by themselves, agents, servants and/or anyone claiming under the said 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents from entering upon, trespassing onto, taking possession, building on, building structures on and/or in any other way, whatsoever, interfering with the Petitioner's rights and/or interests over the suit properties, that is Nyaribari Chache/B/B/Boburia/9154, 9155 and 9156.**

**g) Payment of damages, arising from the illegal and void actions by and/or at the instance of the Respondents.**

**h) Costs of the Petition be borne by the Respondents jointly and/or severally.**

**i) The Honourable Court be pleased to issue such orders and/or writs as the Court may deem fit and/or expedient.**

3. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents in answer to the Petition filed grounds of opposition to the Petition on 28<sup>th</sup> October 2014 and set out the following grounds:-

**1. The Petition had no merit as the Petitioner flouted the rules of res judicata and filed the Petition.**

**2. The Petition as filed is not an appeal against the existence of a lawful decree and subsequent dismissal of judicial review.**

**3. The Petition as filed cannot be a solution to the confirmed grant in succession proceedings hence the procedure of filing Petition was bad in law and legally untenable.**

**4. Lawful land sale agreements cannot be a violation of fundamental right.**

4. On 25<sup>th</sup> February Okong'o, J. gave directions that the Petition was to be heard viva voce and parties were to exchange witness statements and file their bundles of documents within 30 days from that date. The Petition was fixed for hearing on 2<sup>nd</sup> December 2015 but the Respondents had not complied with the directions given earlier and the matter was adjourned.

5. On 19<sup>th</sup> June 2018 the Petition was listed for mention before me for directions. The Petitioner sought directions that the Petition be determined on the basis of affidavit evidence and submissions as it only raised issues of law and only involved review of documents which were largely not disputed. The court agreed that the Petition could be disposed by way of written submissions as it essentially raised issues of law and the documents relied upon were not contested. The court directed that the Petition be argued by way of written submissions.

6. The Petitioner filed her submissions on 22<sup>nd</sup> June 2018 while the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents filed their submissions on 22<sup>nd</sup> March 2019. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file any response or any submissions to the Petition.

**The Petitioner's Case**

7. The Petitioner's case is set out in the Petition and the affidavit sworn in support by the Petitioner. The Petitioner's averment was that her late husband, Joakim Ogoti Kinara (deceased) was before his death the registered proprietor of land parcel **Nyaribari Chache/B/B/Boburia/6776** and that following his death the said property was transferred to her (the Petitioner). The Petitioner caused the land to be subdivided to create land parcels **Nyaribari Chache/B/B/Boburia/ 9153, 9154, 9155 and 9156** respectively. The subdivisions were all registered in the Petitioner's name.

8. The Petitioner stated that in October 2010 the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents started laying claim of ownership to land parcels **Nyaribari Chache/B/B/Boburia 9154, 9155 and 9156** and in that regard lodged a claim before the Kiogoro Land Disputes Tribunal who heard the claim and went ahead to give a decision that effectively annulled the Petitioner's titles to the aforesaid properties. The Tribunal directed the Petitioner's titles to be cancelled and the same to be transferred to the Respondents. The decision/award by the Tribunal was subsequently lodged before the Kisii Chief Magistrate's Court (Kisii CMCC (Land Case) Nos 63 and 66 of 2011) and was adopted as judgment and a decree issued which was implemented/executed.

9. The Petitioner contends that the Tribunal had no jurisdiction to deal with the dispute in terms of Section 3(1) of the Land Disputes Tribunals Act, No. 18 of 1990 and its decision was ultra vires and null and void. Further the Petitioner contended there was no valid decision/award that the 1<sup>st</sup> Respondent could lawfully have adopted as judgment and issued a decree. She argued the judgment and decree issued by the Chief Magistrate's Court was null and void and of no legal effect.

#### **The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents Case:**

10. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents in response to the Petition averred that the Petition lacked merit and was res judicata. The said Respondents contended that the Petitioner did not prefer an appeal against the decree issued by the Chief Magistrate's Court and that the Petitioner's Judicial Review application was dismissed and no appeal was preferred against that decision. The Respondents denied any fundamental rights of the Petitioner had been violated to warrant the grant of the prayers sought in the Petition.

#### **The Submissions, Analysis and Determinations:**

11. The gist of the Petitioner's submissions was to the effect that the Kiogoro Land Disputes Tribunal lacked the jurisdiction to hear and determine the dispute lodged before them by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents as the dispute affected title to registered land. Equally, the Petitioner contended there was no valid decision of the Tribunal that the Magistrate's Court could properly adopt as judgment and issue a decree on. The Petitioner in support of this submission referred the court to the cases of **Lucy Bosire -vs- Nyankoni Manga Robi [2014] eKLR** and **Joseph Oginga Onyoni & 2 Others -vs- The Hon. Attorney General & 2 Others [2016] eKLR** where the Court considered the effect of a decision/award made by a Tribunal without jurisdiction and where such decision had been adopted and implemented. In the case of **Lucy Bosire -vs- Nyankoni Manga Robi** [supra] Okongo, J. stated as follows:-

