



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC JR CASE NO. 18 OF 2017**

**(Formerly Kisii JR Misc ELC No. 86 of 2011)**

**GEORGE ADWARI OPENGO.....PLAINTIFF**

**VERSUS**

**CHAIRMAN NYANZA PROVINCIAL LAND**

**APPEALS COMMITTEE.....1<sup>st</sup> DEFENDANT**

**CHAIRMAN MIGORI DISTRICT LAND**

**DISPUTES TRIBUNAL – AWENDO DIVISION.....2<sup>nd</sup> DEFENDANT**

**JUDGMENT**

1. The ex-parte applicant namely George Adwar Opengo (hereinafter referred to as the applicant) by Chamber Summons (ex-parte) dated 23/9/2011, sought leave of the court to apply for an order of certiorari to quash **the** award of Nyanza Provincial Land Appeals Committee Appeal No. 339 of 2006 dated 13/7/2011, an order of prohibition against the District Land Registrar and Surveyor, Migori prohibiting them from implementing the award and that the orders to operate as stay thereof. On 26/9/2011, the Court (Makhandia, J as he then was) granted him leave accordingly.

2. Pursuant to the leave granted by court, the applicant represented by learned counsel, Mr J.Kisera, filed a Notice of Motion dated 14/10/2011 (hereinafter referred as the application) for Judicial Review. In the application he sought the following orders:-

- a) That the Honourable court be pleased to grant an order of Certiorari to remove and bring to the High Court for purposes of quashing the Award of Nyanza provincial Land Appeals Committee dated 13<sup>th</sup> July 2011 which Award ordered that the Exparte Applicant's parcel of land Number SOUTH SAKWA / KOGELO / 1319 (the suit land) be subdivided into 2 and Interested Party be given one half thereof and quashing of the initial award of the 2<sup>nd</sup> Respondent.
- b) This Honourable Court be pleased to grant an order of Prohibition directed against the District land Registrar and Surveyor Migori District prohibiting them from implementing the Award dated 13<sup>th</sup> July 2011 and the initial award of the 2<sup>nd</sup> Respondent.
- c) That the costs of this Application be borne by the Interested Party.
- d) Any other further Orders as the Court may deem fit and just.

3. The application was anchored on the ex-parte applicant's statutory statement, his supporting affidavit and grounds on the face of the application. The grounds include:-

- a. **Section 3 of the District Land Disputes Tribunal Act No. 18 of 1990 specifically stipulated the jurisdiction of the Tribunal which did not include nullification of title registered under Cap 300 laws of Kenya hence the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein acted without jurisdiction.**
- b. **Article 40 of the Constitution guarantees the Exparte applicant the protection and enjoyment of the right to property.**
- c. **Section 27 and 28 of registered Lands Act protects the Exparte applicant.**

**d. Rules of natural justice were not adhered to.**

**e. The award of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents if implemented, the exparte applicant is bound to suffer irreparable loss.**

**f. The proceedings and the award of the Respondents were a nullity in law.**

4. The applicant stated that he became the sole registered owner of the suit land pursuant to a succession cause in the estate of his late father Opengo Ayungu. The interested party was the complainant before Land Disputes Tribunal, Awendo Division (2<sup>nd</sup> Respondent) which unlawfully awarded a portion of the suit land which was by then registered in the name of the deceased contrary to the Law of Succession Act. The Applicant appealed to the 1<sup>st</sup> Respondent which unlawfully and arbitrarily issued the impugned award on 13/7/2011 that the suit land be subdivided into two equal halves of 2.77 hectares each between the applicant and the interested party without jurisdiction. It then rendered the present application necessary.

5. The Respondent and their interested party never filed any response to the application herein. The instant matter remains unopposed.

6. Learned counsel for the Ex-parte applicant argued the application by way of written submissions further to the directions given by the court on 26<sup>th</sup> June, 2017. Counsel cited sections 3 and 4 of the Land Disputes Tribunal Act No. 18 of 1990 (the repealed LDTA) on the jurisdiction and composition of the tribunal. He relied on the case of **Kenya National Examinations Council vs R – Exparte Godfrey Gathanyi Njoroge & 9 Others (1997)e KLR Civil Appeal No. 266 of 1996 which was approved in Kisii ELCC MISC Application No. 35 OF 2012, R vs Land Disputes Tribunal (Kisumu) Exparte Fanuel Okoth Onyango.** He urged the court to allow the application.

7. I have studied the entire application including the grounds upon which it is based, the statutory statement and the Supporting Affidavit of the Ex-parte applicant. I also consider the submissions together with the cited case law. The issues for determination are whether:-

**a) the Land Appeals Committee, Nyanza lacked jurisdiction to entertain the land dispute**

**b) The Ex-parte applicant is entitled to the orders sought in the application.**

8. The Ex-parte applicant claimed that the Land Appeals Committee and **Land Disputes Tribunal, Awendo** lacked jurisdiction to nullify title to the suit land under Section 3 of the repealed LTDA as the land was registered under the now repealed Registered Land Act Cap 300 Laws of Kenya. His claim was based on grounds and supporting affidavit referred to hereinabove.

9. According to the proceedings of 13<sup>th</sup> July, 2011, Nyanza Land Appeals Committee acted outside its jurisdiction when it ruled, thus:-

***“Appeal dismissed. The dispute land should be subdivided equally among the parties George Adwar Opengo to get 2.77 Ha and Benson Oseko Obok should also get 2.77.Ha...”***

10. **Section 3(1) of the repealed LDTA**, provided as follows:-

**i. The division of or determination of boundaries to land including land held in common.**

**ii. A claim to occupy or work land.**

**iii. Trespass to land.**

11. The Appeals Committee clearly lacked jurisdiction to determine the issue of ownership of the suit land and or direct the subdivision hence cancellation of registered title to the same land. This was a reserved jurisdiction for the High Court. In **Kimote Musau-vs-Makumi Muluva Muthwethau & 2 others (2015) eKLR**, the Court of Appeal, stated, inter alia;

***“...Indeed the tribunal did not have power to order transfer or registration of land and on this score alone, we find that it made this order ultra vires its jurisdiction.”***

12. I absolutely agree with the able submissions by the Ex-parte applicant's counsel to fortify the application. He cited **Kenya National Examination Council case (supra)** where it was stated that an order of certiorari will issue if:-

**a) The decision is made without jurisdiction. or**

**b) The decision is made in excess jurisdiction, or**

**c) Where the rules of Natural Justice are not complied with, or for such like reasons**

13. I find that then Nyanza Land Appeals Committee had no jurisdiction to make the award dated 13<sup>th</sup> July, 2011 which is a nullity ab initio. The decision of that committee can not be allowed to stand. The Ex-parte applicant is entitled to the orders sought in the application.

14. A fortiori, I grant orders of certiorari and prohibition sought in the application dated 14<sup>th</sup> October, 2011.

15. I further order that each party to bear own costs of the application.

**DELIVERED, SIGNED and DATED** in open court at MIGORI this **13<sup>th</sup>** day of **March, 2018**

**G. M. A. ONGONDO**

**JUDGE**

**In the presence of;**

Kwenga Mboya holding brief for Kisera for the Ex-parte Applicant

Tom Court Assistant

**G. M. A. ONGONDO**

**JUDGE**