**"...A decision made without or in excess of jurisdiction is a nullity ab initio. It is irrelevant that the Plaintiff participated in the proceedings before the Tribunal. As was held in the case of Allarakhia -vs- Agakhan [1969] E.A 613, parties cannot by mutual consent confer jurisdiction on a court which had no such jurisdiction. The Resident Magistrate's Court had no jurisdiction to adopt a null and void decision of the Tribunal as a judgment of the Court."**

12. On the effect of an award/decision made without jurisdiction and adopted by the Court, the Hon. Judge had the following to say:-

**"...I am of the view the adoption of the decision of the Tribunal as a judgment of the Court did not change the nature and character of the said decision. The decision was null and void and remained so even after adoption. To put it in other words, nullity can only beget nullity. It is my finding therefore that the decision of the Tribunal and that of the Resident Magistrate's Court at Kehancha that adopted the same as a judgment of the court were null and void."**

13. In the case of **Joseph Oginga Onyoni & 2 Others -vs- The Hon. Attorney General & 2 Others** [supra] this Court considered the jurisdiction of the Land Disputes Tribunals under Section 3(1) and in its judgment at paragraph 12 stated as follows:-

**"...The Land Disputes Tribunal could only exercise jurisdiction in regard to matters that it had been conferred jurisdiction under the aforesaid Section 3(1) of the Act to deal with. The Tribunal did not have jurisdiction to deal with title to registered land. That is what the Tribunal in the instant case did and by doing so it clearly acted in excess of its jurisdiction. Courts have repeatedly held that the Land Disputes Tribunals established under Section 4 of the Land Disputes Tribunals Act No. 18 of 1990 lacked jurisdiction to deal with title and that any resultant awards in cases where Tribunals made decisions touching on title to registered land such awards were a nullity."**

14. The Court in the same case, having found that the award made by the Tribunal was in excess of its jurisdiction, observed as follows in regard to the adoption of the award by the Magistrate's Court:-

**"...The 2<sup>nd</sup> Respondent acted without jurisdiction and hence the Magistrate's Court could not properly endorse and enter judgment in respect of an award that was null and void. There was no valid award that the Magistrate's Court could have given effect to. The award by the Tribunal was a nullity and so was the endorsement of the same as judgment and decree of the Court."**

15. In the case of **Macfoy -vs- United African Co. Ltd [1961] 3 ALL ER 1169**, Lord Denning stated as follows concerning an act which is a nullity at page 1172 of the judgment:-

**“...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 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.”**

16. In the present matter there can be no doubt that the Kiogoro Land Disputes Tribunal entertained a dispute that they had no jurisdiction to handle. The dispute clearly touched on the ownership and title in regard to land parcels **Nyaribari Chache/B/B/Boburia/9154, 9155 and 9156** then registered in the name of the Petitioner. The Tribunal in two determinations; firstly in Land dispute Claim No. 7 of 2010 lodged by the 5<sup>th</sup> and 6<sup>th</sup> Respondents herein on 2<sup>nd</sup> March 2011 made a decision/award for the Petitioner to transfer land parcels **Nyaribari Chache/B/B/Boburia/9155 and 9156** to the 5<sup>th</sup> and 6<sup>th</sup> Respondent; and secondly on 26<sup>th</sup> May 2011 made a determination/award in Land Dispute No. 2 of 2010 that the Petitioner transfers land parcel **Nyaribari Chache/B/B/Boburia/9154** to the 4<sup>th</sup> Respondent herein. The Tribunal had no jurisdiction under Section 3(1) of the Land Disputes Tribunals Act No. 18 of 1990 to deal with disputes relating to ownership or title to registered land. Their decision was therefore made outside their jurisdiction and was accordingly null and void and of no effect.

17. The Respondents (4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup>) have in their response to the Petition and in their submissions argued that the Petitioner sought Judicial Review of the decision by the Tribunal and the endorsement of the same as judgment by the Magistrates Court and the Judicial Review applications namely Kisii ELC Misc. Civil Application Nos. 69 of 2011 and 70 of 2011 (consolidated) were struck out. The Respondents submit the Petition was not an appeal against the striking out of the Judicial Review application as such an appeal would only lie to the Court of Appeal. The Respondents therefore contend that the present Petition was *res judicata* as the matter had previously been determined by the Court. The Respondents contend that the award by the Tribunal having been adopted as judgment by the Magistrate's Court and a decree issued and implemented and a consequent judicial review of the award and judgment struck out, the present Petition lacks merit as it seeks to reopen a matter that had already been determined. It is in this regard the Respondents have argued the Petition as presented was *res judicata*.

18. The doctrine of *res judicata* applies where there has been a previous suit involving the same parties and substantially the same issues and a court of competent jurisdiction had made a final adjudication of the issues being raised in the subsequent suit. The doctrine of *res judicata* would be inapplicable where for instance the issue in dispute was not determined on merits. Where a suit is struck out on a technicality, there is no final determination on the issues and provided the suit would not be statute barred by limitation, a party would be at liberty to institute a fresh suit so that the issues in dispute can be determined on merit.

19. The Respondents further argued that the Magistrates Court having adopted the Tribunal's award as judgment and the Petitioner's judicial review having been struck out, the instant Petition could not be properly instituted by the Petitioner. The Respondents argued that the petition could not operate as an appeal and contended that the litigation process had been completed and thus the Petition ought to be struck out.

20. The Court of Appeal in Kisumu Civil Appeal No. 157 of 2001 - **Asman Maloba Wepukhulu & Another -vs- Francis Wakwabubi Biket** (unreported) in an appeal where the High Court had quashed orders made by the Tribunal and adopted by the Magistrate's Court resulting in the suit land being subdivided on the ground that the Tribunal lacked jurisdiction, the Court of Appeal upheld the decision of the High Court. The Court of Appeal in its judgment stated as follows:-

**“...the learned judge could not be faulted at all since none of the bodies was seized of jurisdiction to determine the dispute relating to the suit land. With respect, we agree with him. The title relating to the suit land, Bokoli/Kituni/169, was unlawfully interfered with by bodies which lacked jurisdiction and all orders made by them were illegal. The effect of the decision of the learned judge is that all proceedings and orders made by the Senior Resident Magistrate's Court and the Tribunal are a nullity and were correctly quashed and vacated by the learned Judge. The parties must go back to the competent court for a proper hearing of the dispute relating to the suit land.”**

21. Likewise in the present matter, the Tribunal had no jurisdiction to determine the dispute and the decision adopted by the Magistrate's Court was a nullity. The judicial review application that was struck out did not alter the position. It is my view that the Petition is properly before the Court as it seeks to right the wrongs and/or illegalities that had been committed.

22. The judicial review applications in regard to Kisii ELC Misc. Civil Applications No. 69 of 2011 and 70 of 2011 by the Petitioner were instituted without leave and Okong'o, J. had the following to say in his judgment:-

**“...Leave as a pre-condition to the bringing of applications for orders that were sought herein is a statutory requirement. The rule aforesaid requiring leave to be obtained prior to filing of an application for mandamus, certiorari and prohibition is donated by Section 9 of the Law Reform Act, Cap 26 Laws of Kenya. The same cannot therefore be waived as it is not a procedural technicality which this Court can overlook pursuant to the provisions of Article 159(2) (d) of the Constitution of Kenya.**

**.....the applications herein were filed without leave of the Court and as such the same are incurably defective and incompetent.”**

23. In the same Judgment, Okongo, J. after considering whether the Kiogoro Land Disputes Tribunal had jurisdiction to deal with the disputes before them stated as follows:-

**“...I am fully in agreement with the submissions by the Applicant's advocates that the 1<sup>st</sup> Respondent acted without jurisdiction in determining issues concerning ownership and/or title of Plot Nos. 9154, 9155 and 9156. The 1<sup>st</sup> Respondent's decisions aforesaid were therefore illegal, null and void and could not be adopted by the 2<sup>nd</sup> Respondent as judgment of the**

**Court. See the cases of Sara Wambui Mugo -vs- Land Disputes Tribunal Maragna & 2 Others [2007] eKLR and Samwel Chacha Rioba -vs- George Joseph Kigingga & 2 Others [2010] eKLR.”**

24. It is evident therefore the Judicial Review applications were not determined on their merits but rather on a procedural technicality. Indeed the Judge observed were it not for the omission to obtain leave before filing the judicial review application, the application had merit except for that defect which was incurable.

**Conclusion and Decision:**

25. The Court having held and found that the Tribunal lacked the jurisdiction to deal with the dispute referred to it, the decision and/or award it made was a nullity. The Tribunal acted illegally and their determination was void and of no consequence. The Magistrate’s Court was not enabled under Section 7 of the Land Disputes Tribunal Act, No. 18 of 1990 to adopt what were otherwise illegal and void awards from the Tribunals as judgment. The expectation was that the Tribunals would have acted within their mandate and jurisdiction under Section 3(1) of the Act and would have made valid awards. If there was no valid award then any purported adoption of the same would amount to nothing. The court cannot validate something that is void and illegal.

26. While it may be possible that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents may have genuine and valid claims against the Petitioner, the process and procedure they followed to pursue the claims and/or rights against the Petitioner flouted the law and the Court will not sanitize illegalities. The Court’s role is to uphold the rule of law and that is what the Constitution mandates a judge to do when he takes the Oath of office. The Court in that regard will not give its seal of approval to what was clearly a flawed process. The Petitioner is thus entitled to feel shortchanged and/or done in by the process through which the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents obtained the award, the judgment and the execution thereof. Parties may perhaps have to go back to the drawing board to agitate for and to pursue their perceived rights.

27. Having considered and evaluated the Petition, I am persuaded the same has merit and I allow the Petition in terms of prayers (a), (b), (c), (d) and (e). I am not persuaded a case for payment of damages has been made out and I decline to award any damages to the Petitioner.

28. Each party will bear their own costs of the Petition.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 19<sup>TH</sup> DAY OF JULY 2019.**

**J. M. MUTUNGI**

**JUDGE**